IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-01434

AMERISTAR CASINO-VICKSBURG
EMPLOYER/APPELLANT

AND

LEGION INSURANCE COMPANY
CARRIER/APPELLANT

VS.

JAMES RAWLS
CLAIMANT/APPELLEE

Appeal From The Circuit Court of Warren County, Mississippi

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE REPLY

The fallacy of Rawls' Appellee argument is four-fold.

1. The Administrative Law Judge[1] did not base a decision related to Rawls physical abilities on medical testimony. She based it on her purported notion of "common sense."

2. The medical testimony completely contradicts the Administrative Law Judge's findings with regard to Rawls' physical capabilities.

3. As much as Rawls wants to obfuscate the testimony, Ameristar in fact offered Rawls a position that met the requirements of the Functional Capability Evaluation, and Rawls never reported back to his employer to attempt to perform the job.

4. As Rawls admitted, asserting a physical disability is not sufficient for a Workers Compensation finding of permanent disability. Disability is the incapacity to earn the same wages the employee was earning at the time of the accident. Rawls agrees that he did not consider wage earning ability an element of his claim as he did not put on any evidence of the impact of his physical capabilities on his wage earning capacity and was only able to place in the record a scintilla of evidence[2] on the topic during cross examination. That scintilla was not legally sufficient to prove lack of wage earning capacity.

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[1] Since the Commission adopted the Administrative Law Judge's findings without discussion and without comment, the reference is to the September 2005 written decision of the Administrative Law Judge which the Commission adopted.

[2] In addition to the evidence being inadequate to meet the Claimant's burden of proof, the admission of the scant proof of the so-called job search was subject to objection since the testimony was not disclosed during discovery and was contrary to the discovery responses supplied by the Claimant.

REPLY

A. The Medical Testimony Refutes the Commission's Finding

The Commission's finding of "permanent disability" was based, not on any record testimony, but on a notion of "common sense" which was directly contradicted by the medical testimony and the employer's job offer. The finding, as stated in the Administrative Law Judge's September 16, 2005, Opinion, which the Commission adopted as its own, was that the Claimant was permanently and totally disabled as a result of his work related injury because "common sense tells one that no employer will hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers."

The Administrative Law Judge required Rawls to undergo an independent medical exam ("IME") to be performed by Dr. Rahul Vohra nearly three years after the accident. After examining Rawls on two occasions and having a second Functional Capacity Evaluation ("FCE") performed on Rawls, Dr. Vohra testified as follows with regard to Rawls' ability to work.

Dr. Vohra first testified unequivocally that Rawls could perform light work. In fact Rawls could perform any job which came within the restrictions of the FCE.

> Q. [Bailey] Okay. Thank you, sir. All right. I cut you off earlier. I think you were finishing up your July 7, 2004, office note review and did you again see Mr. Rawls or do you have any follow-up notes after that time?
>
> A. At that time I did send him for a functional capacity evaluation once the workup was complete, and I did receive the results of that. And overall, it placed him at a light level of work which was consistent with the first FCE that he had.

Q. All right, sir. And is it your opinion that Mr. Rawls would be able to go back to work at any job that met these restrictions?

A. Yes, sir.

Vohra, P. 15, L. 6 – P. 16, L.. 4.

Rawls' attorney wanted Dr. Vohra to elaborate on what exactly the FCE restrictions meant with regard to Rawls' work capabilities, and Dr. Vohra complied.

Q. [Sessums] Are you able – I know you agree with the FCE. Can you state for us today your opinion as to how long he could continuously stand for any one given period of time?

A. Yes sir, I think - (Examines document.) I would allow him to stand for an hour at a time.

Q. An hour?

A. Yes sir.

Q. And after an hour, what would you recommend he do?

A. Change positions. Sit for at least five or ten minutes.

...

Q. How long is it your opinion that he could continuously sit for one period of time?

A. The same. I would say an hour.

Q. Okay. And you're referring to the FCE at this point?

A. Yes sir. They don't – they don't specifically say that. They just say sit and stand frequently.

Q. That's why I'm asking you, I guess.

A. So I'm trying to be a bit more specific than that.

Q. What can he do with regard to squatting?

A. Squatting, I would - - I would say occasionally.

Q. I hate to ask you this, what does that mean?

A. Up to a third of the day, usually.

Q. What about bending, same question.

A. Same.

Q. Third of the day. And what about stooping?

A. Same

Q. What's your opinion in terms of does he need to be climbing stairs or how often can he?

A. I think he could climb stairs occasionally. Again, a few times a day, but I don't think it's something he could do continuously.

Q. Okay. And are there any limitations on the amount of weight he could lift at any one time?

A. yes sir.

Q. What would those limitations be?

A. Twenty pounds floor to waist and waist to shoulder and 15 pounds overhead

Vohra, P. 27, L. 21 – P. 29, L. 22.

To make sure that Dr. Vohra understood that Rawls was in pain and taking pain medication, Rawls' attorney asked if he had considered that factor. Vohra assured him

that he had.

> Q. [Sessums] Is there anything in the FCE or your opinion that would take into account his pain levels as how those pain levels would affect his ability to work?
>
> A. Yes sir. That's what the FCE was ---
>
> Q. It does that
>
> A. – for. Yes, sir.

Vohra, p. 26, L. 4 - 10.

Based on Dr. Vohra's uncontradicted testimony, Rawls could do light work, stand and sit for an hour at a time before changing positions, climb stairs, stoop and bend a third of the day, and those capabilities took into account his pain which Dr. Vohra stated was appropriately being managed with pain medication.

And it was not only Dr. Vohra who agreed that Rawls could return to work within the work restrictions placed upon him by his Functional Capacity Evaluations. Dr. Brian Bulloch, his treating physician, testified as follows:

> Q. [Bailey] But as long as [Rawls] had a job available to him that met the FCE restrictions that were placed on him, on page 3 of the FCE, he could work that job, based upon ---
>
> A. Correct.
>
> Q. --- in your opinion?
>
> A. Correct. In my opinion. Correct.
>
> Q. All right, sir. And so if Ameristar made available a job to him within those restrictions, he would be able to physically perform that job?
>
> A. Yes.

Bulloch, P. 30, L. 13 - 23.

The Administrative Law Judge's purported "common sense" finding that "no employer will hire someone who is taking narcotic pain medication" flies in the face of the uncontradicted medical opinions of both Dr. Vohra and Dr. Bulloch, who were of the opinion that Rawls was capable of performing work that met the restrictions placed upon him by his Functional Capacity Evaluations, notwithstanding his pain or his pain medication. It is also worthy of note here that the out of state decisions cited by the lower court in support of proposition that the Commission "rightfully" considered Rawls' use of pain medication in determining issue of permanent total disability have no application here, even if they were binding authority on this Court, which they are not. The underlying record offers no support for the Commission's decision that Rawls is unable to work based upon his pain medication. Accordingly, the authorities are of no import to this case. [3] The medical evidence in this case is clear in showing that Rawls can return to work within the work restrictions placed upon him and the Commission's adoption of the so-called 'common sense' reasoning applied by the Administrative Judge was error.

B Ameristar Offered Rawls a Job, and Rawls Did Not Attempt to Accept or to Perform the Proffered Work

Rawls argues that Ameristar's job offer was bogus because there was no such job as "Under the Influence Dispatcher." [Appellee Brief, p. 35]. Ameristar's representative testified that it was up to Rawls' physician - not Ameristar - to determine

[3] As a practical matter, the fact that the lower court found it necessary to pull out cases from across the country to attempt to justify the Commission's decision is evidence in and of itself that the record does not support their finding.

whether Rawls could perform while taking the nightly Darvocet[4]. When asked whether Ameristar wanted their dispatchers taking pain medications while working, Leesha Heard stated: "I feel like that responsibility is on [Rawls'] doctor to determine whether or not Mr. Rawls can function on Darvocet and do dispatching or do any kind of job regardless of what that job is because I would only address his performance." R. 56, L. 17-21.

Since both of Rawls' physicians cleared him to perform light work with certain lifting restrictions, they in fact found that Rawls could work while taking pain medication. Rawls' continued assertion that the taking of pain medication precluded him from working is refuted by the two Functional Capacity Evaluation he underwent along with the medical testimony of both Dr. Bulloch and Dr. Vohra, who testified that Rawls was capable of performing light work at the level determined by the FCE. Moreover, Dr. Vohra went a step further when testifying to clarify that the FCE took into account Rawls' pain and pain medication.

Moreover the record is clear that after Rawls was released to return to work with restrictions, Ameristar offered him a job that paid the wages he made prior to the accident, required no training and allowed him to sit and stand as he chose, while talking on the same radio-telephone he used as a slot technician. R. 50–51.

Rawls acknowledged that Ameristar advised him that they had a dispatcher job available for him. He testified at the hearing as follows:

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[4] [4] It should be noted that at the hearing, Rawls was asked by his attorney to advise as to what amount of pain medicine he was taking per day. He testified that he was taking one Darvocet per day and he took it at 9:00 p.m. R. 26, L. 8-13.

Q. [Sessums] All right. James, tell us about you Trying to return to work.

A. Well, they said they had me a job.

Q. Who said that?

A. Ameristar.

Q. When did they tell you that?

A. Some time in March of - - - it must have been In March of 2001.[5]

Q. Okay. Was it March of last year or the year before last?

A. The year before last.

Q. What kind of job did Ameristar tell you that had waiting for you?

A. Dispatch.

Q. Dispatch?

A. Correct.

Q. Yes, it was in dispatch.

Q. What does dispatch do in a casino?

A. Dispatches buses from one location to another whether they are employees or guests.

R. 19, L. 23 – R. 20, L. 12.

Rawls make it quite clear that the offer of a dispatch job was clearly conveyed to him. He also was clear that he never went by to try to work the job, testifying on direct examination that he drove to Ameristar and checked on his 401K savings account, but never went by to follow up on the job offer because "I didn't see no way to work." R. 21,

[5] Rawls was determined to have reached maximum medical improvement by Dr. Bulloch on March 1, 2001. Exhibit C to Dr. Bulloch's deposition [medical records].

L. 11-12. His testimony on cross was more direct:

> Q. [Bailey] Now the dispatch job, you never followed up on it, did you?
>
> A. No.
>
> Q. You never attempted to go find out anything about that job?
>
> A. I went, but I couldn't - - when I got there - -
>
> Q. The reason you went - -
>
> A. It wasn't no use.
>
> * * *
>
> Q. Okay. You went for something else, you couldn't get it, then went back home?
>
> A. Right.
>
> Q. You never went down the hall to ask about the dispatch job?
>
> A. I went down the hall.
>
> Q. But never sought anyone out to ask about the dispatch job?
>
> A. I don't remember who I seen, but I seen somebody --- some lady and I asked about my 401.
>
> Q. But you never asked about the dispatch job?
>
> A. No.

R. 38, L. 15 – R. 39, L. 19.

For Rawls to take this testimony and attempt to argue that the dispatch job was never offered is in total contradiction to the record before this Court. Moreover, Rawls' argument that Ameristar did not offer to train him for the position is a red herring that should be rejected out of hand because: (a) Heard testified that the job required no

training; R. 50. (b) Rawls never even attempted to accept the position to see if he in fact needed any training; and (c) responding to telephone and radio requests for transportation and calling the bus drivers on the radio do not require training beyond the use of the radio that Rawls had been using for five years. Moreover, it is disingenuous to insinuate that Rawls, who has the skills to repair both complex gaming devices and complicated automotive systems, does not have the mental acuity to use the radio-telephone to answer and process requests for transportation during the slowest shift at the casino.

The record before this Court clearly reflects that Ameristar offered Rawls a job that met the work restrictions placed upon him by Drs. Bulloch and Vohra and paid him the same wages he was making at the time of his work related workers' compensation injury. Rawls' failure to even attempt to perform the job eliminates his ability to prove that he could not earn comparable wages. Rawls had an obligation to report back to his employer, and he failed to do so.

C. Rawls Failed to Prove The Essential Element of His Claim

As Rawls admitted in his Appellee Brief, a claimant must prove both an injury and "its effect on or loss of wage earning capacity." Appellee Brief, p. 12. Rawls would lead this Court to believe that he was not required to attempt the job offered to him by Ameristar or otherwise make a reasonable job search based upon the Varnado decision. Specifically, Rawls states that "once a finding of total disability was made by the [Commission] 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."

Appellees Brief, P. 3. This statement flies in the face of the well established case law handed down by this Court.

Rawls relies on *Pike County Board of Supervisors v. Varnado,* 912 So. 2d 477 (Miss. Ct. App. 2005), for the proposition that he was not required to undertake a job search or to prove that he could not perform the job offered by his employer. In *Varnado*, however, Dr. Terry Westbrook provided Varnado with a letter that stated that

> "I have advised him [Varnado] that he is totally physically disabled because of recurrent back pain, spinal stenosis. I do not feel that he is physically able to hold any type of job."

Varnado, 912 So. 2d at 479. That letter, according to the Mississippi Court of Appeals, was the deciding issue in whether Varnado was permanently and totally disabled. And whether he was required to perform a reasonable job search. Varnado, 912 So. 2d at 483.

There is no such medical testimony or support for Rawls. To the contrary and as noted above, the testimony of the two physicians and the results of the two Functional Capacity Evaluations concluded that Rawls could perform light work with restrictions on the length of time that he could sit or stand before changing positions. *Varnado* thus provides Rawls no support. *Varnado*, in fact, reiterates the familiar standard that a Commission order may be reversed when it is not based on substantial evidence. *Varnado*, 912 So. 2d at 480.

The Court of Appeals decision in *Lane Furniture Industries, Inc. v. Essary*, 919 So.2d 153 (Miss. Ct. App. 2005) is helpful here. In that case, the claimant sought an award of permanent total disability benefits based upon a back injury. The claimant injured her back and later underwent surgery. She was ultimately released with certain work restrictions. The claimant never returned to her employer seeking work after being

released. She did testify that she sought to apply for various jobs in the area, but several employers wouldn't accept her application after she told them of her back injury and inability to lift anything.

The Court of Appeals reversed the Commission's award of permanent total disability benefits, stating:

> A worker's compensation claimant must demonstrate (1) that he is medically disabled and unable to work, and therefore need not seek employment, or (2) that he has presented himself to his employer for work, and the employer failed or refused to reinstate him. *Hale v. Ruleville Health Care Center,* 687 So.2d 1221, 1226 (Miss.1997); *Lanterman v. Roadway Exp., Inc.,* 608 So.2d 1340, 1347 (Miss.1992). The burden does not rest with the employer to seek out the employee, and inquire as to whether he/she is interested in returning to work and if so, under what conditions.

919 So. 2d at 157.

In reversing the Commission's decision, the Court of Appeals stated

> This Court finds that the Commission's decision, that Essary was totally disabled, as shown by her inability to find employment, was not supported by substantial evidence. This Court also finds that the Commission improperly placed upon Lane the burden of seeking Essary out to determine when she could return to work, and if so, under what circumstances.

Id. at 159.

In our case, Rawls was in fact contacted by Ameristar and advised of the job offer, even though it was not their duty to do so. Despite that, Rawls never attempted to work the job. And unlike the claimant in Essary, Rawls did not make a job search with other employers.

The Mississippi Court of Appeals in December 2006 reiterated the requirement that a claimant "must report back to his employer in order to activate a presumption that a partial disability is in fact a total permanent disability." *Imperial Palace Casino v. Wilson*, 960 So. 2d 549, 553-54 n.2 (Miss. Ct. App. 2006)(citations omitted). It is uncontradicted that Rawls did not report back to Ameristar or even attempt to perform the proffered employment.

Rawls did not "activate the presumption" that a partial disability is in fact a total permanent disability by returning to Ameristar and being unable to perform the proffered transportation dispatcher job. Even if he had, however, the Court in *Imperial Palace Casino* confirmed that Ameristar could "present evidence (if any) showing that the claimant's efforts to obtain other employment was a mere sham, or less than reasonable, or without proper diligence." *Imperial Palace Casino*, 960 So. 2d at 554 (citations omitted).

Rawls' cites *Merit Distribution Services., Inc. v. Hudson*, 883 So. 2d 134 (Miss. Ct. App. 2004), as providing facts similar to those in this case. The facts in *Merit Distribution Services*, however, are quite different on the issue of job search. Hudson testified that she placed formal applications at five trucking companies for the position of driver. She named the companies, and the employer contradicted the testimony by that of several of the companies. *Merit Distribution Services*, 883 So. 2d at 137. The Commission addressed the issue of the conflicting testimony and found that the conflicting evidence weighed in Hudson's favor. The Court of Appeals then held that "although the evidence conflicted, we find that there was evidence that suggested Hudson attempted to find subsequent employment. Because there was such evidence,

the circuit court's decision to affirm the full Commission's ruling is not clearly erroneous." *Merit Distribution Services*, 883 So. 2d at 137.

Rawls did not consider that undertaking a job search was a requirement of his claim. And there is no question that Rawls did not undertake any job search at all for at least two years after the July 2000 accident. Rawls testified that he had made no formal applications for any job since the date of his accident and being released to return to work. (Tr. P. 42). He said he had not gone around anywhere and applied for a job or sought employment anywhere else other than "talking to his two friends." (Tr. P. 42). Despite Ameristar's objection to this testimony at the hearing, based upon previously-filed discovery responses,[6] Rawls was allowed to testify further. He went on to state that all he did was talk to two friends with stores sometime between July 2002 and September 2002 who were afraid that he would get hurt and that since talking to his two friends six to eight months prior to the hearing in this matter, he had made no further efforts to obtain employment. (Tr. P. 42-43). Rawls further testified that at no time prior to, or after, these conversations with his two friends had he made *any* effort to locate employment or otherwise apply for a job. (Tr. P. 43).

In *Merit Distribution Services*, the Commission acknowledged the conflicting job search evidence. In this case the Commission did not address the lack of a job search because it erroneously found that no one would hire anyone taking Darvocet. Moreover Hudson made formal applications and Rawls did not, and as the cases cited in Ameristar's Appellant Brief confirm, Rawls' two purported discussions with friends do not constitute the diligence required in a claimant's efforts to find work.

[6] Rawls' discovery response on file prior to the hearing expressly stated that he made no job search seeking employment after being released to return to work by his treating physician.

another or different trade for which he might be suited. Without evidence of attempting to perform the comparable job offered by his Employer or of a good faith job search, Rawls has failed to prove that he has suffered a loss of wage earning capacity. Consequently, the Circuit Court's affirmance of the Commission's finding of permanent disability benefits is both an error as a matter of law and unsupported by record evidence and should be reversed. Rawls' claim for permanent disability benefits should be denied.

This the 26th day of March, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellants Ameristar Casino-Vicksburg, and Legion Insurance Company to

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This the 26th day of March, 2008.

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