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

BRIEF OF APPELLANT

F. Hall Bailey
Kathryn H. Hester
WATKINS LUDLAM WINTER & STENNIS, P.A.
633 North State Street
Post Office Box 427
Jackson, Mississippi 39205-0427
(601) 949-4900
ATTORNEYS FOR APPELLANTS
AMERISTAR CASINO-VICKSBURG
AND LEGION INSURANCE COMPANY

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STATEMENT OF THE ISSUES

1. Is the Full Commission's finding that James Rawls met his burden of proof in establishing his entitlement to an award of permanent total disability benefits under the Mississippi Workers' Compensation Act based upon substantial evidence in view of Rawls' failure to undertake reasonable efforts to gain employment in similar or other vocations after reaching maximum medical improvement and being released to return to work within certain work restrictions?

2. Is the Full Commission's finding that James Rawls met his burden of proof in establishing his entitlement to an award of permanent total disability benefits under the Mississippi Workers' Compensation Act based upon substantial evidence in view of Rawls' failure to accept the job offered to him by his Employer, Ameristar Casino, which met the work restrictions placed upon him by his treating physicians after he had been released to return to work?

3. Is the Full Commission's finding that James Rawls met his burden of proof in establishing a loss of wage earning capacity under the Mississippi Workers' Compensation Act based upon substantial evidence in view of Rawls' failure to undertake reasonable efforts to gain employment in similar or other vocations after reaching maximum medical improvement and being released to return to work within certain work restrictions;

4. Is the Full Commission's finding that James Rawls met his burden of proof in establishing a loss of wage earning capacity under the Mississippi Workers' Compensation Act not based upon substantial evidence in view of Rawls' failure to accept the job offered to him by his Employer, Ameristar Casino, which met the work restrictions placed upon him by his treating physicians after he had been released to return to work;

5. Did the Full Commission err as a matter of law in adopting the Administrative Judge's finding that "common sense tells one" that James Rawls was unemployable based upon his intake of pain medication?

6. Did the Full Commission's err as a matter of law in finding that James Rawls was permanently and totally disabled?

7. Are the Full Commission's findings concerning the existence, nature and extent of Claimant's permanent disability attributable to his work related injury supported by substantial evidence?

8. Did the Full Commission err as a matter of law in finding that James Rawls suffered a loss of wage earning capacity as a result of his work related injury

9. Is the Full Commission's finding concerning James Rawls' purported loss of wage earning capacity based upon substantial evidence?

10. Did the Full Commission err as a matter of law in finding that James Rawls met his burden of proof in establishing his entitlement to an award of permanent total disability benefits under the Mississippi Workers' Compensation Act?

I. STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition in Commission Below*

On July 31, 2000, the Claimant, James Rawls, ("Rawls" or "Claimant") suffered injury to his lower back while working at the Ameristar Casino in Vicksburg, Mississippi.

On February 22, 2001, Rawls' treating orthopedic physician, Dr. Brian Bulloch, released Rawls for light work based on a February 6, 2001, Functional Capacity Evaluation ("FCE").

On April 23, 2001, Rawls filed the Petition to Controvert alleging that he had a 25% impairment, as a result of his work related injury, according to Dr. Bulloch.

On May 21, 2001, the Employer and Carrier (hereinafter referred to collectively as "Ameristar") filed an Answer, admitting that the injury occurred, but denying the allegations related to temporary and permanent disability and Rawls' claim that he suffered a loss of wage earning capacity as a result of the injury.

On March 24, 2003, a hearing in this matter was held at the MWCC building in Jackson, Mississippi.

On August 22, 2003, the Administrative Judge issued an Opinion in which she referred Rawls for an independent medical examination ("IME") to be conducted by Dr. Rahul Vohra.

On December 1, 2003, Dr. Vohra performed the IME and issued a five-page report which recommended further studies to definitively rule out the presence of a recurrent disc herniation.

On June 14, 2004, the Administrative Judge issued a Second Opinion, ordering the Claimant to undergo the additional workup recommended by Dr. Vohra in his December 1, 2003, report.

On June 28, 2004, Dr. Vohra performed the additional testing consistent with the ALJ's Order.

On July 7, 2004, Dr. Vohra prepared a Clinic Note that addressed the findings noted from the additional test and recommended a Functional Capacity Evaluation to delineate restrictions.

On October 26, 2004, Dr. Vohra noted that Rawls' FCE placed him at a light level of work, a finding with which he concurred.

On September 16, 2005, the Administrative Judge issued her final Opinion, the Second Supplemental Opinion, finding 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."

On October 6, 2005, Ameristar timely filed its Notice of Appeal to the Full Commission for review of that Order.

On April 18, 2006, the Full Commission, issued a short two-paragraph Order affirming the "Second Supplemental Opinion of the Administrative Judge dated September 16, 2005."

On May 18, 2006, the Ameristar filed a timely appeal to the Circuit Court of Warren County, Mississippi.

On June 14, 2007 the Circuit Court of Warren County, Mississippi issued its Order affirming the Order of the Mississippi Worker's Compensation Commission.

On June 21, 2007 Ameristar timely filed its Notice of Appeal to this Court.

B. Statement of Facts

The Claimant, a resident of Winnsboro, Louisiana, suffered an injury to his lower back on July 31, 2000, while in the course and scope of his employment as a slot technician with Ameristar Casino. After an MRI exam revealed a disc protrusion at the L4-5 level, Rawls was referred to Dr. Brian Bulloch with the Orthopaedic Clinic of Monroe (LA), who performed surgery on Rawls on September 20, 2000. After undergoing follow-up care and physical therapy, Dr. Bulloch noted in his office notes that the Claimant had reached maximum medical improvement on February 6, 2001. Rawls was referred for a Functional Capacity Evaluation for his work restrictions following surgery. This report was completed on February 22, 2001, and indicated that the Claimant had a 23% impairment rating to the body as a whole. According to Dr. Bulloch's notes, the FCE restrictions indicated that Rawls should not be asked to sit or stand for longer than 45 minutes to an hour at a time, without being able to change position, and that Rawls was limited to "light duty." [3-1-01 notes]. Light duty, according to Dr. Bulloch, limited Rawls to lifting a maximum of twenty pounds. [Bulloch, pp.15-16, Vol. 1 of 1][1]

The Administrative Law Judge referred Rawls to Dr. Rahul Vohra, whose Independent Medical Examination report and additional testing were performed in December 2003 and June 2004, thirty-three and forty months respectively after the first

[1] Reference is either to the Hearing Transcript using the number at the bottom of the page (Tr. P. __), or to the depositions which were made part of the record [Bulloch, p.__] or [Vohra, p. _].

FCE, per the ALJ's Order. In response to the ALJ's specific questions, Dr. Vohra was of the opinion that Rawls suffered a 10% impairment as a result of the work related injury, that he could stand or sit for an hour at a time at which time he would need to change positions; that he could squat, bend, or stoop up to one third of the day, he could climb stairs a few times a day, lift 20 lbs occasionally from floor to waist and waist to shoulder, 15 lbs shoulder to overhead, carry 15 lbs, push 40 lbs and pull 10 lbs occasionally. [Vohra, p. 29]. Vohra found that continued management of Rawls' pain with medications was reasonable [Vohra, p. 21] and that Rawls could do any job that met these restrictions. [Vohra, p. 16].

At the hearing of this matter, Leesha Heard, Corporate Risk Manager for Ameristar Casino, testified that Ameristar Casino offered Rawls a job to return to their employment after he was released by Dr. Bulloch. This job offer was for the position of transportation dispatcher, which had no job lifting requirements and allowed the employee to stand and sit at will. (Tr. P. 48-49). Accordingly, the job met the physical restrictions placed upon Rawls by the February 22, 2001 Functional Capacity Evaluation Report.

Heard further testified that the dispatcher job offered to Rawls paid the same wages that he was earning while employed as a slot technician. (Tr. P. 49). According to Heard, the dispatcher job required no training. All the employee had to do was be able to talk on a radio, like the one used by the slot technicians where you would push a button and talk into a microphone, or use the telephone. The dispatcher was able to sit and stand at his pleasure while operating the radio and using the telephone. (Tr. P. 49-50).

In response to a question related to whether Ameristar's policy would allow Rawls to work and take pain medications, Heard responded that it was up to Rawls' physicians to determine whether Rawls could work while taking Darvocet. (Tr. P. 55).

Rawls, by his own admission, never made an effort to accept the job offer by Ameristar Casino for the position of transportation dispatcher. (Tr. P. 37). Rawls testified that he went by the Ameristar Casino location after being released by Dr. Bulloch to get his 401K proceeds, but he never went down to ask about the transportation dispatcher job or try to accept the job to see if he was able to perform it. (Tr. P. 37-38).

Not only did Rawls not accept or even try the job offered to him by Ameristar, which met the physical restrictions placed upon him within the Functional Capacity Evaluation, he made no legitimate effort to find a job of any kind on his own. The Employer and Carrier propounded to Rawls interrogatories, which included a question asking the Claimant whether or not he had attempted to find employment or work since the date of his work-related accident. Rawls' August 2001 response to this interrogatory, more than a year after the accident, was simply "no." *See* Response to Interrogatory No. 11, marked as Exhibit "B" for identification. Vol. 1 of 1. His response to the same question ten months later at his deposition was the same. [Rawls Depo, at 37-38, Vol. 1 of 1] When Rawls was questioned at the hearing about this response and his lack of any effort to seek employment, he attempted to change his answer over objection by Ameristar.[2]

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[2] Ameristar objected to this proposed testimony on the basis that it was inconsistent with the discovery responses and matters submitted by the Claimant within his pretrial statement. The Administrative Judge chose not to rule on the objection, but simply stated that she would take the matter up when issuing her final opinion in the case. The various opinions handed down by Administrative Judge did

Even when allowed to testify, Rawls' testimony reflects that he made no good faith effort to seek employment after being released to return to work with restrictions. Specifically, he stated that he "tried two different places" asking a couple of friends that have stores if they would let him work. These friends declined because they were "afraid that he would get hurt worse," apparently not because he could not do the job. No mention was made as to what type work this was, who his friends were, or any other details other than that provided above. (Tr. P. 41). Rawls also 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. 41). 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. 41). He further testified that since talking to his two friends six to eight months prior to the hearing in this matter, which would place these conversations sometime between July 2002 and September 2002, he had made no further efforts to obtain employment. (Tr. P. 41-42). 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. 42).

II. SUMMARY OF ARGUMENT

The Administrative Law Judge, summarily affirmed by the Full Commission, ignored Rawls' burden of proving loss of wage earning capacity and made two unsupportable conclusions which are errors as a matter of law. With absolutely no supporting evidence, the ALJ found that

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not address Rawls' discovery response and the testimony related to new testimony given at the hearing.

1. "common sense tells one that no employer will hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers,"

2. "it is the opinion of the undersigned that Mr. Rawls simply cannot function in the work force while taking these types of medications."

(September 16, 2005 Order at p. 5, (e)).

Not only is there no record support these findings, but there are uncontroverted facts in opposition to both conclusions. Furthermore, the decision of the Administrative Judge, which was affirmed summarily by the Full Commission, ignored Dr. Vohra's testimony that both his opinion and the FCE took Rawls' pain into account when assessing his functionality – his ability to work. In other words, Rawls' pain and pain medication allowed him to perform light duty work and did not make him unemployable.

In addition, the Full Commission erred as a matter of law in finding that the "sitting and standing" restrictions precluded the Ameristar job offered to Rawls from meeting the requirements of the FCE. There is no evidence to support a finding that there were sitting and standing restrictions which prevented Rawls from performing the job that Ameristar offered him in April 2001. Consequently, that finding is an error as a matter of law and must be reversed.

The Full Commission also ignored the fact that Rawls did not meet his burden of proving a loss of wage earning capacity, which is essential to an award of permanent disability benefits. The claimant is not allowed to avoid meeting this burden by simply putting on proof that he has suffered a permanent physical impairment. Mississippi's courts have held that in order for the claimant to prove that he has suffered a workers' compensation disability he must unequivocally prove a *reasonable* effort to find other

employment. Rawls offered no such proof. Accordingly, the award of the Full Commission is contrary to the law and not supported by substantial evidence.

III. ARGUMENT

Ameristar recognizes that under the familiar standard of review, an appellate court is bound by the decision of the Mississippi Workers' Compensation Commission if the Commission's findings of fact and order are supported by substantial evidence. *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). That is not the case here. Moreover, under the flip side of that standard, a court will reverse the Commission's order "if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence." *Hardaway Co. v. Bradley*, 887 So. 2d 793, 795 (Miss. 2004). That is the case where as here there is no evidence to support the Administrative Law Judge's findings of fact, and in fact the record evidence overwhelmingly supports a contrary finding. As the Supreme Court has noted

> A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act. Weatherspoon v. Croft Metals, Inc. 853 So. 2d 776, 780 (Miss. 2003) (citations omitted)

Hardaway Co. v. Bradley, 887 So. 2d 793, 795 (Miss. 2004).

The Administrative Law Judge, summarily affirmed by the Full Commission, ignored Rawls' burden of proving loss of wage earning capacity and made two unsupportable conclusions which are errors as a matter of law. With absolutely no supporting evidence, the ALJ found that

> 3. "common sense tells one that no employer will hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers,"

4. "it is the opinion of the undersigned that Mr. Rawls simply cannot function in the work force while taking these types of medications."

(September 16, 2005 Order at p. 5, (e)).

Not only is there no record support for these findings, but there are uncontroverted facts in opposition to both conclusions.

A. The Administrative Law Judge Incorrectly Held that Rawls "simply cannot function in the work force while taking [narcotic pain medications]"

The record does not support a finding that Rawls could not function in the work force as a result of taking pain medication, and in fact the record facts are completely opposite. They include:

1. Rawls had been taking pain medication since he got hurt in July 2000. (Tr. P. 27).

2. Rawls originally took hydrocodone and muscle relaxers for pain [Bulloch, p. 7] but was put on Darvocet beginning in March 2001. [Bulloch 18]

3. Darvocet is a mild narcotic pain medication. [Bulloch, p. 16]

4. Rawls had been cut back to one Darvocet per day one month prior to the hearing (Tr. P. 27).

5. At the time of the hearing, Rawls took one Darvocet each evening around 9:00 p.m. in order to sleep better. (Tr. P. 26).

6. Rawls was taking pain medication in 2000 during the three weeks that he drove to Delhi, Louisiana for physical therapy, nearly an hour away.

7. Rawls was taking pain medication in 2000 during the six weeks that he drove the twenty minutes to physical therapy in Winnsboro, Louisiana.

8. Rawls was taking pain medication in February 2001 when he was given the FCE at Oachita Physical Therapy in Monroe, Louisiana, 56 miles away from his home in Winnsboro, Louisiana.

9. Rawls was taking pain medication at each of the thirteen visits he made in 2000 and 2001 to his treating physician, Dr. Brian Bulloch in Monroe, Louisiana, 55 miles from his home in Winnsboro, Louisiana.

10. Rawls was released for work on February 21, 2001, by his treating physician Dr. Bulloch following a Functional Capacity Evaluation which

recommended Rawls for jobs in the "light duty to sedentary duty restrictions" which limited lifting to no more than ten – twenty pounds [Bulloch, p. 16 - 17]

11. Dr. Bulloch and the FCE found that Rawls could sit for forty-five minutes to an hour and then would require a five to ten minute break of walking around and stretching before sitting for another similar period. [Bulloch, p. 31]

12. Rawls was taking pain medication when his patient profile was filled out and tests run in June 2004 at River Oaks Hospital, 108 miles from his Winnsboro, Louisiana home.

13. Rawls' June 2004 River Oaks Health System Patient Input Form, indicated that he had no hearing, visual or learning impairments, even though he was taking Darvocet, and that he was motivated to learn and his learning preferences were verbal and written. [Vohra, Ex. 4, p. 15].

14. Rawls was taking pain medication at each of his two or three visits with Dr. Rahul Vohra in Flowood MS, 108 miles from his home in Winnsboro, Louisiana.

15. Dr. Vohra, who performed an IME at the Order of the Workers' Compensation Commission, noted on December 1, 2003, that Rawls was "awake, alert and cooperative," even though Rawls was then taking Darvocet daily. [Ex. 2 to Vohra, p. 3]

16. Rawls was taking pain medication when his second Functional Capacity Evaluation was performed in October 2004.

17. Not one doctor, nurse or physical therapist suggested that Rawls was impaired by the taking of Darvocet.

18. Ameristar's witness testified that it was Rawl's treating physician's responsibility to determine whether Rawls could work while taking Darvocet. (Tr. p. 56).

19. Dr. Vohra, stated that Rawls could perform any job which came within the restrictions of the FCE (light work). [Vohra, p. 16].

20. Dr. Bulloch, Rawls' treating physician, in his deposition, stated that Rawls could perform any job which came within the FCE restrictions. [Bulloch, p. 30]

21. In response to Rawls' question specifically related to pain, Dr. Vohra stated that "the FCE takes into account his [Rawls'] pain levels as to how those pain levels would affect his ability to work." [Vohra, p. 26]

22. Rawls testified at the March 2003 hearing, with no evidence that he was in any way impaired, even though he was taking Darvocet and had driven for two hours from his home to the hearing site.

If Rawls' ability to perform had been impaired by the taking of pain medication, including the nightly Darvocet he was taking at the time of the hearing, that impairment would have been reflected in the two Functional Capacity Evaluations performed at the request of Drs. Bulloch and Vohra. The two FCE's were performed three and one-half years apart. The first was performed during a period of time when Rawls was taking more pain medication than he was at the time of the hearing since, according to his testimony, he was cut back to one nightly Darvocet one month before the hearing. (Tr. p. 26). Yet both the March 2001 and the October 2004 FCE had the same findings – findings which took Rawls' pain and pain medication into account in evaluating his ability to perform. Both FCE's had the same result. Rawls was able to perform light work as long as he could change positions after standing or sitting for an hour and with limits on his ability to lift anything over ten lbs. There was no evidence that the taking of a Darvocet nightly would make Rawls unemployable, and the Commission's contrary finding and the Warren County Circuit Court's affirmance is an error of law. There is *no* evidence to support that finding, much less substantial evidence. On the contrary, there is substantial evidence to find that Rawls, even taking a Darvocet at night, was able to perform the job within the restrictions placed on him by the FCE and his treating and examining physicians.

Furthermore, the decision of the Administrative Judge, which was affirmed summarily by the Full Commission, ignored Dr. Vohra's answer to the Administrative Judge's question about Rawls' limitations as a result of the injury. In her June 14, 2004 Order, the Administrative Judge asked Dr. Vohra to give his opinion in four areas:

a. the nature and extent of the claimant's disability, if any, resulting from the work injury

b. the need for further and/or future medical treatment, surgical intervention or otherwise, as a result of the injury

c. whether the claimant suffers any restrictions, limitations, or other inability to perform work activities as a result of the injury;

d. the recommended course of treatment, if any, required by the nature of the injury and the claimant's recover therefrom.

June 14, 2004 Order, p. 2-3. (Vol. 2 of 3, p. 71-71)

In response to (d)[3], Dr. Vohra recommended against certain previously suggested pain management recommendations [Vohra Ex. 2, p. 4] and found that the "pharmacologic management of his symptoms is certainly reasonable". Vohra, Ex. 3. In responding to (c), Dr. Vohra's opinion with regard to Rawls' work-injury restrictions was that the limitations on Rawls as a result of the injury were those in the FCE which was performed four years after the accident, [Vohra Ex. 5], and which were consistent with the February 2001 FCE. [Vohra, p. 15].

Expounding on the specific restrictions, Dr. Vohra noted that Rawls would be placed in the light work category, that he could continuously stand for up to an hour at a time after which he would need to change positions, that he could continuously sit for an hour at a time, squat, bend and stoop about one third of the day; climb stairs a few times a day and lift a limited amount of weight. [Vohra, Ex. 5 and p. 15, 27-29]. None of those limitations made Rawls unemployable. The Administrative Law Judge, affirmed summarily by the Full Commission, likewise ignored Dr. Vohra's testimony that both his opinion and the FCE took Rawls' pain into account when assessing his functionality –

[3] In response to (a), Dr. Vohra found that Rawls had presented with both work-injury related and non-work-injury related symptoms. [Vohra Ex. 3]; that certain aspects of the pain he was expressing was not work-related, [Vohra, p. 12-13]; that he had a 10 percent impairment to the whole person with the restrictions based on the functional capacity evaluation. [Vohra, p. 20] In response to (b), Dr. Vohra recommended additional testing, which the ALJ ordered. [Vohra Ex. 2, p. 4].

his ability to work. [Vohra, p. 26]. In other words, Rawls' pain and pain medication allowed him to perform light duty work; Rawls' pain and his pain mediation did not make Rawls unemployable.

Moreover, finding that the taking of pain medication by itself makes a claimant unemployable flies in the face of previous Mississippi Supreme Court and Court of Appeals cases. *See, e.g. International Paper Co. v. Kelley*, 562 So. 2d 1298, 1302 (Miss. 1990)(back pain and necessity of taking pain killers does not make one permanently and totally disabled; disability is the loss of wage earning power, not physical injury); *Craddock v. Whirlpool Corp.*, 736 So. 2d 400, 404 (Miss. Ct. App. 1999)(Claimant taking pain medication at time of hearing found to have no permanent medical impairment). Even if there was medical support within the record in support of Rawls' argument that the pain medication he was taking caused him some limitation, these case authorities support Ameristar's position that the taking of pain medication does not render one disabled.

The Administrative Law Judge, summarily affirmed by the Full Commission, erred as a matter of law by finding that the nightly taking of Darvocet made Rawls unemployable and thus permanently and totally disabled, and the decision must be reversed.

B. The Administrative Law Judge Incorrectly Found that "common sense tells one that no employer will hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers"

The record does not support a finding that no employer would hire Rawls, because, in fact, Ameristar offered Rawls a job which met the restrictions of the FCE and his treating physicians. Rawls even admitted that he probably could have done the

job, and his objection was that he would have to drive the sixty miles from his home in Winnsboro, Louisiana to Ameristar Casino. Rawls' treating physician acknowledged that Rawls could perform any job which met the restrictions placed on him by the FCE, [Bulloch, p. 30]. Specifically, Dr. Bulloch testified as follows:

> Q. But as long as he had a job available to him that met the FCE restrictions that were placed on him, I think, 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].

Moreover, Rawls' treating physician admitted that Rawls could make the drive to and from his home to Ameristar as long as he was able to stop and stretch during the drive. [Bulloch, p. 30-32, Vol. 1 of 1]. Rawls himself acknowledged also that having a new truck with cruise control, as he had at the time of his deposition, a year after he was released for work, made it much easier to drive because he didn't "have to sit and hold the accelerator" in that new truck. [Rawls' Deposition, 31, Vol. 1 of 1]

With his treating physician acknowledging that Rawls could make the drive, with the proffered job coming within the FCE restrictions, and with Rawls admitting that he could have probably done the job, it was error for the Administrative Law Judge, with

the summary affirmance of the Full Commission, to find that no one would hire someone taking pain medications.

The record facts in opposition to the ALJ's findings that no one would hire someone on pain medication include:

1. Dr. Vohra interpreted the FCE performed in 2004 as well as the FCE performed in 2001 to restrict Rawls to standing or sitting for one hour at a time at which time he would need to change positions for 5-10 minutes; squatting, bending, stooping up to one third of the day; and climbing stairs a few times a day; lifting up to 20 lbs and 15 pounds overhead [Vohra, p. 28-29].

2. Ameristar Casino offered Rawls the job of transportation dispatcher which required him to use the hand-held telephone he had used as a slot technician and to talk on that phone while sitting or standing at his choosing. (Tr. P. 49-50).

3. The job did not require any training, it required no lifting, and it thus came within the parameters of the work restrictions imposed as a result of the FCE.

4. Ameristar's witness testified "if Mr. Sessums states that I should have some knowledge about what level of Darvocet Rawls can take, I feel like that responsibility is on his doctor to determine whether Mr. Rawls can function on Darvocet and do dispatching or do any kind of job regardless of what that job is... (Tr. P. 56).

5. Dr. Bulloch, Rawls' treating physician agreed that Rawls could travel the 58 miles between his home in Winnsboro, Louisiana and Ameristar Casino in Vicksburg as long as he could stop and stretch along the way as necessary. [Bulloch, p. 37].

6. Rawls' drove himself and his wife the two hours from his home to the March 2003 hearing in Jackson, Mississippi, 105 miles away, taking either no stop or one stop, according to his wife Linda, who rode with him. (Tr. P. 46).

7. Rawls drove the one hour trip to Ameristar both the day after and two days after the accident with no complaint.

8. Neither Rawl's treating physician, Dr. Bulloch, nor Dr. Vohra who performed the IME, limited Rawls activities because of the fact that he was taking Darvocet.

9. Rawls himself agreed that he thought he could do the job even though he had not given it a try.

Ameristar offered Rawls a job, and Rawls declined to even try. The Mississippi Workers Compensation Commission found that Rawls was not required to make a job search because it was "common sense" that an employer would not "hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers." The Commission Order must be reversed unless there is substantial evidence in support of its this finding. *Hardaway Co. v. Bradley*, 887 So. 2d 793, 795 (Miss. 2004). Here there is no evidence to support a finding that no one would hire someone in Rawls' situation. One, Rawls made no job search to test the Commission's "theory." Two, we know for a fact that Ameristar did offer Rawls a job which met the restrictions of the February 2001 FCE, and Rawls failed to even attempt to accept that job. Under Mississippi law that conclusion must be reversed. The Commission Order must be reversed and Rawls' claim for permanent disability benefits must be denied.

C. The Administrative Law Judge Erred as a Matter of Law in Finding that Sitting and Standing Restrictions Precluded the Ameristar Job From Meeting the Requirements of the FCE

The Administrative Law Judge found that the "fact" that Rawls was unemployable if he suffered long term pain and was required to take narcotic pain medication "*coupled with the sitting and standing restrictions prevent him from performing the one position offered by" Ameristar Casino*, and "common sense tells one that no employer will hire someone who is taking narcotic pain medication coupled with muscle relaxers and membrane stabilizers." Second Supplemental Order, at ¶5(e), p. 4)(Emphasis added).

There is no evidence to support a finding that there were sitting and standing restrictions which prevented Rawls from performing the job that Ameristar offered him in

April 2001. Consequently, that finding is an error as a matter of law and must be reversed. Record facts which contradict that finding include the following:

1. Dr. Vohra interpreted the FCE performed in 2004 as well as the FCE performed in 2001 to restrict Rawls to standing or sitting for one hour at a time at which time he would need to change positions for 5-10 minutes; squatting, bending, stooping up to one third of the day; and climbing stairs a few times a day; lifting up to 20 lbs and 15 pounds overhead [Vohra, p. 29].

2. Dr. Vohra testified that Rawls could go back to work at any job which met the FCE restrictions. [Vohra, p.16].

3. In response to the Administrative Law Judge's questions as to "whether the claimant suffers any restrictions, limitations or inability to perform work activities as a result of the injury," Dr. Vohra responded the only restrictions were those outlined in the 2004 FCE. [Vohra, p. 24].

4. Dr. Vohra specifically testified that both the FCE and his opinion took into account how and whether pain would affect Rawls' ability to work. [Vohra, p. 26].

5. According to Dr. Brian Bulloch, Rawls' treating physician, the earlier February 2001 FCE performed at Oachita Physical Therapy in Monroe, Louisiana, indicated that Rawls could not sit or stand for more than forty-five minutes to an hour without being allowed to change posture. [Bulloch notes 3-1-01].

6. Dr. Bulloch, Rawls' treating physician, agreed that "if Ameristar made a job available to [Rawls] within the FCE restrictions, he would be able to physically perform that job." [Bulloch, p. 30].

7. Dr. Bulloch, Rawls' treating physician, agreed that based upon the March 2001 FCE and his examination of, and care for, Rawls, Rawls could sit or stand for thirty to forty-five minutes as long as he was able to get up and stretch for five or so minutes and then go back and sit down for another period of thirty to forty-five minutes. [Bulloch, p. 31].

8. Dr. Bulloch, Rawls' treating physician, agreed Rawls could travel the 58 miles between his home in Winnsboro, Louisiana and Ameristar Casino in Vicksburg as long as Rawls could stop and stretch along the way as necessary. [Bulloch, p. 31; Tr. P. 37]

9. Leesha Heard, Ameristar's Corporate Risk Manager, testified at trial that the dispatcher job that Ameristar offered to Rawls had no restrictions on whether he sat or stood while performing his job and that he could have sat or stood as needed. (Tr. P. 50).

10. Leesha Heard's testimony that there were no sitting and standing restrictions was not refuted.

The Administrative Law Judge, affirmed summarily by the Full Commission, asked for an IME for Rawls from Dr. Vohra, and specifically asked for Dr. Vohra's opinion on Rawls' limitations as a result of the injury. Vohra stated that Rawls could sit or stand for an hour at a time as long as he could change positions for five or ten minutes before resuming his sitting or standing. Ameristar offered Rawls a job which allowed him to sit or stand as he chose; to perform the job requirements while either sitting or standing. The Administrative Law Judge, affirmed summarily by the Full Commission, had no record support for a finding that there were sitting or standing requirements which precluded Rawls from performing the job proffered by Ameristar. Consequently, the decision is an error of law that must be reversed.

D. The Claimant Failed His Burden of Proving Loss of Wage Earning Capacity

In addition to making an "unemployablility" finding unsupported by anything other than personal opinion, the Administrative Law Judge also ignored the fact that Rawls did not meet his burden of proving a loss of wage earning capacity which is essential to an award of permanent disability benefits. The claimant is not allowed to avoid meeting this burden by simply putting on proof that he has suffered a permanent physical impairment. *See, e.g., Clements v. Welling Truck Service Inc.*, 739 So. 2d 476, 480 (Miss. Ct. App. 1999) (fact that claimant is not restored to the same physical condition he exhibited before an injury is not sufficient to find a permanent occupation disability; rather, there needs to be an incapacity because of the injury to earn the wages received at the time of the injury in the same or other employment).

1. Rawls Failed to Meet His Burden of Proving Reasonable Effort to Find Employment

The Mississippi Supreme Court has repeatedly held that the burden of proof lies with the claimant to demonstrate that he has, in fact, suffered a disability within the meaning of the workers' compensation statutes. Miss. Code Ann. § 71-3-3(i) defines "disability" to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment . . . ." Miss. Code Ann. § 71-3-3(i) (Rev. 2000). Disability means a loss of earning power in whole or in part, not physical injury. *International Paper Co. v. Kelley*, 562 So. 2d 1298, 1302 (Miss. 1990). See also *Hall of Mississippi, Inc. v. Green*, 467 So. 2d 935, 936-939 (Miss. 1985)("Disability means incapacity because of injury, to earn wages which the employee was receiving at the time of the injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings.")

Mississippi's courts have held that in order for the claimant to prove that he has suffered a workers' compensation disability he must

> show (a) an inability to resume his former work, and (b) the effort he has made to seek employment in another or different trade for which he might be suited. *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826, 828 (Miss. 1979).

Entergy Mississippi, Inc. v. Robinson, 777 So. 2d 53, 55 (Miss. Ct. App. 2000).

Moreover, the Mississippi Supreme Court has long stated that in order for the claimant to make out a *prima facie* case of disability, he must unequivocally prove a *reasonable* effort to find other employment. *See, e.g., Sardis Luggage v. Wilson*, 374 So. 2d 826, 829 (Miss. 1979) (claimant seeking permanent disability benefits for loss of wage earning capacity must first prove that he has sought other employment and was unsuccessful in acquiring a position, the employment being in another or different

trade). In this case, Ameristar offered Rawls a job to return to work that met all of his physical restrictions and also offered him the same pay that he was earning at the time of the work-related incident. Rawls made absolutely no effort to accept this job and simply ignored the job offer. Accordingly, the burden of proving loss of wage earning capacity remained with Rawls. *See, e.g., Clements v. Welling Truck Service Inc.*, 739 So. 2d 476, 480 (Miss. Ct. App. 1999) (when a claimant seeking to establish permanent occupational disability chooses not to return to the employer, the claimant bears the burden of showing a loss of earning capacity).

The most recent pronouncement on this issue can be found in *Chestnut v. Dairy Fresh Corp.*, 966 So. 2d 868 (Miss. Ct. App. 2007). In that case, the claimant suffered a back injury but was subsequently released to return to work with work restrictions. However, the claimant failed to report back to his employer for work with work restrictions for his employer to accommodate. Further, with the exception of one attempt to perform yard work for a friend, the claimant did not search for alternative employment.

The Mississippi Worker's Compensation Commission denied Chestnut's claim for permanent disability benefits on the basis that he failed to perform a reasonable job search, citing the precedent of *Dulaney v. National Pizza Co.*, 733 So. 2d 301, 304 (Miss. Ct. App. 1998). The Mississippi Court of Appeals affirmed the Commission's decision denying Chestnut permanent disability benefits in October 2007. In so doing, the Court of Appeals noted that

> [w]hen the claimant has not returned to work after reaching maximum medical recovery, the claimant must establish either that he has sought and been unable to obtain work in similar or other jobs or show that, upon his reaching maximum medical improvement, he reported back to his

> employer and the employer refused to reinstate or rehire him. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1226 (Miss. 1997); *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994); *Jordan v. Hercules, Inc.*, 600 So. 2d 179, 183 (Miss. 1992).

966. So. 2d at 871.

The unanimous Court of Appeals went on to recite the well-settled law requiring a reasonable job search, stating:

> The law of workers' compensation is well-settled when a claimant, after reaching maximum medical improvement, fails to prove that he sought, but nonetheless failed, to regain employment or secure alternate employment, an award of permanent disability benefits is precluded. *Hale*, 687 So. 2d at 1228; *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1249 (Miss. 1991); *Piper Industries, Inc. v. Herod*, 560 So. 2d 732, 735 (Miss. 1990); *Pontotoc Wire Products Co. v. Ferguson*, 384 So. 2d 601, 603 (Miss. 1980). Even if a claimant has been assigned a permanent impairment rating and working restrictions, an administrative judge may deny permanent partial disability benefits if the claimant has made no effort to return to his previous employer our sought suitable alternative employment. *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826, 829 (Miss. 1979); *Cuevas v. Copa Casino*, 828 So. 2d 851, 858 (¶21) (Miss. Ct App. 2002); *Owens v. Washington Furniture Co.*, 780 So. 2d 643, 647 (¶12) (Miss. Ct. App. 2000); *Dulaney*, 733 So. 2d at 304 (¶8).

Id.

The facts presented by *Chestnut* are strikingly similar to the case before this Court. A worker's compensation claimant who suffers a back injury is found to have reached maximum medical improvement and released to return to work with work restrictions. The claimant fails to report back to work and fails to make a reasonable job search. Permanent disability benefits are denied based upon a long-standing line of cases handed down by the Mississippi Supreme Court. The decision was correct in *Chestnut* and should be applied to the facts at hand to deny Rawls' claim for permanent disability benefits.

2. Half-Hearted Effort to Find Employment Does Not Meet the Claimant's Burden

Not only does the burden of proving loss of wage earning capacity rest with Rawls, but he must overcome the uncontroverted proof that he had a job available to him making the same pay that he was earning at the time of the accident, which he made absolutely no effort to accept. The Commission never addressed whether the Claimant met that burden of proof.

Rawls makes much of the notion that he would be unable to perform the disputed job offered to him. Ameristar vehemently disagrees with this argument. However, if we assume for the sake of argument that Rawls is correct on this point, it still does not relieve the Claimant of his burden to make a reasonable job search. As the Mississippi Court of Appeals stated in *Chestnut*:

> The Mississippi Supreme Court has held that, **even in the case where the claimant cannot return to her former employment, an unexcused failure to show an effort to explore other employment opportunities more suited to the claimant's post-injury condition is fatal to a claim for permanent disability."** *Wagner*, 825 So. 2d at 706 (¶12). "One attempt at finding employment has been held to not be sufficient." *Cuevas*, 828 So. 2d at 858 (¶21) (citing *Compere's Nursing Home v. Biddy*, 243 So. 2d 412, 414 (Miss. 1971)). Here, the Commission found that Chestnut's reaching maximum medical improvement, and his failure to make a reasonable effort to find employment following release from his physicians, constitutes a bar as to his ability to present a *prima facie* case of permanent partial disability. We agree. Even assuming that Chestnut's endeavor to perform yard work for a friend constitutes a job search, this one attempt at securing alternative employment is insufficient to demonstrate a permanent partial disability.

Id. at 871-72. (emphasis added)

Rawls made absolutely no effort to find a job. As the Court said in *Park Inn Int. v. Hull*, 739 So. 2d 487 (Miss. Ct. App. 1999), "it is absolutely essential that a

claimant...after having been released for work, make reasonable efforts to find employment." It is a fundamental prerequisite to recovery. *Park Inn*, 739 So. 2d at 489.

As noted earlier, in the discovery responses signed by Rawls thirteen months after the accident, he openly admitted that he made no effort to seek other employment. At his deposition ten months later, Rawls admitted that he had not sought employment. Then at the hearing, Rawls sought to "supplement" this response by giving vague testimony that he talked to two "friends" about them hiring him, and both declined. While this testimony should be stricken and not offered into evidence[4], it still offers Rawls little benefit in meeting his burden of proof. Even if these "efforts" had been properly documented and the Employer and Carrier had been given an opportunity to follow-up with these friends to see what type jobs Rawls sought and whether or not these jobs were such that he was qualified, the fact that he only made an attempt to talk to two friends during a time that was 17 months after he had been released to return to work and 6 to 8 months prior to the hearing is inadequate to show that he has met his burden of proof. *See, e.g., Boyd v. Miss. Workers' Comp. Comm'n Self-Insurer Guar. Ass'n*, 919 So. 2d 163, 164-170 (Miss. Ct. App. 2005) (merely inquiring but not filling out employment application does not constitute good faith effort to seek employment); *Owens v. Washington Furniture Co.*, 780 So. 2d 643, 547 (Miss. Ct. App. 2000) (evidence not sufficient to show that claimant made reasonable efforts to find

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[4] The reason the Employer and Carrier propounded the interrogatory in question was to find out well prior to the hearing information related to any efforts made by the Claimant to secure employment. Once this information was timely provided through the interrogatory response, that would allow the Employer's counsel an opportunity to go follow-up on that request to see if it had in fact taken place, and if so, secure more information about the type job applied for and the nature of the application and verify the Employer's response. When Rawls simply stated that he had made no efforts to seek employment, he should be bound to that response at the hearing. This is the case even if he did in fact talk to the two "friends" that he refused to identify at the hearing.

employment, and thus, to sustain his burden of showing loss in wage earning capacity to support claim for permanent disability benefits, where in 4 years prior to date of hearing, claimant made no attempt to obtain employment of any kind); *Ford v. Emhart, Inc.*, 755 So. 2d 1263, 1268 (Miss. Ct. App. 2000) (the fact that workers' compensation claimant voluntarily retired from her position, together with the fact that she did not try to find another job for 7 months after leaving employer, supported Commission's decision that claimant did not make reasonable efforts to obtain gainful employment for purposes of her disability benefits claim); *Clements v. Welling Truck Service, Inc.*, 739 So. 2d 476, 481 (Miss. Ct. App. 1999) (claimant made a "voluntary withdrawal from the work force" where efforts to find employment could, at best, only be described as half-hearted).

With or without this disputed testimony, the existing case law clearly reflects that Rawls has failed to undertake a reasonable effort to secure employment in order to meet his burden of proof in establishing a loss of wage earning capacity. Rawls reached maximum medical improvement in February 2001. He was given work restrictions by his treating physician consistent with a Functional Capacity Evaluation performed that same month. Rawls was offered a job by Ameristar that met those physical restrictions in April 2001. Rather than try the job to see if he was able to perform it, Rawls simply acted as if the job was never offered and made absolutely no attempt to take the job. At trial he admitted he probably could have done it. Moreover, he did nothing to find a job between February 2001 and the date of his hearing in March 2003 other than talk to two friends of his sometime between July 2002 and August 2002 to see if they might in fact hire him. He never went around and made any effort at all to apply for a job, interview for a job, to find jobs that may be available for him.

Accordingly, he has not made the adequate job search necessary to prove loss of wage earning capacity, and his request for permanent disability benefits should have been denied.

3. **Ameristar's Job Offer Met the FCE Requirements**

Rawls has tried to argue that the job with Ameristar was not a viable option for him because he would be required to drive sixty minutes to and from the casino in order to report to work and go home. This argument was refuted through the testimony of Dr. Bulloch, who said that there was no reason why Rawls could not stop along the way and to get out and stretch and get back in the car to finish the drive. Accordingly, there was no reason why he would be prevented from accepting a job at the casino which required such a drive.

It should further be noted that Rawls' physical therapy was nearly an hour from his home; his treating physician was located 55 miles away; and his examining physical was nearly two hours away. All of these locations required driving time at least as lengthy as did his trips to Ameristar Casino. Moreover, during the hearing, Rawls' wife, Linda Rawls, testified that James Rawls drove all the way to Jackson from their home in Winnsboro, Louisiana. She said that she couldn't recall if they had stopped. She said they may have stopped one time. Since Jackson is at least another forty-seven miles on the other side of Ameristar Casino in Vicksburg, this testimony reflects that Rawls was clearly able to make the drive to and from Vicksburg at the time of the hearing. Linda Rawls Deposition Testimony, page 46-48.

Rawls has failed to make any effort to accept the job offered to him by the Employer, and he failed to make a good faith effort to secure employment after reaching maximum medical improvement from his back injury. Accordingly, he has failed to meet

his burden of proving that he has a compensable disability, and the Opinion of the Administrative Judge, summarily affirmed by the Full Commission, which ignores this omission should be reversed and Rawls' claim for permanent disability benefits should be denied.

CONCLUSION

Rawls suffered a work related injury that has resulted in a physical impairment of 10% to the body as a whole. Based on the performance of two Functional Capacity Evaluations and the testimony of two physicians, Rawls may perform light work with limited weight lifting as long as he can change positions after standing or sitting for an hour. The Administrative Law Judge's contrary finding, summarily affirmed by the Full Commission, that the taking of a nightly Darvocet made Rawls unemployable is not supported by substantial evidence and constitutes error as a matter of law.

Moreover, Rawls failed to meet his burden of proving a loss of wage earning capacity as a result of the physical injury. First, Ameristar Casino offered Rawls a job which not only met his work restrictions, but would have also paid him the same wage he was earning at the time of his accident. Rawls basically ignored this offer, choosing to not even acknowledge it or attempt to do the work to see if he was able to do so. Moreover, Rawls failed to show that he made a good faith effort to seek employment in 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 17th day of January, 2008.

Respectfully submitted,

AMERISTAR CASINO-VICKSBURG,
AND LEGION INSURANCE
COMPANY, APPELLANTS

By Their Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
F. Hall Bailey

F. Hall Bailey, MS Bar No. 1688
Kathryn H. Hester, MS Bar No. 2400
WATKINS LUDLAM WINTER & STENNIS, P.A.
633 North State Street
P. O. Box 427
Jackson, MS 39205-0427
(601) 949-4900

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 Brief of Appellants Ameristar Casino-Vicksburg, and Legion Insurance Company to

David M. Sessums, Esq.
Varner Parker & Sessums
P. O. Box 1237
Vicksburg, MS 39181-1237
ATTORNEY FOR CLAIMANT

This the 17th day of January, 2008.

_____
F. Hall Bailey