IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NESHOBA COUNTY GENERAL HOSPITAL AND MISSISSIPPI HOSPITAL ASSOCIATION PUBLIC WORKERS' COMPENSATION GROUP (HEALTHCARE PROVIDERS) — EMPLOYER & CARRIER/ APPELLANTS

VS. — CASE NO. 2007-TS-01131

SALLY HOWELL — CLAIMANT-APPELLEE

BRIEF OF CLAIMANT-APPELLEE

(On Appeal from the Circuit Court of Neshoba County, Mississippi)

Oral Argument Not Requested

AL CHADICK
ATTORNEY AT LAW
POST OFFICE BOX 1637
KOSCIUSKO, MS 39090
(662) 289-2242

ATTORNEY FOR CLAIMANT-APPELLEE

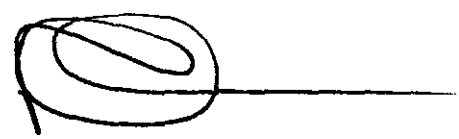
IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NESHOBA COUNTY GENERAL HOSPITAL AND MISSISSIPPI HOSPITAL ASSOCIATION PUBLIC WORKERS' COMPENSATION GROUP (HEALTHCARE PROVIDERS)	**EMPLOYER & CARRIER/ APPELLANTS**
VS.	**CASE NO. 2007-TS-01131**
SALLY HOWELL	**CLAIMANT-APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Sally Howell, Appellee;
2. Al Chadick, Attorney for Appellee;
3. Neshoba County General Hospital, Employer/Appellant;
4. Andrew D. Sweat, Esq., and Jennifer H. Scott, Esq., Attorneys for Appellants;
5. Honorable Marcus D. Gordon, Circuit Court Judge;
6. Liles Williams, Chairman; John Junkin, Commissioner; Gen. Augustus Collins, Commissioner; Full Commission of the Mississippi Workers' Compensation Commission.



AL CHADICK (MSB NO. [redacted])
Attorney for Appellee

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Mississippi Workers' Compensation'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

The claimant, Sally C. Howell, is a thirty-five (35) year old female with a date of birth of 20 July 1970. (T. 5). She had an LPN degree from college and an associates in Arts and Crafts degree. (T. 6). Her early occupations were that of a cashier, clerical staff, a sandwich maker, and a phlebotomist. (T. 7 & 8).

It was in 1994 when she graduated and got a degree as a Licensed Practical Nurse that she began her career in that medical field. (T. 10). While working as an LPN, the claimant suffered her first injury to her body and eventually had surgery to her neck by Dr. Lynn Stringer. (T. 15). A few months after that, she began treatment with Dr. Lynn Staggs who treated the claimant for approximately a year. (T. 18). Dr. Staggs ultimately released the claimant with a 20 to 30 pound lifting restriction. (T. 18).

In May of 2003, the claimant began work for the employer in this cause, Neshoba County General Hospital, as an LPN in the Neshoba Personal Care Unit. (T. 19). In that capacity, she was required to assist and help patients occasionally to and from their room, the bathroom, as well as perform other physical acts in that position. (T. 19). It was while in this position that she injured herself by catching a patient who had lost her balance and was rolling from her bed. She immediately felt discomfort in her neck and down her left arm. (T. 20).

The claimant continued working for the employer until September of 2003 when she had to change jobs. (T. 22). In August of 2003, the employer had moved her to a new position in Station 2 which required her to do more physical activity. (T. 23). The claimant was doing full duty nursing in her new position. (T. 23). As a result of having to physically do more work in this new occupation, the claimant was not physically able

to continue her work at Neshoba County as a result of her injury in July of 2003. (T. 24). She then took a new position in October of 2003 with Dr. Soriano of Philadelphia, Mississippi, which required her to just do lab work and charting. (T. 25).

The claimant continued to have physical problems as a result of her injury in July of 2003 and eventually had surgery by Dr. Phillip Azordegan of Jackson, Mississippi. (T. 26). Dr. Azordegan eventually referred the claimant to Dr. Michael Winkelmann of Jackson, Mississippi, for further treatment. (T. 26). Following Dr. Michael Winkelmann's treatment, he advised the claimant that she had reached maximum medical improvement and had a 10% permanent partial rating to the body as a whole. (Exhibit 12 at 14). Furthermore, Dr. Winkelmann testified that the claimant was physically capable of performing only sedentary work as a result of her latest injury. (Exhibit 12 at 17).

Bruce Brawner, a vocational rehabilitation expert, testified on behalf of the employer and carrier by deposition. Mr. Brawner testified that based upon the claimant's previous restrictions from Dr. Lynn Staggs, the claimant was restricted from performing 57 out of 100 jobs that she was qualified for at the time of her first injury. (Exhibit 13 at 21). Furthermore, Brawner testified that following her second injury and restrictions assigned by Dr. Michael Winkelmann, the claimant was now restricted from performing 83% of the jobs for which she was qualified. (Exhibit 13 at 22). Mr. Brawner had also performed a job search on behalf of the employer and carrier and in his evaluation, the best job he could identify for the claimant was a position earning $7.83 an hour. (Exhibit 13 at 22). Fortunately for the claimant, she had found a position on her own prior to that time and had in fact returned to work at Choctaw Health Center in Choctaw, Mississippi, in December of 2005. (T. 29). At that time, the claimant returned to work making

$12.85 an hour without benefits and as a temporary employee. (T. 29). Claimant testified that her physical obligations in this position was simply to chart a patient, show the patient to their room and if medication was ordered by the treating physician, to give that medication. (T. 30 & 31). She was also allowed to sit and stand as needed and picked up nothing weighing in excess of 10 pounds. (T. 31).

Brawner further testified that based upon the restrictions assigned by Dr. Winkelmann, the claimant could not return to any of her past relevant employment. (Exhibit 13 at 28). Furthermore, Brawner testified that given the restrictions assigned to her by Dr. Winkelmann, she could not return to any positions within the medical field other than as a receptionist. (Page 29). Lastly, Brawner agreed that given his job search efforts, the claimant would be only able to work a $6.00 or $7.00 an hour job in any of the position he had identified and that her best attempts to receive an average wage would be $7.83 an hour. (Exhibit 13 at 22). Lastly, during Brawner's employment for the employer and carrier, he agreed that the employer in this cause, Neshoba County General Hospital, never offered the claimant re-employment with or without accommodation. (Exhibit 13 at 37).

SUMMARY OF THE ARGUMENT

The evidence in this matter is quite clear that the claimant suffered a pre-existing injury in 2000 which caused her to have her first neck surgery resulting in the assignment of a 20 to 30 pound lifting restriction by Dr. Lynn Staggs. Following her release from Dr. Staggs, the claimant returned to her employment with the Neshoba County General Hospital as an LPN but working in a reduced physical capacity as a result of this previous injury. While on the job and within the course and scope of her employment, she had

another injury in July of 2003 while assisting a patient from falling from her bed. The claimant had immediate pain in her neck and down her left arm which did not abate until after her surgery.

After her injury in July of 2003, the employer, Neshoba County General Hospital, moved her to another position within the hospital which required her to perform much more physical strenuous activity. As a result of her increased physical activity in her new position, she was physically unable to perform that employment as a result of her injury of July, 2003. The statement in the employer and carrier's brief that the claimant resigned her employment with Neshoba County General Hospital because of the restrictions assigned by Dr. Lynn Staggs is factually incorrect. The basis for the claimant's leaving her employment with the employer, Neshoba County General Hospital, was her injury in July of 2003 and the physical problems that accompanied that injury.

Nevertheless, following the injury in July of 2003, the claimant eventually received medical treatment and surgery from Dr. Phillip Azordegan and Dr. Michael Winkelmann who released the claimant with additional permanent impairment findings as well as increased physical restrictions. Based upon these restrictions, the claimant was unable to find any employment except for one job with the Choctaw Health Center where she performed sedentary work as an LPN.

The testimony is unrebutted by the employer and carrier that as a result of the injury in July of 2003, the claimant had an increased medical impairment rating and physical limitations and restrictions as assigned by Dr. Michael Winkelmann. Furthermore, from the employer and carrier's own expert witness, Mr. Bruce Brawner,

testified that the claimant suffered from additional loss of wage earning capacity given the fact that the claimant was restricted from returning to a significant number of jobs as a result of her latest restrictions.

The claimant therefore feels that the Order of the Administrative Judge is well reasoned and would request that this Court affirm the prior decisions in this matter by the Administrative Judge, Full Commission, and Circuit Court Judge.

ARGUMENT

A. Standard of Review

The Commission is the ultimate trier of fact, notwithstanding any contrary finding by the Administrative Law Judge. *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1998). As such, appellate courts are charted with reviewing all questions of law and fact, and "if the Commission's findings of fact and order are supported by **substantial evidence**, all appellate courts are bound thereby." *Id.* (emphasis added). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and affords a "substantial basis of fact from which the fact in issue can be reasonably inferred." *Central Electric Power Association v. Hicks*, 110 So.2d 351, 357 (Miss. 1959). Based on this highly deferential standard, an appellant court should reverse the Full Commission Order **only** if it finds the Order to be clearly erroneous and contrary to the overwhelming weight of the evidence. *Fought*, 523 So.2d at 317. The highly deferential standard applies even if the record evidence would convince this Court to rule otherwise, if it were the ultimate finder of fact. *Id.*

B. Did the claimant suffer a loss of wage earning capacity as a result of the July 29, 2003, injury.

It is a well established principle in the Mississippi Workers' Compensation Law that the burden is on the claimant to prove both medical impairment and loss of wage earning capacity. *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 as the claimant has experienced no loss of wage earning capacity. *General Electric Company v. McKinnon,*, 507 So.2d 363, 365 (Miss. 1987). Furthermore, in determining whether there has been a loss of wage earning capacity, the Commission is to evaluate training, education, ability to work, failure to be hired elsewhere, pain and other medical circumstances. *Delaughter v. South Central Tractor Parts,* 642 So.2d 375, 379 (Miss. 1994).

The decision as to the loss of wage earning capacity "is largely factual and is to be left largely to the discretion and estimate of the Commission." *Greenwood Utilities v. Williams,* 801 So.2d 783, 791 (Miss. Appellate Court 2001). *Dunn*, Mississippi Workers' Compensation, Law and Practice Rules and Forms, Section 68 (3rd edition 1982). Furthermore, *Dunn* states, "incapacity to earn wages and the extent thereof 'must be supported by medical findings,' but the requirement is met when the fact and extent of incapacity is corroborated in part by medical testimony." *Id.* At Section 70. However, "medical findings are not the exclusive basis for the determination, and the Commission is required to consider all of the testimony and all the pertinent factors, including physical or functional disability from the medical viewpoint and any demonstrated impairment of the claimant's capacity to secure and retain employment and perform the work for which he is qualified." *Id.*

In the case before us, as outlined previously, the claimant has shown that not only did she incur an injury in July of 2003, she had resulting physical impairment as assigned by Dr. Michael Winkelmann of a 10% permanent partial disability as a result of her injury to her neck. Furthermore, Dr. Winkelmann assigned permanent work restrictions of sedentary level of employment which was an increased restriction over the claimant's prior restrictions.

Lastly, we have the testimony of the employer and carrier's own witness, Mr. Bruce Brawner, who testified that as a result of the claimant's increased restrictions assigned by Dr. Michael Winkelmann, the claimant was further occupationally disabled as a result of these restrictions and able to perform a very limited amount of positions. In fact, it was the testimony of Mr. Brawner, that based upon his own job search efforts as vocational expert, the average wage which he was able to show was that the claimant was able to earn $7.83 an hour. It was upon the claimant's own diligence that she was able to find a job which paid her $12.85 an hour. Furthermore, it was the claimant's testimony and the proof of Mr. Brawner that the claimant had responded to approximately 18 other job placement opportunities, none of which would hire her.

The claimant would state then that there is ample evidence to reflect the fact that the claimant suffered a significant loss of wage earning capacity as identified by the decisions in this matter. The claimant has rebutted the presumption of no loss of wage earning capacity by showing that even though she may be earning approximately more wages at this time, she is doing so with increased medical and occupational disabilities.

Decisions of the Workers' Compensation Commission will be affirmed unless they are clearly erroneous and contrary to the overwhelming weight of the evidence.

Barnes v. Jones Lumber Company, 637 So.2d 867, 869 (Miss. 1994). Furthermore, where there is substantial, although disputed, evidence supporting the Commission's findings that the presumption was or was not overcome, we are required to affirm the Commission's judgment. *Marshall Durbin, Inc. v. Hall,* 490 So.2d 877, 879 (Miss. 1986); *Smith v. Picker Service Company,* 240 So.2d 454 (Miss 1970).

C. Was the finding of apportionment by the Commission correct.

The Administrative Judge had originally opined that the claimant suffered a 70% loss of wage earning capacity as a result of this injury. Furthermore, that as a result of the pre-existing injury to her neck, the claimant's 70% loss of wage earning capacity would be apportioned down by 30%. This would leave the claimant with a net 40% loss of wage earning capacity as a result of this occupational injury in July of 2003.

Bruce Brawner, the vocational expert for the employer and carrier, had opined that the claimant had in fact suffered a 83% occupational disability as a result of her two injuries in this cause. (Exhibit 12 at 22). In fact, the claimant was restricted to that level of activity given the restrictions assigned by Dr. Michael Winkelmann of sedentary level of work. (Exhibit 12 at 22). Based upon Mr. Brawner's job search efforts, the best the claimant would be able to perform would be $7.83 an hour given the restrictions assigned by Dr. Winkelmann. Based upon Mr. Brawner's findings, the claimant would in fact still have a loss of wage earning capacity of $100.00 per week. This is based upon her pre-injury wages versus the $313.20 which Mr. Brawner said she was capable of returning back to work to. As previously stated in this matter, the loss of wage earning capacity is not an exact science nor an exact calculation. The Commission has reviewed all of the findings in this matter and has rendered their opinion that the claimant is in fact suffering

a 40% industrial loss of wage earning capacity. When you take 40% 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 66 2/3% under the Commission Law, you get $123.25. This is the exact findings of the Administrative Judge, Full Commission and Circuit Court Judge. When you look at the medical testimony of Dr. Phillip Azordegan, Dr. Michael Winkelmann and the vocational testimony of Mr. Bruce Brawner, it is clearly within the facts and circumstances herein that the claimant is suffering from at least a 40% loss of wage earning capacity.

Clearly, the decision of the Commission is based upon the fact and evidence presented in this matter. As stated previously, "decisions of the Workers' Compensation Commission will be affirmed unless they are clearly erroneous and contrary to the overwhelming weight of the evidence." *Barnes v. Jones Lumber Company,* 637 So.2d, 867, 869 (Miss. 1994).

CONCLUSION

The appellee, claimant, would therefore state that she feels the prior decisions of the Administrative Judge, Full Commission and Circuit Court Judge are well reasoned and based in fact as well as law. When you look at the totality of the evidence from Doctors Azordegan and Winkelmann, as well as the vocational testimony of Mr. Bruce Brawner, it is clear that the appellee is suffering from a significant occupational disability which severely impacts her wage earning capacity. It is therefore well reasoned that as a result of this injury in July of 2003, that the claimant would suffer a 40% industrial loss of wage earning capacity as a result of her additional impairment and significant restrictions imposed by Dr. Michael Winkelmann. Based upon all the foregoing, the

claimant requests that this Honorable Court affirm the prior decisions in this matter and order the employer and carrier to pay permanent partial disability benefits as ordered.

Respectfully submitted, this the 15th day of Feb., 2008.

SALLY HOWELL, CLAIMANT/APPELLEE

AL CHADICK (MSB NO. [redacted])

AL CHADICK
ATTORNEY AT LAW
P.O. BOX 1637
KOSCIUSKO, MS 39090
(662) 289-2242

ATTORNEY FOR CLAIMANT/APPELLEE

CERTIFICATE OF SERVICE

I, Al Chadick, attorney of record for the claimant/appellee, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF CLAIMANT-APPELLEE** to:

ANDREW D. SWEAT, ESQ.
JENNIFER H. SCOTT, ESQ.
WISE, CARTER, CHILD & CARAWAY
P.O. BOX 651
JACKSON, MS 39205-0651

HONORABLE MARCUS D. GORDON
CIRCUIT COURT JUDGE
P.O. BOX 220
DECATUR, MS 39327

PATTI DUNCAN LEE
NESHOBA COUNTY CIRCUIT CLERK
401 EAST BEACON STREET
PHILADELPHIA, MS 39350

This the 13th day of Feb., 2008.

AL CHADICK