

IN THE SUPREME COURT OF MISSISSIPPI

SIDNEY HILL

APPELLANT/CROSS-APPELLEE

VS.

CIVIL ACTION NO. 2007-WC-00509

MEL, INC. DBA PURE WATER SOLUTIONS  
AND ROYAL INDEMNITY COMPANY

APPELLEES/CROSS-APPELLANTS

ON APPEAL FROM THE CIRCUIT COURT  
OF RANKIN COUNTY, MISSISSIPPI

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REPLY AND CROSS-APPELLEE BRIEF OF APPELLANT/CROSS-APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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## I. ARGUMENT

### A. The Claimant's Loss of Wage Earning Is Greater than the Award.

Claimant was not rehired by Pure Water Solutions. Disability measured in this manner is referred to as "industrial" disability as opposed to "functional" or "medical" disability; the claimant must prove industrial disability by proving medical impairment which results in a diminished wage-earning capacity. Robinson v. Packard Elec. Div. GMC., 523 So.2d 331 (Miss. 1988). The record evidence reveals claimant's wages were reduced from \$522.59 to \$185.51. Claimant's wage-earning capacity has been severely diminished. In fact, the record evidence indicates claimant could not perform the loading and lifting tasks of his pre-injury job and searched for similar employment at wages equal to his pre-injury wage.

The fact that claimant has secured employment as a bus driver with the Rankin County School District does not negate a loss of wage earning capacity. Georgia Pacific v. Taplin, 586 So.2d 823, 828 (Miss. 1991). The burden the employer must overcome is that the employee has suffered no loss of wage earning disability. Jordan v. Hercules, Inc., 600 So.2d 179, 183 (Miss. 1992). The correct standard for overcoming the burden of a prima facie case of total disability is by presenting affirmative evidence that other jobs existed in the relevant job market for which the worker's compensation claimant was at least facially qualified, and that the claimant made no legitimate effort to pursue any such employment.

McCray v. Key Constructors, Inc., 803 So. 2d 1199 (Miss. Ct. App. 2000). Moreover, the record reveals claimant applied for employment at nine various jobs. In addition, claimant continued his job search by applying for employment with the list of potential employers he received from the employer/carrier's vocational specialist. He applied for most of these positions and obtained two job interviews. However, no employment was extended to claimant. These facts demonstrate claimant has sustained a loss of wage earning capacity greater than the amount awarded.

B. The Employer/Carrier' Failure to File A Cross-Appeal Bars Review of The Full Commission's Award of Permanent Partial Disability.

The employer/carrier did not file a cross-appeal from the Full Commission order awarding claimant partial permanent disability in the amount of \$69.68 per week. For an appellee to raise an argument other than in response to the appellant's argument, the filing of a notice of cross-appeal M.R.A.P. 4(c) is necessary. Morrow v. Morrow, 591 So.2d 829, 832 (Miss. 1991). The employer/carrier's failure to file a notice of cross-appeal is fatal. Under Rule 4(c), a notice of appeal for a cross-appeal must be filed within 14 days after the date on which the notice of appeal was filed. Lindsey v. Lindsey, 612 So. 2d 376, 377 (Miss. 1993).

This Court should not consider the employer/carrier's cross-appeal. Appellee's Brief at 8-9.

## II. CONCLUSION

The Court should reverse and render that claimant has sustained a \$224.69 per week loss of wage earning capacity as a

result of the July 26, 2001 work-released injury (\$522.59 minus \$185.51 = \$337.08 x 66.66 = \$224.69). The legal effect of the evidence and the ultimate conclusion to be drawn therefrom are questions of law. Here, the Full Commission reached the wrong legal conclusion. Claimant's loss of wage earning capacity is \$224.69 per week.

SO REPLIED, this the 15<sup>th</sup> day of November, 2007.

Respectfully submitted,

SIDNEY HILL, Appellant/Cross-Appellee

By:

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CERTIFICATE OF SERVICE

I, ELLIS TURNAGE, Attorney for the Appellant/Cross-Appellee,  
do hereby certify that this day mailed a true and correct copy of  
reply and cross appellee brief of appellant/cross-appellee to:

Honorable Stephanie A. Taylor  
SCOTT, SULLIVAN, STREETMAN, FOX  
Post Office Box 13847  
Jackson, Mississippi 39236-3847

Honorable William E. Chapman, III.  
CIRCUIT COURT JUDGE  
Post Office Box 1626  
Canton, Mississippi 39046

This, the 15<sup>th</sup> day of November, 2007.

  
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ELLIS TURNAGE