IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-01434

AMERISTAR CASINO-VICKSBURG
EMPLOYER/APPELLANT

AND

LEGION INSURANCE COMPANY
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION
CARRIER/APPELLANT

VS.

JAMES RAWLS
CLAIMANT/APPELLEE

Appeal From The Circuit Court of Warren County, Mississippi

BRIEF OF APPELLEE

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JAMES RAWLS

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CERTIFICATE OF INTERESTED PERSONS

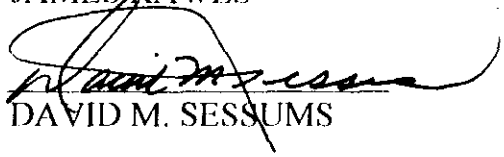
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Circuit Court of Warren County, Mississippi may evaluate possible disqualification or recusal.

1. Ameristar Casino Vicksburg Inc.;
2. Watkins Ludlam Winter & Stennis;
3. F. Hall Bailey, Esquire;
4. David M. Sessums and Varner Parker & Sessums P.A;
5. James Rawls

THIS the 6th day of FEBRUARY, 2008.

Respectfully Submitted,

JAMES RAWLS

BY: 
DAVID M. SESSUMS

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STATEMENT OF ISSUES

Although identified differently by the employer and carrier the statement of issues is as follows:

I. Whether the decision of the Commission is supported by substantial evidence;

II. Whether the Commission applied an erroneous legal standard;

III. Is this a case of permanent partial disability or total disability;

IV. Did Ameristar make a legitamate job offer to Claimant or did Ameristar refuse to rehire Claimant;

V. Can Ameristar first create alleged error and then complain of same.

STATEMENT OF THE CASE

On August 22, 2003, the Administrative Law Judge (ALJ) entered their First Opinion (V.2 p.59) and ruled that the injuries to James Rawls constituted an admittedly compensable injury under the Workermen's Compensation Act and ordered a "through medical examination and evaluation by Dr. Rahul Vohra." (V.2 p.67)

On June 14, 2004, the ALJ issued a Second Opinion and ordered a further "work up" and more extensive EMG/nerve conduction studies, a lumbar myogram, a post myogram CT, a lumbar flexsion, and extension x-rays of Mr. Rawls. (V.2 p.70)

On September 16, 2005, the Administrative Law Judge issued their Second Supplemental Opinion (V.2 p.76) holding that James Rawls was totally and permanently disabled. (See V.2 p.79)

Exactly twenty (20) days later the employer and carrier filed their Notice of Appeal to the full Mississippi Worker's Compensation Commission.

The Mississippi Worker's Compensation adopted the factual findings of the Administrative Law Judge without comment other than stating that they did so after a "through review of the record" and affirmed by opinion dated April 18, 2006. (V.2 p.85)

Thereafter the employer and carrier again made their appeal deadline by thirty (30) days later filing their Notice of Appeal to the Circuit Court of Warren County, Mississippi.

On June 13, 2007, the Circuit Court entered its order affirming its decision of the Worker's Compensation Commission. (V.1 p.82) and the employer and carrier perfected their appeal to this Court.

SUMMARY OF THE ARGUMENT

The Workers Compensation Commission, as the ultimate finder of fact, was

imminently correct in affirming without comment the decision of the ALJ holding James Rawls was totally disabled and not merely permanently partially disabled. Once this factual finding was made by the Commission, which finding is more than supported by substantial evidence and the medical testimony of not one but two physicians, (one of which was independently selected by the Commission itself) the outcome of this case was never in doubt and neither the Commission nor the ALJ applied and erroneous legal standard in reaching their respective decisions. The Circuit Court applied the correct legal standard on appeal and affirmed.

Once this finding of total disability was made by the fact finder there was and is no requirement that James Rawls as the injured claimant show that he either attempted to perform the job offered to him by his former employer or that he attempted to secure other employment but was turned down.

Even were effort at re-employment a requirement for a person found to be totally disabled, (as opposed to only permanently partially disabled) James Rawls did in fact make attempts to return to employment, which attempts were brought out only on Mr. Rawls' cross examination by counsel for the Employer and Carrier who may not then complain of any alleged error which they created in the first place.

Further, the alleged job that Ameristar supposedly offered to James Rawls after his release by his treating physicians was of a non existent job. The uniform medical testimony is uncontradicted that James Rawls will be on heavy pain and narcotic medication the rest of his life.

Leesha Heard, Ameristars "risk manager" did not know whether or not Ameristar would hire James Rawls as a dispatcher given the undisputed fact that he was on pain medication. Ms. Heard's testimony was directly, pointedly and flatly rejected by the

Administrative Law Judge and the full Commission and ultimately by the Circuit Court on appeal.

Finally, because Ameristar refused to rehire James Rawls, offering him a non existant position of "Under The Influence Dispatcher" Ameristar created a presumption of total disability in favor of James Rawls resulting in the burden shifting to Ameristar to show only partial disability or that he suffered no loss of wage earning ability at all and Ameristar totally failed to meet this burden.

This testimony more than substantiated the finding of the ALJ, and more importantly the full Commission, that James Rawls suffered a total disability as a result of his admittedly compensable work related accident and the well known standard of review of Workers Compensation Commission cases was applied by the Circuit Court which properly affirmed the decision of the full Workers Compensation Commission in all respects.

ARGUMENT

UNDISPUTED FACTS

James Rawls was 58 years of age at the time of his undisputed injury on July 31, 2000, when he hurt his back at Ameristar Casino in Vicksburg. (See ALJ Opinion V.2 p.59)

James' duties required him to move heavy slot machines weighing between 150 and 300 pounds on a daily basis.

After his admittedly compensable injury he was seen by Dr. Brian Bulloch in Monroe, Louisiana who performed back surgery on September 20, 2000. There is no dispute in this matter that James Rawls has suffered a twenty three percent (23%) permanent partial disability to his body as a whole by way of injury to his back.

There is also no dispute between the parties as to the physical limitations placed upon Mr.

Rawls which consist of no lifting over 10 pounds, not carrying over 15 pounds, limited climbing, limited stairs, and limited standing with rest periods every hour.

Out of an abundance of caution the Administrative Law Judge in this case referred James Rawls to Dr. Rahul Vohra for a, truly, independent medical evaluation which was performed by Dr. Vohra on December 1, 2003; truly independent in that neither the claimant nor the employer and carrier selected Dr. Vohra.

Dr. Vohra recommended further studies, which recommendation the Administrative Law Judge followed, resulting in additional testing being performed by Dr. Vohra on June 28, 2004.

On September 16, 2005, the Administrative Law Judge issued their final opinion finding James Rawls to be permanently and totally disabled as a result of his work related injury.

On April 18, 2006, the full Commission stating that it had "made a through review of the record" upheld the factual finding and conclusion of the law of the ALJ without discussion or comment." (V.2 p.85)

On appeal the Circuit Court of Warren County, applying the correct standard of appellate review, affirmed the decision of the full Commission by order dated June 13, 2007. (V.1 p.82).

STATEMENT OF THE TESTIMONY

James Rawls, born October 29, 1942, was fifty eight (58) at the time of this injury and was sixty (60) years old at the time of hearing on March 24, 2003. (V.3 p.7) Mr. Rawls went through the tenth (10^{th}) grade (V.3 p.8) and went to work when he was sixteen (16) years old and engaged in manual labor all of his life. (V.3 p.10) He is now sixty-five (65) years old and has yet to receive any permanent disability benefits.

In 1994 Mr. Rawls wanted a job at Ameristar so bad that he went to night school to get his GED so as to be able to get the job at Ameristar (V.3 p.10).

His slot technician job at Ameristar involved repairing and moving games weighing anywhere between one hundred fifty (150) pounds to three hundred (300) pounds which require two (2) men to pick them up (V.3 p.10). These type games were moved all day during Mr. Rawls five (5) day work week and Mr. Rawls moved from thirty (30) to three hundred (300) of such games each week (V.3 p.11).

James Rawls was a model employee being named Star Employee of the Year in 2000 for not missing any days or time, not making any mistakes and was awarded a week off with pay for his exemplary work. (V.3 p.10). The only time he ever missed work was during an ice storm and for death in the family. (V.3 p.10)

Mr. Rawls was hurt at Ameristar on July 31, 2000, when he was admittedly moving and working on a game. (V.3 p.12).

When Mr. Rawls tried to get up off the floor he had to hold on to one of the machines and another employee had to help his to stand up (V.3 p.13). The incident was duly reported to Supervisor Art Phillips (V.3 p.13).

After MRI, surgery was performed by Dr. Brian Bulloch on September 20, 2000, at St. Francis Hospital in Monroe, Louisiana (V.3 p.16-17).

Mr. Rawls had never had any previous back injuries or back surgeries (V.3 p.17).

Although Dr. Bulloch recommended pain management the worker's compensation carrier would not approve same and Mr. Rawls could not personally afford to pay for same (V.3 p.17-18).

However, the carrier did pay for physical therapy and for an FCE and paid Mr. Rawls' medical bills (V.3 p.18-19).

At the time of hearing Mr. Rawls was still taking pain medication including Darvocet for the pain confirmed by Drs. Bulloch and Vohra. (V.3 p.19)

Mr. Rawls testified that Ameristar informed him that they had a job for him around

March of 2001, stating that they had a job available as a transportation dispatcher (V.3 p.19-20).

Mr. Rawls testified that he had never worked as a transportation dispatcher in the past and that Ameristar did not offer to give him any training so he could perform such alleged job. (V.3 p.20)

When Mr. Rawls tried to accept the dispatch job he attempted to drive from his home in Monroe, Louisiana to Vicksburg, a one hour drive, and had to stop twice on the way to Vicksburg and upon his arrival in Vicksburg could not get out of his truck. (V.3 p.20-21)

Upon arriving at Ameristar Mr. Rawls had to "keep working" it so he could get his leg out of the truck (V.3 p.21).

The last time Mr. Rawls received a disability check from the employer and carrier was April 1, 2001 (V.3 p.21-22).

No one at the insurance company or its representative ever gave Mr. Rawls a reason why his disability checks were stopped (V.3 p.21-22).

Mr. Rawls testified that as of the hearing date he was able to do very little and testified that he drove to Jackson from Monroe, Louisiana because he was physically unable to ride in the passenger's seat. (V3 p.24). He was forced to make two (2) stops on the drive between Monroe, Louisiana and Jackson, Mississippi (V.3 p.25) and testified that the he can only sit for approximately fifteen (15) minutes without discomfort setting in and was unaware of any place where he could get a job which would allow him to sit for just fifteen (15) minutes at a time. He testified that after fifteen minutes he is forced to get up and walk or move around and later go back and sit down (V.3 p.25). He testified that there was no position that he could really get comfortable in, not even laying down (V.3 p.25).

He testified that he can lift probably ten (10) pounds without experiencing pain and that it is hard to get up and down steps and that he can not climb ladders and does very little house work or yard work but can cook as long as he does not have to stand at the stove (V.3 p.25-26).

He testified that he did not know of any jobs he could apply for and hold while taking analgesic pain medication such as the Darvocet he is prescribed and takes on a daily basis (V.3 p.26). He stated that he did not think he could work while on pain medication (V.3 p.27). He has testified that he has been on this pain medication since he was hurt in the year 2000 and he did not know of any plans by any doctor to take him off of the pain medication (V.3 p.27).

On cross examination elicited by the employer and carrier the following testimony occurred:

"Q. Now, you have told me before, but you never applied for a job anywhere since this accident have you?

A. Only two places. (V.3 p.39)

***

A. I tried two different places since I seen Mr. Hall Bailey. I've got a couple of friends that have stores and they would not let me work because they were scared I would get hurt worse. I mean, just anything, you know. But there was nothing I could do for them and get paid." (V.3 p.42)

Mr. Rawls testified that on a scale of ten (10) his pain level is an eight (8). (V.3 p.43)

Linda Rawls testified that since his injury her husband can piddle around the house and can walk outside as long as he has his cane and that she had seen him fall (V.3 p.45).

She confirmed that James Rawls has never had any back surgery or problems before the injury at Ameristar (V.3 p.46).

Leesha Heard the widely known, and in some Warren County Worker's Compensation cases, notorious "Risk Manager" for Ameristar testified that she reviewed the Functional Capacity Evaluation (FCE)of Dr. Bulloch detailing Mr. Rawls' restrictions. Ms. Heard testified that Ameristar offered Mr. Rawls a job of transportation dispatcher.

However, Ms. Heard claimed that as corporate representative of Ameristar she could not "answer intelligently" whether Ameristar frowns on its employees being on duty while taking prescription pain medication (V.3 p.53).

Ms. Heard, despite being Ameristar's corporate representative, and being its "corporate risk manager" (V.3 p.53) testified under oath that she could not give evidence about Ameristar's policy and whether or not it would be a problem with Ameristar if an employee was on pain medication such as Darvocet while attempting to work. (V.3 p.48)

Ms. Heard testified that the job restrictions from GAB she reviewed did not address or even mention whether Mr. Rawls would be able to work while taking pain medication such as Darvocet (V.3 p.54).

In fact, the always candid Ms. Heard confirmed that the restrictions she received from GAB did not even mention Mr. Rawls being on pain medication (V.3 p.57).

Ms. Heard testified that the mental acuity and concentration required for the alleged transportation job involves continuously matching up and coordinating Ameristar's moving equipment with Ameristar's mobile customers. She stated that this was because Ameristar would not want its customers standing around waiting on a ride (V.3 p.57-58) and obviously such intricate matters would have to be highly organized and constantly monitored.

Dr. Brian Bulloch testified by deposition dated March 6, 2002 and testified that Mr. Rawls' MRI confirmed a disc herniation at L-4-5 (V.1; Depo. Pgs 5-6) and that surgery was performed on September 20, 2000, (V.1; Depo. Pg 7).

Dr. Bulloch testified he saw Mr. Rawls on November 1, 2000, and diagnosed continued progression of pain in his back (V.1; Depo. Pg 9) at which time he prescribed a Medrol Dose Pack.

Based upon the results of the functional capacity evaluation Dr. Bulloch testified that Mr.

Rawls could lift no more than ten (10) pounds (V.1; Depo. Pg 15).

What the Employer and Carrier failed to mention in precise agreement to the Circuit Court is the following pertinent portions of Dr. Bulloch's testimony.

Dr. Bulloch testified that because of Mr. Rawls "significant pain" that it would be difficult for Mr. Rawls to travel sixty (60) miles to and from work (V.1; Depo. Pg 18) and that he placed Mr. Rawls on Darvocet (V.1; Depo. Pg 18).

Dr. Bulloch testified that he had concerns about whether Mr. Rawls would be able to be employable (V.1; Depo. Pg 18) and specifically testified that Mr. Rawls was not "employable in most situations." (V.1; Depo. Pg 19)

Dr. Bulloch testified that Mr. Rawls was in significant pain on a regular basis which limited his ability to sit or stand in any position for any significant length of time and that fifteen (15) to twenty (20) minutes was about as much as could be asked of Mr. Rawls to stay in one position (V.1; Depo. Pg 19).

Dr. Bulloch testified that twenty-three percent (23%) was the appropriate physical impairment rating for Mr. Rawls (V.1: Depo. Pg 20) Dr. Bulloch testified that Mr. Rawls could lift no more than ten (10) pounds. (V.1; Depo. Pg 15)

Dr. Bulloch testified that because of Mr. Rawls' condition that he would have to take frequent breaks and that sometimes he could probably sit for five (5) minutes and some times possibly up to thirty-five (35) minutes and then possibly be okay. (V.1; Depo. Pg 31)

Dr. Bulloch testified that it was not possible that Mr. Rawls could make the sixty (60) miles trip to drive to Ameristar without any problem. (V.1; Depo. Pg 32)

STANDARD OF REVIEW

As this Court is and the Circuit Court was aware, Circuit Courts act as intermediate

Court's of appeal in Worker's Compensation cases. Westmoreland v. Land Lamare Furniture, Inc. 752 So. 2d 444 (Miss App 1999) and a decision of the Worker's Compensation Commission is subject to a limited standard of appellate review. Mabry v. Tunica County Sheriff's Department, 911 So. 2d 1038 (Miss App 2005)

The Worker's Compensation Commission sits as the fact finder and it is the decision of the Commission, and not that of the Administrative Law Judge, which is reviewed by the Circuit Court and the Court of Appeals, University of Mississippi Medical Center v. Smith, 909 So. 2d 1209 (Miss App 2005), a matter the Employer and Carrier should have borne in mind as a majority of their argument attacks the decision of the Administrative Law Judge and does not really address the standard of review when reviewing the decision of the fact finding Commission itself. However, when the Commission simply adopts the ALJ opinion that opinion is then awarded the same due deference just as if it were the order of the Commission. Hinds County Board of Supervisors v. Johnson 2006-WC-01297. Or as stated in said case:

> "Before we delve into this particular issue, we again note the administrative judge rendered a very thorough findings of facts and conclusions of law in his opinion and order. The Commission affirmed and did not comment beyond its decision to affirm. It is very well possible that the Commission did not comment because of the detail involved in the administrative judge's opinion. In any event, under these circumstances, it is appropriate to address our review toward the decision of the administrative judge, rather than the Commission."

The standard of review in Worker's Compensation cases is limited and a substantial evidence test is used, Mississippi Baptist Medical Center v. Dependants of Mullett, 856 So. 2d 612 (Miss App 2003) The Circuit Court and this Court is obligated to give substantial deference to the decision of the Commission, Fly v. North Mississippi Medical Center, 801 So. 2d 826 (Miss App 2001) and a decision of the Worker's Compensation Commission enjoys the presumption that it made proper determinations as to the weight and credibility of the evidence

and its factual findings are binding upon the Circuit Court and Court of Appeals provided such findings are supported by substantial evidence. Bryan Foods, Inc. v. White, 913 So. 2d 1003 (Miss App 2005). As recently as January 29, 2008, the Court of Appeals in F & F Construction v. Holloway, 2007-WC-00155-COA stated:

> "The Commission is the ultimate finder of fact and has the discretion to weigh all the evidence presented. The Commission exercised its discretion in its order based on what we believe to be substantial evidence, and the circuit court appropriately affirmed. This Court is also obligated to affirm."

TOTAL DISABILITY

The matters to be taken into account in workers compensation cases in determining the extent of disability are 1) the actual physical injury and 2) its effect on or loss of wage earning capacity. Spann v. Wal-Mart Stores, Inc., 700 So. 2d, 308 at (Miss 1997) and "disability" is held to mean the incapacity to earn the wages the employee was receiving at the time of injury in the same or other occupation: Jordan v. Hercules, Inc., 600 So. 2d 179 (Miss 1992)

The best example the undersigned as been able to come up with in distinguishing or explaining the difference between the percentage of a physical disability and the percentage of an occupational disability is the piano player/lawyer example. Assume for purposes of consideration that a world renowned concert piano player and a lawyer suffer the identical amputation and loss of their left pinky finger. They are treated by the same doctor, require the same number of stitches, take an identical number of pain medication pills and their medical bills are identical to the last penny. Upon discharge they would, according to disability rating guides, suffer a minimum physical loss of 1%. However, this 1% physical loss affects their respective occupations in a vastly different manner. The world renowned concert pianist would suffer a 100% occupational disability while the lawyer would suffer a 0% occupational disability.

At the time of his injury James Rawls was 58 years of age (he is now over 65 years of age

and has yet to receive a dime in permanent benefits) and had a tenth grade education. To his credit he demonstrated a commendable degree of personal initiative and incentive when he went back at a late age in his life and obtained his G.E.D. specifically so he could get a job with Ameristar Casino. (V.3 p.10)

There is no dispute regarding James Rawls' physical limitations nor any dispute about his job requirements which involved moving massive weights on a daily basis.

There is also no dispute as to Dr. Bulloch's testimony that Mr. Rawls suffers severe physical and permanent limitations which finding have been substantiated and confirmed by IME by Dr. Vohra and further subsequent testing performed by Dr. Rahul Vohra, a physician whose opinions are familiar to and respected by the Commission. So respected in fact that Dr. Vohra was independently selected by the Administrative Law Judge to examine Mr. Rawls and provide his opinion which concurred with that of Dr. Bulloch.

Under any objective standard or authority the decision of the Administrative Law Judge, and the Commission by adoption, finding James Rawls to be totally and permanently disabled was based on more than substantial evidence and was properly affirmed by the Circuit Court.

The Employer and Carrier have expended considerable energy attacking the "common sense" statement of the Administrative Law Judge who stated that common sense yielded the conclusion that no employer would employee someone one narcotic pain medication for the rest of their life. Yet the employer and carrier do not challenge the fact rule Dr. Vohra confirmed that Mr. Rawls would be on prescription narcotic pain medication for the remainder of his life.

The argument of the Employer and Carrier against the "common sense" logic used by the Administrative Law Judge and the full Commission also ignores the fact that medical testimony is not even always required in Worker's Compensation cases or, as stated by the author in Dunn, Mississippi Worker's Compensation, 3rd Ed. Section 273 at Page 342

> "In some situations, accident related disability may be established without medical proof. In the area of the commoner afflictions and after some injury is shown to have occurred from an accident, the testimony of the claimant himself that he suffers a disabling pain in the part of the body affected by the established injury may be received and may even be enough to carry the burden of proof on the issue of accident related disability without the aid of medical proof. This view has been taken in some cases involving asserted back injuries. When a Claimant suffers back pain following an accident and so testifies, this could be found to be sufficient to carry the burden of proof, despite the absence of objective symptoms or medical cooperation."

Of course, in this case, there is medical corroboration of Mr. Rawls' injury and of his continuing back pain. There is medical corroboration (not challenged by the Employer and Carrier) that Mr. Rawls will be on this pain medication for the rest of his life and the Administrative Law Judge, and more to the point the full Commission upon appeal to it as the fact finder, simply reached the obvious conclusion that someone on permanent narcotic pain medication is not employable.

APPELLANTS INVITATION OF ALLEGED "ERROR"

Only on cross examination (V.3 p.39) was the subject of James Rawls efforts to find other employment brought out during his examination (V.3 p.39) as during his direct examination and testimony no attempt was made to elicit any testimony from Mr. Rawls about any efforts to return to employment.

Having opened the door and elicited such testimony the employer and carrier then objected to the testimony they had themselves elicited claiming same to have been contradicted by Mr. Rawls previous discovery responses (V.3 p.40-41). Rather than ignoring what they had invited and moving on the employer and carrier then compounded what they now claim to be error by continuing this same line of questioning proceeding to inquire whether Mr. Rawls had made any "formal application" for jobs. (V.1 p.42-43)

And, directly contrary to what the employer and carrier argued to the Commission it is

absolutely not true that Mr. Rawls refused to identify the two friends at the hearing before the Administrative Law Judge. Mr. Rawls was never asked to identify the two friends at hearing and such statement to the Commission (that he refused to identify them) were simply untrue and directly contradicted by the record. (V.1 p.38-43)

It is the rule in Mississippi that one cannot first create or invite error and then object to same. Caston v. State, 823 So. 2d 473 (Miss 2002) ("a party cannot complain of error invited or induced by himself") See also Singleton v. State, 518 So. 2d 653 (Miss 1988)

Since it is the employer and carrier which elicited the testimony regarding efforts to seek other employment, testimony of which they now complain, they are precluded from doing so by Mississippi law. Further contrary to the argument of the employer and carrier, once they elicited such testimony this becomes a matter of determining the weight of such testimony and not its admissibility. Mississippi State Highway Commission v. Robertson, 350 So. 2d 1348 (Miss 1977)

PAIN AS A FACTOR IN DISABILITY

Only two doctors testified in this case. Dr. Brian Bullock was James Rawls' treating physician. Dr. Rahul Vohra is a physician in Jackson, Mississippi, whose opinion is highly thought of and well respected by the Worker's Compensation Commission. It was for this reason that the Administrative Law Judge selected Dr. Vohra to perform an Independent Medical Examination (IME) on James Rawls.

The ALJ found in their decision of September 16, 2005, (V.2 p.76) that Dr. Vohra had initially seen James Rawls and ordered certain extensive testing and that subsequent to this testing Dr. Vohra again saw Mr. Rawls and then again saw Mr. Rawls after a Functional Capacity Evaluation (FCE) and that Dr. Vohra had testified as to Mr. Rawls permanent disability and. "recommended the continued pharmacologic management of claimants symptoms was

reasonable." (V.2 p.78) The ALJ observed that Dr. Vohra, "noted that claimant has a failed back and that the medications that are used for such are narcotics, seizure medications or membrane stabilizers (Topamax, Depakote, or Neurotin) and muscle relaxers. Dr. Vohra testified that as long as the narcotic pain medication helps the claimant's pain, he should take it." (V.2 p.78)

The ALJ also observed that, "Dr. Bullock noted that the claimant that the claimant was taking Darvocet for pain and that although that there was a possibility that a position could be located for the claimant such a position, 'would be few and far between. He was not employable in most situations." Additionally, Dr. Bullock is concerned that claimant would have to travel sixty (60) miles one way to the employers place of business and he felt this was a significant concern." (V.2 p.78)

Relying upon the concurring medical opinions of Dr. Bullock and Dr. Vohra, the only medical opinions of record, the ALJ found and concluded, "both Dr. Bullock and Dr. Vohra in accordance with the restrictions set forth in the two (2) FCE's, restricted claimants sitting and standing and opined that in all probability Mr. Rawls would experience long term pain and, as such, would require among other medications, narcotic pain medications. As such, the facts are not as described by the employers corporate risk manager." (V.2 p.79)

Directly to the point the ALJ found "although the claimant may be physically able to perform light duty work as reflected by FCE findings, if he suffers from long term pain, which Dr. Vohra believes he will, and has to take narcotic pain medication, coupled with muscle relaxers as well as membrane stabilizers, it is the opinion of the undersigned that he is unemployable and, as such, permanently and totally disabled. As stated, this fact coupled with the setting and standing restrictions prevent him from preforming the one position offered by this employer and common sense tells one that no employer will hire someone who is taking pain medication, coupled with muscle relaxers and membrane stabilizers. It is the opinion of the

undersigned that Mr. Rawls simply cannot function in the workforce while taking these types of medications." (V.2 p.79-80)

These factual findings were adopted by the Commission as the fact finder in its Order of April 18, 2006. (V.2 p.83)

The employer and carrier cite the case of International Paper, Co. v. Kelley, 562 So.2d 1298 (Miss.1990) to this Court stating that it stands for the proposition that "back pain and necessity of taking pain killers does not make one permanently and totally disabled; disability is the losse of wage earning power, not physical injury." (Appellant's brief p.13) However, even a casual reading of International Paper Co., v. Kelley, shows it to completely and factually unrelated to the present matter under consideration. In Kelley the ALJ awarded medical benefits, temporary total disability benefits and permanent partial disability benefits. On appeal the Commission approved the findings of the ALJ except the Commission reversed the finding that the claimant had suffered a lose of wage earning capacity attributable to the compensable injury. On appeal to the Circuit Court of Jackson County, Mississippi that Court applied the correct substantial evidence rule regarding factual findings and affirmed the decision of the full Commission.

Citing the well established principal that if a decision of the Commission is based upon substantial evidence both the Circuit Court and the Supreme Court are bound by the finding of facts made by the Commission the Kelley court found the decision of the Worker's Compensation Commission was supported by substantial evidence and affirmed.

Suffice it to say that no matter how many times one reads International Paper Co., v. Kelley, supra, the reader cannot glean therefrom the Appellant's representation to this Court that, "back pain and the necessity of taking pain killers does not make one permanently and totally disabled" (Appellant's Brief p.13). Pain has always been a factor for consideration in deciding

the totality of the evidence in worker's compensation cases.

Likewise Appellant's citation of Craddock v. Whirlpool Corp., 736 So.2d 400 (Miss. Ct. App. 1999) is to a case quite different from the present matter. In Craddock, supra, the Worker's Compensation Commission had entered a finding that the claimant had suffered no permanent disability which is directly opposite of it's factual findings in this case. Again it suffices to say that the Appellants have again played fast and lose with their representations to this Court when they state that Craddock stands for the proposition that taking pain medication by itself does make not the claimant unemployable. James Rawls has never made this claim but pain and the taking of pain medication for pain has always been a factor to be considered among many other factors in deciding worker's compensation cases.

While our courts in Mississippi have never specifically enunciated that pain, standing alone, will warrant a finding of compensability, pain has always been a factor in disability determinations.

In Dunn, Mississippi Worker's Compensation, (3rd Ed.) the author in Section 281 long ago stated:

> "Moreover, compensation may be allowed for disabling pain in the absence of positive medical testimony as to any physical cause whatsoever. When the patient complains of pain, the doctor usually takes the fact of pain for granted and the absence of physical findings to account for the pain will not necessarily bar compensation. In such cases, evidence of an accident followed by disabling pain and the absence of evidence as to the cause of the pain from objective medical findings has been found sufficient as the basis for compensation, at least in the absence of circumstances tending to show malingering or to indicate the claimant's testimony as to pain is not inherently improbable, incredible or unreasonable, or that the testimony is untrustworthy." Dunn, Mississippi Worker's Compensation at pp. 352-353

In this case there is absolutely no evidence of malingering. To the contrary James Rawls at a late age went back to school and got his GED specifically so he could go to work for Ameristar. (V.3 p.10) He was star employee of the year. (V.3 p.10) The testimony of two (2) doctors, including the IME physician independently selected by the Worker's Compensation

Commission Judge confirms, not contradicts, Mr. Rawls' objectively confirmed physical injury and disability and substantial complaints and evidence of pain.

Mississippi is not alone in holding that pain can be an operative factor in disability determinations as the author in Larson's Worker's Compensation Law notes:

> "Finally, it may be noted that one of the elements contributing to a finding of disability in these cases may be the fact that, while claimant may have managed to some work after the injury, he could do so only by undergoing considerable pain." Larson's Worker's Compensation Law section 57.51 (g) at p.10-359

In Waffle House, Inc., vs. Allam, 2006-WC-00840-COA the Mississippi Court of Appeals had occasion to address a situation were a worker had sustained injuries when she fell while unloading boxes from a delivery truck. The Commission initially held that the claimant's injury was not compensable but on appeal the Circuit Court of Hinds County reversed the Commission's decision and on appeal the Court of Appeals found no error, affirmed and remanded the case to the Commission for determination of benefits.

In the Allam the Court of Appeals saw fit to mention Allam's pain fifty-seven (57) times in rejecting the appeal of Waffle House. Waffle House had argued that Allam's testimony was uncorroborated and contradicted by the medical records while Allam argued her testimony was corroborated by her records and maintained it was error for the Commission to reject her undisputed evidence. The Court of Appeals sided with Allan noting that, "Allam's medical records corroborate the approximate date and nature of her injury. In fact, the record from the independent medical examination reveals the conclusion that "her historical representation of her problems is compatible with her overall physical evaluation in that she does have loss of active lumbar reserve and also has some positive radicular changes into her lower right extremity. This finding was sufficient to establish Allam's prima facia case."

In noting the numerous references to pain in Allam's medical records the appellate court stated, "A review of Allam's medical records indicate that her claim is only corroborated and not contradicted," finding that the Commission's denial of Allam's claim was not supported by substantial creditable evidence and affirmed Circuit Court's reversal of the Commission's denial of benefits.

Like the situation in Allam, supra, the medical records in the present matter are replete with objective physical cause and substantiation of James Rawls' complaints of pain and the only two (2) doctors to testify before the Commission confirmed, not contradicted, these complaints of pain and the employer and carrier have even to date offered no evidence whatsoever to the contrary. The objective physical evidence of his physical disability is conceded by the employer and carrier.

The uncontradicted medical records establish beyond any question that James Rawls is on and will remain on strong narcotic pain medication for his admittedly work related back injury. Yet the employer and carrier have doggedly persisted even up to this appellate level that James Rawls is employable.

Surely the employer and carrier would not argue to this Court that they would allow an alcohol intoxicated employee to work on Ameristar's premises and not be subject to discharge for such intoxication. Nevertheless, the employer and carrier appear to argue to this Court that an employee under the influence of strong narcotic pain medication would be allowed to work on their premises and even go so far as to argue that they would have this pharmacologically intoxicated employee dispatch and coordinate moving vehicles involved in transporting business invites of Ameristar to, from and about its premises. Perhaps Ameristar allows its employees to

be under the influence of a little ,but not too much, Jack Daniels? Perhaps Ameristar allows its employees to work under the influence of a little, but not too much, narcotics?

When pressed on this issue Ameristar's representative, Ms. Heard, got understandably quite vague regarding Ameristar's policy about employees working under the influence. (V.3 p.56-58)

And while Ameristar may ask this Court to believe that it would employ persons working under the influence of narcotics, (and presumably alcohol) it is noteworthy that Mississippi provides criminal penalties for persons operating vehicles under the influence of either intoxicating liquor or "under the influence of any other substance which has impaired such persons ability to operate a motor vehicle." Section 63-11-30 (Miss. Code Ann. 1972)

Other than its bogus job offer as described by its "risk manager" Ms. Heard, Ameristar has not pointed out a single employer which will hire someone taking the levels and types of pain medication as prescribed for and taken by James Rawls.

On appeal of the ALJ's decision the full Mississippi Worker's Compensation Commission had only this to say:

> "Having throughly studied the record in this cause and the applicable law, the Commission affirms the 'Second Supplemental Opinion of the Administrative Judge' dated September 16, 2005." (V.2 p.85)

To date the undersigned has not heard Ameristar to argue to this or any other tribunal that James Rawls does not in fact need the strong narcotic pain medication prescribed for him by his physicians. The facts stand uncontradicted that James Rawls must take this medication. Yet Ameristar apparently continues to ask that the ALJ, the full Commission, the Circuit Court of Warren County and now this Court to simply ignore such medication and its undisputed and well known effects on the human body. Effects that are so well known and recognized they are

proscribed by the State of Mississippi. See § 63-11-30. supra.

The adoption implied in the Commission's per curium affirmance of the ALJ's decision was acknowledged by the Circuit Court of Warren County when it took specific note of Ameristar's objection to "the Commission taking into consideration Rawls continued use of pain medication in determining permeant total disability." (V.1 p.84) After first noting the binding nature of the findings and orders of the Worker's Compensation Commission, so long as they are supported by substantial evidence, the Circuit Court observed that "both doctors" had agreed that James Rawls would be on continuing narcotic medication for his pain and that, conversely, Lisa Heard, the risk manager, testified that she did not take Rawls' continued taking of pain medication into account in describing the job of dispatcher and that she had refused to testify about Ameristar's corporate policy about taking narcotics pain medications and working. (V.1 p.84)

The Circuit Court of Warren County cited Dennis v. BOH Brothers Construction Co., 899 So.2d 761 (La. App. 2Cir 2005); Leigh v. Seekins Ford, 136 P.3d 214 (Alaska 2006); and Adams v. Prudential Insurance Co., of America, 280 F. Supp. 2d 731 (N.D. Ohio 2003) as authority to support the Commission rightfully considering Rawls' continuing use of narcotic pain medication in reaching its determination of permanent total disability.

In Dennis v. BOH Brothers Construction Co. supra, the evidence showed that Dennis had worked as a heavy equipment operator for a number of years and was fifty-six (56) years old at the time of hearing and had not worked since the accident occurring in 1993. In that case Dr. Michael Vise, a neurosurgeon in Jackson, Mississippi, had placed "Dennis on an extensive pain management program, including "the potent pain medication Lorcet" and that Dennis "was still under the care of Dr. Vise at the time of the hearing and was taking four (4) Lorcet tablets a day

for pain." (899 So.2d at p.763)

At the trial of that worker's compensation matter the Dennis worker's compensation judge ruled in favor of Dennis finding him permanently and totally disabled and the employer and carrier appealed. Utilizing basically the same appellate standard of review as used in Mississippi the Louisiana Court addressed Dennis' claim that his physical conditions, "along with his dependent upon narcotic pain medication" rendered him unemployable and affirmed stating:

> "He suffers from numerous physical aliments, including chronic pain as well as diabetes, pitting edema and obesity as well as enduring the regimen of narcotic pain medication which all appear to be directly associated with the injury he sustained while working in the course and scope of his long-time employment with BOH Brothers. Here, considering the totality of the evidence, we cannot say the trial court committed reversible error." (899 So.2d at p.765)

In the present case no one disputes that James Rawls injured his back while working in the course and scope of his employment at Ameristar. No one disputes that his back condition lead directly to his back surgery. Two (2) competent physicians , one preeminent, testified that Mr. Rawls has a permanent physical and objectively confirmed injury to his back. (i.e.; either 10% or 23%) Both physicians confirm that he is required to take strong narcotic pain medication and will have to continue to do so into the indefinite future and probably the rest of his life. After coming up with a bogus job offer Ameristar balked (finally) at the idea of a dispatcher on strong narcotic pain medication when Leesha Heard pretended to not to know what Ameristar's policy or attitude would be about its employees working in such a demished capacity. (V.3 p.51-52)

In Leigh v. Seekins Ford, supra, Leigh injured his back while working for Seekins Ford and applied for worker's compensation benefits. Leigh argued that evidence of his debilitating pain and pain resulting medication kept him from working and rendered futile any efforts to find suitable employment. On appeal the Supreme Court of Alaska observed:

> "Leigh's treating Arizona neurosurgeon, Dr. Stephen Ritland, wrote in December 1999, that, 'with the ongoing medication required and with the ongoing chronic pain and associated limitations, I do not believe that [Leigh] would be effectively employable.' The board also noted that 'numerous friends, family members and co-workers' testified about Leigh's pain and inability to work despite his motivation to work. Leigh took narcotic pain medication, and there was evidence that these medications prevented him from working." (36 P3d at p.218)

In remanding for consideration of the evidence relating to the effects of the pain medication the Alaska Court further stated:

> "We therefore turn to the real crux of Leigh's appeal. Even if it does not create a presumption of compensability, evidence of Leigh's chronic pain and of the effects of pain medication remain relevant to determining by a preponderance of the evidence whether he is permanently and totally disabled. Leigh argued before the board, and offered evidence to support those arguments, that his chronic pain and the resulting pain medications prevented from obtaining employment." (136 P3d. at p.217)

In Adams v. Prudential Insurance Co., of America, supra, Adams' physician wrote a letter to Prudential which might very well have been addressed to Ameristar in this case in which he stated:

> "I am very impressed that your company feels that this gentlemen is not totally disabled. I have suggested to Sam that he obtain a letter from you and your company that you will take responsibility for any decision he makes, any injuries he suffers to himself or any injuries he causes for the company he works for, as well as take full and complete responsibility for any poor advice he gives or any problems he has driving to and from work, which again you so kindly suggest that he can do. The reason I think you people should take responsibility is because this gentlemen takes Oxycotin and Demarol on a daily basis and I think it is just sort of absurd for you people to say he can work while taking these medications. It is difficult for this young man to make to my office for any appointment much less do an 8 hour job." (280 F. Supp. 2d at p.738)

Perhaps, just perhaps, it is this sort of logic that was used by the Administrative Law Judge in formulating their opinion of September 16, 2005, and adopted by the Commission as the trier of fact.

In reversing Prudential's denial of benefits the Adams court noted" that Oxycotin impacts more than the ability to drive, or operate heavy machinery. Oxycotin may interfere with [ones] ability to do certain things that require your full attention." (280 F.. Supp. 2d at.p.741) The Court

held in summary that:

> "Plaintiff persuasively argues that Prudential improperly failed to consider the impact of the narcotic pain relievers Adams takes on a daily basis on his ability to work. Adams directs the Court to *Godfrey v. BellSouth Telecomm., Inc.*, 89 F.3d 766 (11th Cir.1996) and *Dirnberger v. Unum Life Ins. Co. Of Am.*, 246 F. Supp.2d 927 (W.D.Tenn.2002). In *Godfrey*, the court affirmed the district court's finding that a denial of benefits was arbitrary and capricious in part because the defendants "ignored the effects of the medication that [the plaintiff] had to take on a daily basis due to her condition." *Godfrey*, 89 F.3d at 758-59. The only rational explanation was that taking this into account would confirm that the Plaintiff was disabled. *Id.* at 759. Likewise, in *Dirnberger,* the court asserted that the defendant's denial of benefits was arbitrary and capricious based on the plaintiff's ability to return to his *sedentary* job due in part to the failure "to take into account what effect [the plaintiff's] medications would have on his ability to fulfill his job requirements." *Dirnberger*, 246 F.Supp.2d at 934. *See also* **Stvartak v. Eastman Kodak co.*, 945 F.Supp. 1532 (M.D.Fla.1996) (holding that a plan administrator abused his discretion "in discounting the effects of potent anti-depressant and anti-psychotic medications that [the plaintiff] took on a daily basis to remain at work"). 280 F.Supp. at p.740

The Court in Adams felt so strongly about Prudential's refusal to consider the effects of the documented strong pain medication that it decided that an award of cost and attorneys fees should be assessed against Prudential to "deter Defendant and other like Defendants from ignoring the effects of daily doses of potent pain medication on a person's ability to work. "(280 F.Supp.2d at p.742)

It is too bad that added costs and attorneys fees cannot be assessed against the employer and carrier in this case. Certainly if Ameristar were to employ James Rawls as a dispatcher it would summarily discharge him if he opened a bottle of Jack Daniels and poured himself a drink of whiskey while dispatching vehicles engaged in transporting Ameristar's customers. For Ameristar to even suggest that it would not do otherwise if James sat at his desk and popped pain pills is obscene and the zenith of absurdity

The decisions of the ALJ, the full Commission and the Circuit Court were supported by not only common sense but also were based on more than substantial evidence and well settled law and must be affirmed.

EFFORTS TO RETURN TO WORK

It is here that the employer and carrier appear to base their main argument on appeal.

Mr. Rawls was 58 years old at the time of his undisputed injury on July 31, 2000. He was 63 years of age at the time the Administrative Law Judge issued their final opinion on September 16, 2005. He is now 65 years old. At time of hearing Mr. Rawls still had his 10th grade education (he did get a GED at night school so he could work for Ameristar), his 23% physical disability, still was prevented from lifting over ten pounds, was still on narcotic pain medication, could still only stay in one position for 15 to 20 minutes, still could not travel the 60 miles to and from his home and work with pain and rest stops, would have to take frequent breaks and would probably be able to sit for only 5 minutes and sometimes up to 35 minutes (according to Dr. Bulloch) yet the Employer and Carrier somehow contend that Mr. Rawls was employable.

In Beckett v. Planters Compress & Bonded Warehouse Co., 65 So. 275 (Miss 1914) the Supreme Court stated the obvious when it held as a matter of law that:

"the law never imposes upon any one the doing of a vain and fruitless thing" 65 So. at 276

Through the years this rule has been repeatedly reaffirmed as the law in the State of Mississippi. Star Chevrolet Co., v. Green, 473 So. 2d 157 (Miss 1985) Fourth Davis Island Land Co., v. Parker, 469 So. 2d 516 (Miss 1985) Levy v. McKay, 445 So. 2d 546 (Miss 1984)

The factors to be considered and deciding whether a claimant has made an attempt to find employment are 1) economic and industrial aspects of the local community 2) the jobs available in the community and 3) the claimant's general educational background, including work skills and the particular nature of the disability for which compensation is sought. Merritt Distribution Services, Inc. v. Hudson's, 883 So. 2d 134 (Miss App. 2004)

In Merritt Distribution Services, Inc. v. Hudson's supra, the claimant was found by the

Administrative Law Judge to be permanently and totally disabled and on appeal the full commission adopted the Administrative Law Judge's findings and affirmed.

The facts in that case showed that Hudson drove trucks and during her course of employment fell on a concrete dock injuring her neck and back. Hudson eventually had two (2) surgeries and was kept on "heavy medication" for her injuries. Her physician assigned Hudson a fourteen percent (14%) impairment to her body as a whole and she was restricted to lifting no more than 20 pounds. Her physician was of the opinion she could not return to driving trucks.

A brief comparison of the above facts in Hudson, supra, demonstrate that they are almost identical to those found in the present case. James Rawls was admittedly injured, has a 10% to 23% impairment, cannot lift over 10 pounds and is on narcotic pain medications.

As in this case, the employer and carrier in Hudson claimed that Hudson just did not look for employment in a sufficient manner, claiming that Hudson made no real effort to find a job within her physical limitations and that the only inquiry she made was to satisfy the procedure requirements of filing her Complaint.

The evidence in Hudson, supra, indicated that Hudson applied only for trucking positions, claiming that was the only qualification she had. The Court of Appeals affirmed correctly noting that the Administrative Law Judge was aware of "the extent to which Hudson searched for employment and still found her permanently and totally disabled." 883 So. 2d at 137

Noting that the full commission as the finder of fact chose to adopt the Administrative Law Judge's finding and conclusions the Court of Appeals in Hudson affirmed the award of total permanent disability.

In the seminal case of Thompson v. Wells-Lamont Corporation, 362 So. 2d 638 (Miss 1978) it was conceded that the claimant could not "return to her previous job" and the question involved was her ability to procure another job after reasonable efforts.

Upon making an evidentiary review of the facts the Court in Thompson, supra, stated:

> "What constitutes a reasonable effort to obtain employment is a matter not of easy definition, and what might be a reasonable effort in one situation might not be so in another...Several factors may be relevant, including: the economic and industrial aspects of the local community, the jobs available in the community and surrounding area, the claimants general educational background, including work skills and the particular nature of the disability for which compensation is sought....It is uncontradicted that Mrs. Thompson, upon the advice of her physician, had to terminate her employment with Wells-Lamont...We reject any notion that the claimant must assume the burden of showing the absolute unavailability of suitable employment by contacting every possible employer in the area. As we have always held, our Workman's Compensation Statues must be liberally but fairly construed so as to carry out the beneficent purposes intended by the legislature. We cannot, and here do not attempt to, delineate any hard and fast rule as to how many or exactly what type efforts a claimant must make in every case in order to establish "disability" within the purvue of section 71-3-3(I), supra.

****

> The rule which we now adopt is: The claimant has the burden of proof to make out a prima facia case for disability, after which the burden of proof shifts to the employer to rebut or refute the claimants evidence...Whether the claimant has made out a prima facia case is a question to be decided by the trier fact on the evidence presented." 362 So. 2d at 640-641.

In this case the Administrative Law Judge quite correctly noted that because Mr. Rawls suffers from long term pain, which the Administrative Law Judge found to be confirmed by both Dr. Bullock and Dr. Vohra, and has to take narcotic pain medication coupled with muscle relaxers and membrane stabilizers that common sense "tells one that no employer will hire someone who is taking narcotic pain medication, coupled with muscle relaxers and membrane stabilizers. It is the opinion of the undersigned that Mr. Rawls simply cannot function in the work force while taking these types of medications." (V.2 p.80)

It is the rule that disability of a compensation claimant, once found to exist, will be presumed to continue until the contrary is shown, Jackson Ready-Mix Concrete v Young, 111 So. 2d 255 (Miss 1959) and both Dr. Vohra and Dr. Bulloch opined that Mr. Rawls' pain

medication is of a long term nature. There is no evidence to the contrary.

Perhaps the most resounding rebuke to the employers "failure to seek employment" argument is found in the case of Pike County Board of Supervisors vs Varnado, 912 So. 2d 477 (Miss App 2005) where the facts showed Varnado to be a sixty one year old resident of Pike County who was injured on the job on August 9, 1999, when he initially suffered an injury to his leg and ankle. After being treated for this injury Varnado developed a limp which in turn caused back pain resulting in his surgeon recommending back surgery, which Varnado declined.

Upon release of Varnado by his physician on April 11, 2000, Varnado's doctor placed him at maximum medical improvement with a forty pound lifting restriction and an hour long standing restriction. Varnado's doctor assigned him only a 7% physical impairment rating to the back. April 24, 2000, another of Varnado's physicians concluded that he had reached maximum medical improvement and stated that Varnado's "disability is no more than 3% "and instructed him to return on an as needed basis. Varnado's regular physician, (who did not even actually treat Varnado for the work related injury) stated "I do not feel that he is physically able to hold any type of job."

Varnado testified that he was told by Pike County that there were no light duty jobs available to him and Pike County countered by stating that Varnado had been offered and refused a dump truck driver position which Varnado testified he could not perform because of numbness in his legs and pain in his back.

The Administrative Law Judge, after considering the nature and severity to Varnado's impairment, his physical impairment rating and restrictions, Varnado's inability to return to any of his former occupations and other industrial related factors such as Varnado's age and work history, found that Varnado had suffered a 100% loss of wage earning capacity attributable to the work related injury of August 9, 1999.

The employer and carrier in Varnado appealed the Administrative Law Judge's decision to the Full Commission which adopted the findings of fact and the decision of the Administrative Law Judge and the Circuit Court of Pike County in turn affirmed the Full Commission.

On appeal, the Mississippi Court of Appeals directly addressed Pike County's argument that because Varnado testified he had never looked for work after being released by his doctors that he failed to establish a prima facia case for permanent total disability as required by Mississippi Workers Compensation Law.

On appeal, the Court of Appeals disagreed with Pike County stating:

> "Varnado maintains that since there is substantial medical evidence that he is permanently, totally disabled and unfit for employment in any occupation, permanent total disability benefits may be awarded without reference to whether or not he sought other employment. In support of this argument, Varnado cites South Central Bell Telephone Co v Aden, 474 So. 2d 584 (Miss 1985)
>
> ***
>
> "We agree with Varnado that there are similarities between the medical evidence submitted to South Central Bell Telephone Co and the medical evidence offered here. However, we note that the precise issue raised here- that a claimant must seek and be refused other compable work before he can be adjudged to have suffered a 100% loss of wage earning capacity- was not raised in South Central Bell Telephone Co.
>
> In addition to citing McCray, Pike County also cites Hale v Ruleville Health Care Center, 687 So. 2d 1221, 1226 (Miss 1997) and Pontotoc Wire Products Co v Ferguson, 384 So. 2d 601, 603 (Miss 1980) for the proposition that Varnado failed to present a prima facia case of total occupational or industrial disability because he neither attempted to perform the job offered to him by Pike County nor attempted to secure other employment but was turned down.
>
> We find none of the cases cited by Pike County to be applicable here. In all those cases, the medical proof was that the claimant had suffered only a permanent partial disability. When a claimant has suffered only a permanent partial disability, 'the claimant bears the burden of making a prima facia showing that he has sought and been unable to find work' in the same or other employment." Hale, 687 So. 2d at 1226. If the claimant reports back to work at his

> current employer but the employer refuses to hire him, the claimant has established a prima facia case of total disability. "The burden then shifts to the employer to prove that the claimant has suffered only a partial disability or that the claimant has suffered no loss of wage earning capacity.
>
> Here, as we have already observed, there was evidence that Varnado not only suffered a one hundred percent medical disability, but also a one hundred percent occupational disability or loss of wage earning capacity. That was the import of Dr. Westbrooks successment that Varnado could not "hold any type of job." 912 So. 2d at 481-482

Dr. Westbrook was Varnado's regular physician who did not even treat Varnado for his work related injury.

Citing the well known standard of review in workers compensation cases that the courts will overturn the Commission's decisions only for an error of law or an unsupported finding of fact and will reverse only when the Commission's order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law the Varnado Court affirmed stating:

> "Therefore, mindful of our differential standard of review and after considering the evidence as a whole, we find that there was substantial evidence to support the Commission's finding that Varnado is permanently and totally disabled. While the medical evidence is in dispute as to whether Varnado has suffered a total or partial permanent injury, it was a dispute to be resolved by the Commission. The Commission resolved it in Varnado's favor. Likewise, whether Varnado also suffered a total loss of wage earning capacity depends in part upon whose version of the medical evidence is accepted. Again, the Commission chose to credit Dr. Westbrook's assessment that Varnado could not hold any type job. This assessment was corroborated by Varnado's testimony as well as Pike County's statement to PERS that Varnado is totally disabled. Accordingly, we affirmed the decision of Circuit Court affirming the decision of the Commission." 912 So. 2d at 483.

In this case, Dr. Bulloch (who unlike Dr. Westbrook in Varnado did treat the claimant

know about James' pain medications. (V.3 p.56)

There was simply no testimony or evidence whatsoever before the Administrative Law Judge or the Commission that Ameristar had or has a dispatcher position available to a person on the level of narcotic pain medication as James Rawls is required to take on a daily basis. To the contrary, it would appear that rather than hiring persons on such pain medication to coordinate moving vehicles with moving passengers Ameristar would instead fire persons on such medication.

Perhaps this is why the Administrative Law Judge in the opinion of September 16, 2005, found (V.3 p.79)) stated:

> "Following claimant's injury and subsequent surgery, the employer offered claimant the position of transportation dispatcher. The employer's corporate risk manager testified during the hearing that this position fell within the restriction set forth in the first FCE and noted that there were no restrictions placed on the claimant relating to standing or sitting and that there was no indication that claimant would need to take any type of pain medications. As discussed below, this is incorrect."(V.2 p.79)

Thus, the Administrative Law Judge, and the Commission by adoption as fact finder, pointedly rejected as a matter of fact Ameristar and Leesha Heard's claim that they had legitimately offered James Rawls a position of transportation dispatcher. The sudden amnesia of Leesha Heard regarding the effects of pain medication on the job description about which she had previously so confidently testified were not lost on the ALJ or the Commission.

The Administrative Law Judge quoting both Dr. Brian Bulloch, the claimant's treating surgeon, and Dr. Rahul Vohra, (the physician independently selected by the Administrative Law Judge) observed that James Rawls was restricted from sitting and standing, that both physicians were of the opinion that Mr. Rawls would experience long term pain and require narcotic pain medications, all of which the Administrative Law Judge found to be outside the job description testified to by Leesha Heard. (V.2 p.79)

In short, Leesha Heard's testimony was not found to be either believable or credible and was flatly rejected by the fact finder.

REFUSAL TO RE-EMPLOY

In Mississippi the refusal of a carrier to re-employ an injured claimant creates a presumption of total disability. Hale v Ruleville Health Care Center, 687 So. 2d 1221 (Miss 1997)

While Ameristar, through Leesha Heard, was to astute enough not to admit or state that it refused to rehire James Rawls, it tacitly did so by offering him one job, and one job only, i.e. a position which did not exist. (a transportation dispatcher on narcotic pain medication)

Once a situation occurs where an employer refuses to rehire an injured employee the burden then shifts to the employer to show that other jobs exist, Hale v Ruleville Health Care Center, supra, and Ameristar has not offered one scintilla of evidence indicating what "other jobs" James Rawls is qualified for other than the now clearly recognized fictitious position of "Under the Influence Transportation Dispatcher."

As stated by the Court in Pike County Board of Supervisors v Varnado, supra:

> "....if 'the employer refuses to hire him, the claimant has established a prima facia case of total disability.' The burden then shifts to the employer to prove that the claimant has suffered only a partial disability or that the claimant has suffered no loss of wage earning capacity" 912 So. 2d at 42

Ameristar refused to rehire James Rawls creating a prima facia case of total disability which then shifted the burden to Ameristar to show that James Rawls suffered only a partial disability or that he suffered no loss of wage earning ability at all and they have woefully failed to meet that burden.

SUMMARY

As seen from the foregoing this is in actuality a case where the employer refused to rehire an injured employee. For example, Ameristar is not in the airport business and has no positions for Mr. Rawls to work as an air traffic controller. Certainly, were Ameristar to offer Mr. Rawls a position as an air traffic controller, this would easily be seen as a sham and treated as what it was; a joke and a refusal to rehire.

Although the above example is extreme to the maximum it nevertheless makes the point. Ameristar has no positions open for transportation dispatchers under the influence of heavy narcotic pain medication, yet this is the only job it offered James Rawls. By offering such a non existent job, and no other, Ameristar refused to rehire James Rawls creating a presumption of total disability.

Even were this not the case, Ameristar itself elicited testimony from James Rawls that, after his deposition, he applied for two subsequent jobs and was not able to obtain or perform either of them and Mississippi law is clear that the employer and carrier cannot first elicit such testimony and then object to same. This testimony, and its weight, was a matter for determination by the Commission.

Under any view of the facts the Administrative Law Judge was correct in finding that "no employer will hire someone who is taking narcotic pain medication, coupled with muscle relaxers and membrane stabilizers" and the Administrative Law Judge's opinion, and in turn the Commissions finding, based upon the uncontradicted and unchallenged testimony of Dr. Brian Bulloch and Dr. Rahul Vohra, who were in agreement, is that Mr. Rawls suffers from chronic and long term pain for which he will have to continue to take narcotic pain medication.

The Commission was correct in rejecting the trumped up job position allegedly made available by Ameristar, especially in light of Leesha Heard's sudden onset of amnesia regarding the effect of narcotic pain medication on the job requirements of such position, and the

Commission correctly affirmed the decision of the Administrative Law Judge. The Circuit Court in turn applied the correct standard of appellate review and affirmed the Commission's findings of facts.

The facts and the uncontradicted medical evidence are more than substantial and lead to only one conclusion, that this is not a case of permanent partial disability but is a case of total disability and for this reason there is no requirement under Mississippi Workers Compensation law that James Rawls make any showing whatsoever of any attempts to return to any employment. Even if there was any question on this issue the Workers Compensation Commission, as in Varnado, supra, resolved that factual question in this case in favor of James Rawls and this Court should under the well recognized standard of review in workers compensation cases affirm the Circuit Court's affirmance of the decision of the full Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID M. SESSUMS, Attorney for Appellee, do hereby certify that I have this day caused to be served a true and correct copy of the Brief of Appellee to Hon. Frank G. Vollor, Circuit Court Judge, P.O. Box 351, Vicksburg, Mississippi 39181 and F. Hall Bailey, Esquire, P.O. Box 427, Jackson, Mississippi 39205-0427.

This the 16th day of February, 2008.

DAVID M. SESSUMS