

IN THE SUPREME COURT OF MISSISSIPPI

SIDNEY HILL

APPELLANT/CROSS-APPELLEE

VS.

CIVIL ACTION NO.: 2007-WC-00509

**MEL, INC. d/b/a PURE WATER
SOLUTIONS, INC. and ROYAL
INDEMNITY COMPANY**

APPELLEES/CROSS-APPELLANTS

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

BRIEF FOR APPELLEES/CROSS-APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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CIVIL ACTION NO.: 2007-WC-00509

**MEL, INC. d/b/a PURE WATER
SOLUTIONS, INC. and ROYAL
INDEMNITY COMPANY**


EMPLOYER & CARRIER / APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Employer and Carrier certifies that the following listed persons and/or business entities have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sidney Hill, Claimant
2. Ellis Turnage, Attorney of record for Claimant
3. Mel, Inc., d/b/a Pure Water Solutions, Employer
4. Royal Indemnity Co., Carrier
5. Stephanie A. Taylor, Attorney of record for Employer/Carrier

So certified, this the 10th day of October, 2007.



STEPHANIE A. TAYLOR

Attorney for Mel, Inc., d/b/a Pure Water Solutions,
Inc. and Royal Indemnity Company

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I. STATEMENT OF ISSUES

- 1.** Whether the Circuit Court erred in affirming the Administrative Judge and Full Commission in denying permanent total disability to claimant.
- 2.** Whether the Circuit Court erred in affirming the award of permanent partial disability to claimant in light of Claimant's failure to make diligent efforts to find comparable employment (cross-appeal issue).
- 3.** Whether the Circuit Court erred in affirming the Full Commission's denial of Claimant's Motion to Supplement Appeal Record and allow additional evidence.

II. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Claimant, Sidney Hill, filed a Petition to Controvert on May 17, 2004, alleging that on July 26, 2001, he suffered a work related accident resulting in injuries to his lumbar and cervical spine.

Employer and Carrier admitted Claimant sustained a work related injury but denied the extent of Claimant's alleged resulting permanent disability.

On September 5, 2005, a hearing was conducted by Mississippi Workers' Compensation Commission Administrative Law Judge Homer Best, resulting in the *Order of Administrative Judge* dated December 19, 2005. See Appellees' Record Excerpts, RE 001-0011. The Honorable Homer Best found that Claimant suffered compensable injuries to his cervical spine and lumbar spine in the subject accident of July 26, 2001, having reached maximum medical improvement from said injuries on May 5, 2004, therefore being entitled to temporary total disability benefits from March 5, 2003, through May 5, 2004. Judge Homer Best further found that Claimant, after having conducted a "barely sufficient" employment search, returned to gainful employment with the Rankin County School District as a bus driver, effective August 10, 2005. Judge Best then determined that Claimant suffered a 20 percent loss of wage earning capacity and thus being entitled to permanent disability benefits in the amount of \$69.68 per week for a period of no more than 450 weeks.

Claimant, feeling aggrieved by the Administrative Law decision, appealed the matter to the Full Commission. Claimant filed a Motion to Supplement Record to Include Additional Evidence on August 17, 2006. The Full Commission affirmed the order of the Administrative Judge on September 18, 2006, and denied Claimant's Motion to Supplement the Record and Introduce Additional Evidence. See Appellant's Record Excerpt No. 2.

Claimant, feeling further aggrieved, appealed the matter to the Rankin County Circuit Court.

By Order dated February 16, 2007, the Rankin County Circuit Court affirmed the Full Commission Order. Appellant's Record Excerpt No. 3. This matter is now before this Honorable Court on Claimant's Appeal of the decision of the Rankin County Circuit Court.

B. Statement of the Facts

Claimant, Sidney Hill, is a thirty-six (36) year old gentleman with a high school degree and one semester of community college education. RE 0019. Claimant also maintains a Commercial Driver's License with Class A, H, P and S endorsements. RE 00147. He has held various employment positions since 1990, including a material handler and machinist before beginning work with Mel, Inc., d/b/a Pure Water Solutions in 1997. RE 0030. Claimant worked continuously at Pure Water Solutions as a route driver until March 4, 2003. RE 0031.

Claimant was injured when a loose tire came through his windshield while he was on a route delivery. RE 39. Following the subject accident, Claimant was on light duty for a brief time before returning to full work duty status until March 4, 2003. RE 0031. Dr. Patrick Barrett performed cervical spine surgery at the C5-6 level on the following day (RE 0055) and Claimant never returned to work with Pure Water Solutions. Claimant underwent a two to three month period of physical therapy following his surgery. RE 0079. On September 4, 2003, Claimant was seen by Dr. Barrett, whose office notes state:

This patient returns, and his MRI scan shows minor wear and tear of the 4-5 and 5-1 discs, but no herniation and no stenosis. It would appear we are left with lumbar strain, which in all probability is connected to his injury. Based on this, I do think strengthening and rehabilitation for his back would be appropriate, and we will try to set him up for this as soon as possible. I will see him back in about four weeks. I also discussed his being able to go back to work as soon as we can determine his back status. (RE 00230).

Claimant was terminated from his employment with Pure Water Solutions by letter dated

October 20, 2003, due to "changes within the organization". RE 00235. Claimant was also notified to contact Pure Water Solutions when he was released to return to work. Claimant never made any attempt to contact Pure Water Solutions following receipt of the termination notice and applied for unemployment benefits with the Mississippi Employment Security Commission (MESC) in March of 2004. RE 0085. Claimant returned to Dr. Barrett in May of 2004 with complaints of low back pain. RE 0081. A Functional Capacity Examination was performed on Claimant and he was released from Dr. Barrett's care as of July 2, 2004. RE 0083. Dr. Barrett permanently restricted Claimant to a medium work level and initially assigned a three percent (3%) permanent impairment to his low back and a five percent (5%) partial permanent impairment to the whole body. RE 0084.

Claimant was ultimately denied benefits by the MESC on a determination that he had been terminated from his employment because "he didn't go to the doctor" and due to his failure to contact Pure Water Solutions about availability for work after he was released from the doctor's care. RE 00236.

Claimant made the following attempts at locating employment following his final release from Dr. Barrett:

1. Registered for employment with MESC job service office Northside Drive;
2. Correspondence to Pure Water Solutions dated February 21, 2005, inquiring about job opening;
3. Submitted employment applications to nine (9) prospective employers from April 5-13, 2005, (only 4 of which were actually hiring at the time); and
4. Attempted to contact potential employers identified by Mr. Todd Edwards, Vocational Rehabilitation Consultant, without success. RE 0093.

Claimant's average weekly wage at the time of his accident was \$522.59. RE 0016.

IV. SUMMARY OF THE ARGUMENT

Claimant was able to return to gainful employment following his release at maximum medical improvement. The findings of fact and rulings of law of the Administrative Judge, denying Claimant permanent total disability, and the subsequent affirmations of the Full Commission and the Rankin County Circuit Court, are clearly supported by the weight of the credible evidence. The injuries sustained by Claimant on July 26, 2001, do not entitle him to the permanent total disability benefits as the Employer/Carrier's rebutted of the *Jordan* presumption.

The decision of the Administrative Judge to award permanent partial disability and the subsequent affirmations of said ruling by the full Commission and the Rankin County Circuit Court were erroneous. The evidence presented at the hearing established that the efforts by the Claimant to find comparable employment were insufficient to support such an award. Thus, this Honorable Court should reverse the finding of permanent partial disability.

Finally, additional evidence submitted following an evidentiary hearing in workers' compensation cases is admitted at the discretion of the Commission and such motion must be made in writing at least five days prior to the date of the hearing of the review by the Full Commission. Claimant, in his motion, failed to state with particularity the nature of such evidence he was offering, the necessity thereof, and the reason it was not introduced at the evidentiary hearing as required by MWCC Procedural Rule 9. Accordingly, the Full Commission's denial of Claimant's Motion to Supplement Record to Introduce Additional Evidence was properly denied by the Full Commission. Claimant offers no facts or case law to support the overturning of the Full Commission's denial of his request, and, therefore, the ruling of the Rankin County Circuit Court must be affirmed.

V. ARGUMENT

1. Whether the ruling of the Mississippi Workers' Compensation Commission was clearly erroneous and contrary to the weight of the credible evidence

Pursuant to Miss. Code Ann. §71-3-3(I), when there is a finding of permanent partial disability, the Claimant bears the burden of making a *prima facie* showing that he has sought and been unable to find work “in the same or other employment.” When the Claimant, having reached maximum medical recovery, reports back to the employer for work, and the employer refuses to reinstate or rehire him, the Claimant has established a *prima facie* showing of total disability. The burden then shifts to the employer to prove that the Claimant has suffered only a partial disability or that the employee has suffered no loss of wage earning capacity. *Jordan v. Hercules, Inc.*, 600 So.2d 179, 183 (Miss. 1992).

Claimant argues that the Administrative Judge, the Full Commission, and the Rankin County Circuit Court erred when they failed to apply the presumption of total disability under *Jordan*. This argument is without merit as the presumption of permanent total disability is rebutted by the simple fact that Claimant was able to return to gainful employment following his release to maximum medical improvement. See *McDowell v. Smith*, 856 So.2d 581, 585 (Miss. App. 2003), which holds that “the post-injury capacity to earn wages at other employment, even at a diminished level, is enough to defeat a claim for permanent total disability”.

The *Order of Administrative Judge* specifically addressed Claimant’s present earning capacity. “The claimant’s current average weekly wage (AWW) from Rankin County of \$185.51 cannot be used as the sole measure of his current income, or his earning capacity, because he also has unspecified current and ongoing income from his vehicle hauling and repair work, and because

we don't know how many hours per week he spends on any of his endeavors." RE 0010. Accordingly, the affirmation of the Full Commission and the Rankin County Circuit Court were proper and the Claimant's appeal on this ground should be denied.

2. Whether Claimant undertook reasonable efforts to find comparable employment

Claimant failed to conduct a reasonable job search which would have allowed him to return to gainful employment at wages equal to or greater than those he is currently making thus precluding him from being entitled to permanent partial disability payments. Once the burden shifts to the employer under the *Jordan* test, the employer may present evidence showing that the Claimant's efforts to obtain other employment were a mere sham, or less than reasonable, or without proper diligence. *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638, 641 (Miss. 1978). "To establish a loss of wage earning capacity, the injured worker bears the burden of showing that he has sought and has been unable to work in similar and other jobs". *Georgia Pacific Corp. v. Taplin*, 586 So.2d 823, 828 (Miss. 1991).

In the subject case, Claimant conducted his only "job search" during a 1 week period in April of 2005, when he submitted employment applications at nine (9) businesses and after he received notification from the Employer of available jobs in the area for which he was qualified. The Administrative Law Judge himself made special note in the Decision portion of his *Order* that the Claimant's post-recovery efforts to return to the same or comparably gainful employment were "just barely sufficient" to entitle him to any permanent benefits. RE 0010. In fact, the only reason he was awarded any benefits at all is because doubtful matters are to be resolved in favor of compensation.

Employer/Carrier disagree that the issue is doubtful based on Claimant's unwillingness to participate in a reasonable and diligent job search. Todd Edwards, an expert vocational consultant,

was hired by Employer/Carrier to conduct a vocational evaluation of the Claimant and determine appropriate job openings based on Claimant's residual functional capacity, transferrable skills from previous work history, educational history and the results of the vocational rehabilitation evaluation. Mr. Edwards identified at least twelve job titles as examples of positions for which he considered Claimant to be a qualified vocational applicant. RE 00258. Mr. Edwards also identified fourteen (14) specific jobs available to Claimant in the Brandon, MS area, which included positions as a concrete truck driver, taxi cab positions, and customer service representative positions. RE 00184. The average pay for the positions found for Mr. Hill was \$10.20 per hour. RE 00186.

Claimant was advised of the available positions on or about August 1, 2005. Subsequently, Mr. Edwards followed up with each of the prospective employers to determine if Claimant had in fact applied for the available positions. RE 00190. Mr. Edwards's findings reflect that Claimant either never submitted applications or appeared disinterested during the employment interviews. RE 00191-00195. Mr. Edwards's expert opinion is that a reasonable job search is a full-time, sustained, coordinated effort, requiring follow-up by the individual seeking employment and that Claimant did not conduct a reasonable job search. RE 00196.

Claimant applied for no work and made no efforts whatsoever to obtain employment from September 2003 through April 2005, and then, when he did see employment in April 2005, he conducted what amounts to a sham job search by filing few applications and failing to act interested during job interviews. Based on Claimant's failure to conduct a reasonable and diligent job search, Claimant has failed to establish a loss of wage earning capacity and the Administrative Judge should not have awarded Claimant any permanent disability benefits.

3. Whether the Full Commission committed reversible error by denying Claimant's Motion to Supplement Appeal Record and Allow Additional Evidence

Additional evidence submitted following the evidentiary hearing in workers' compensation cases is admitted at the discretion of the Commission and such motion must be made in writing at least five days prior to the date of the hearing of the review by the Full Commission. Claimant, in his motion, failed to state with particularity the nature of such evidence he was offering, the necessity therefore, and the reason it was not introduced at the evidentiary hearing as required by MWCC Procedural Rule 9. Accordingly, the Full Commission's denial of Claimant's Motion to Supplement Record to Introduce Additional Evidence was properly denied by the Full Commission. Claimant has offered no facts or case law that would support the overturning of the Full Commission's denial of such request, or the subsequent Order of the Rankin County Circuit Court affirming the Commission's denial.

V. CONCLUSION

The presumption that Claimant was permanently and totally disabled as a result of his work related injury was rebutted by the Employer/Carrier by a showing that Claimant was able to return to gainful employment following his release to maximum medical improvement. Those portions of the rulings of the Administrative Judge, the Full Commission, and the Rankin County Circuit Court were therefore supported by substantial credible evidence. Absent a showing by the Claimant that the Full Commission, and subsequently, the Circuit Court acted erroneously or contrary to the weight of the credible evidence, this Court must affirm those portions of their rulings. However, because the Claimant failed to conduct a reasonable and diligent job search, Claimant failed to establish a loss of wage earning capacity and the Administrative Judge should not have awarded Claimant any permanent disability benefits. Therefore, said portion of the Rankin County Circuit Court Order affirming the ruling of the Full Commission and Administrative Judge must be reversed. Furthermore, Claimant in his motion to introduce additional evidence failed to state with particularity the nature of such evidence he was offering, the necessity therefore, and the reason it was not introduced at the evidentiary hearing as required by MWCC Procedural Rule 9. Accordingly, the Claimant's Motion to Supplement Record to Introduce Additional Evidence was properly denied by the Full Commission and those portions Order of the Rankin County Circuit Court affirming such denial must be affirmed.

Respectfully submitted this the 10th day of October, 2007.


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CERTIFICATE OF SERVICE

I, Stephanie A. Taylor, one of the counsel of record for the **EMPLOYER, MEL, INC. D/B/A PURE WATER SOLUTIONS, INC. AND CARRIER, ROYAL INDEMNITY COMPANY**, do hereby certify that I have this date caused to be served, **via United States Mail, postage prepaid**, a true and correct copy of the above and foregoing pleadings to the following:

Ellis Turnage, Esquire
Turnage Law Office
Post Office Box 216
Cleveland, MS 38732-0216

Honorable William E. Chapman, III
Rankin County Circuit Court Judge
Post Office Box 1626
Canton, MS 39046

THIS the 10th day of October, 2007.


STEPHANIE A. TAYLOR