2007-WC-01487-COA

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2007-WC-01487-COA

BARBARA ANN PRICE	**APPELLANT/CROSS-APPELLEE**
VERSUS	
OMNOVA SOLUTIONS, INC.	**APPELLEE/CROSS-APPELLANT**

CERTIFICATE OF INTERESTED PARTIES

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

1. Barbara Ann Price, Appellant/Cross-Appellee;
2. Omnova Solutions, Inc., Appellee/Cross-Appellant;
3. Lawrence J. Hakim, Esq., Attorneys for Appellant/Cross-Appellee;
4. Stephen J. Carmody, Esq., Attorney for Appellee/Cross-Appellant.

This the 25th day of August, 2008.

LAWRENCE J. HAKIM
MS BAR NO [redacted]

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Argument

A. Introduction

The Appellee/Cross-Appellant, Omnova Solutions, Inc. ("Omnova") makes four principle arguments: a.) that Barbara should be limited to the actual impairment rating she received to her right and left upper extremities, b.) that Barbara is not entitled to any benefits above and beyond what the Commission ordered; c.) Omnova should receive credit for the short term and long term disability benefits paid to Barbara; and, d.) Omnova should not be accessed penalties and interest on any award.

B. Barbara Ann Price Has Sustained Occupational Loss of Use of Her Bi-Lateral Upper Extremities for Wage Earning Purposes in Excess of That Found By the Mississippi Workers' Compensation Commission

Not surprisingly, Omnova avoids discussing several important facts in the case: First, that *in addition* to the 10% left upper extremity impairment rating and 17% right upper extremity impairment rating Barbara received from Dr. Thordersen, Dr. Thordersen also imposed permanent and significant permanent work restrictions as follows: no lifting greater than 20 lbs. and no highly repetitive use of the hands.[1]

A second fact Omnova avoids is Barbara's unrefuted testimony concerning the continuation and severity of her symptoms and inability to use her hands.

A third fact Omnova is again silent about is the fact that it ***refused to take Barbara back to work after Dr. Thordersen released her with the restrictions and in fact encouraged and aided her in securing short term and then long term disability. In fact, Omnova's actions could be construed as an admission that it considered Barbara to be totally disabled.***

[1] Omnova's sole reference to Dr. Thordersen's restrictions of no lifting greater than 20 lbs. and no highly repetitive use of the hands as "modest work restrictions", is ironic as Omnova was not able to offer Barbara any work within those "modest work restrictions." Moreover, there was no rebuttal evidence to the fact that the said restrictions also precluded Barbara from any of her previous employment.

Omnova cites the case of Smith v. Rizzo Farms, Inc., 870 So. 2d 1231 (Miss. Ct. App. 2001). However, Rizzo in fact supports Barbara's argument that the Commission should have found at the very least a much higher level of occupational disability to Barbara's bi-lateral upper extremities since Barbara put on unrebutted proof of the continuance of pain, as well as other related circumstances, i.e., the significant restrictions Dr. Thordersen placed on her, Omnova's refusal to place Barbara back to work with those restrictions, and its providing her with short term and long term disability benefits.

> "Mere estimates of the medical or functional loss [to a scheduled member] may have little value when compared with lay testimony by the Claimant that he suffers pain when attempting use of the member, and that he has tried to work and is unable to perform the usual duties of his customary employment, [and] this is especially true when such testimony is corroborated by persons who have observed the Claimant's attempt to work, or *who have refused to employ the Claimant because of his apparent affliction.*"

Walker MFG. Co. v. Butler, 740 So. 2d 315, 325 (Miss. App. 1998) citing McGowen v. Orleans Furniture, Inc. 586 So. 2d 163 (Miss. 1991). (emphasis added).

Finally, Omnova fails to address let alone successfully refute Barbara's argument on pages 16 and 17 of her Brief that even if she had been able to obtain a job that paid her $8.25 per hour, (which was the highest paying job Omnova's expert identified), she still would have sustained a total loss of wage earning capacity, (when compared to her pre-injury salary), in the amount of $177,606.00, or $41,098.50, above and beyond the life time maximum disability benefits of $136,507.50 for injuries occurring in the year 2000.[2]

[2] Omnova makes much ado about Mr. Cox's paid opinions that Barbara was (allegedly) employable, and the Commission's erroneous finding that Barbara's job search was not diligent (which she vigorously denies). However, both allegations overlook the stark reality that, a.) Barbara in fact looked for work, and b.) had she found work within her restrictions in her geographical area, the resulting disparity in pre and post-injury wages available to Barbara would exceed the categorical maximum award allowed in cases of permanent and total disability.

It should be noted that Omnova did not put on any evidence either through its vocational expert or through any other source that Barbara was capable of obtaining employment that would pay anything remotely close to her pre-injury average weekly wage of $921.87. It is simply perplexing that the Administrative Judge, Full Commission, and Lowndes County Circuit Court, all, missed this elementary fact of the case. This fact further establishes Barbara's occupational disability above and beyond, not just the anatomical ratings Dr. Thordersen assigned, but the extent of permanent disability found by the Commission.

Moreover, even though the Court of Appeals has recently backed away from its decision in McDonald v. I.C. Isaac Newton Co., (cited by Barbara in her initial Brief); the case of Hill v. Mel, Inc., 2007-WC-00509-COA (April 15, 2008), does not defeat Barbara's argument that she could be considered permanently and totally disabled since she has sustained not merely "significantly diminished post-injury wages"; were she employable at the maximum level of her capacity as asserted by Omnova, her loss of wage earning capacity would still ***exceed*** the maximum allowable award for a permanent total arising from a 2000 injury. Accordingly, by failing to properly weigh the evidence, overlooking crucial facts, and misconstruing the applicable law, the Administrative Judge, Full Commission and Circuit Court, all, committed prejudicial and reversible error as a matter of law and fact in finding that Barbara only sustained 20% loss of use of her left upper extremity, and 25% loss of use to her right upper extremity for wage earning purposes.

C. Appellee is Not Entitled to a Credit for Short Term Disability/Long Term Disability Benefits Paid to Barbara

Omnova argues on page 19 of its Brief that the purpose of both beneficent disability plans was to replace a worker's income subject to certain certification requirements. Again, "the issue of entitlement to a credit for non-standard payments turns primarily on whether *positive evidence* shows that payments were intended at that time as such advance payments. Bradley and Thompson, Mississippi Workers' Compensation, 2006 §565 (emphasis added).

Again, "the testimony which constitutes the sole evidence of the purpose of the disability payments" is insufficient to preempt early to allow the Omnova credit for same paid.

Omnova cites the case of Siemens Energy and Automation v. Pickins, 732 So. 2d 276 (Miss. Ct. App. 1999). However, Siemens in fact, reiterates the rule that credit is only allowed where payment of wages is intended to be in lieu of compensation. Thus, the Commission erred as a matter of law when it held the Appellee would be entitled to a credit for the short term disability and long term disability benefits to Barbara.

D. The Commission Correctly Ordered Penalties and Interest

Mississippi Code Ann. §71-3-37 (5) states:

> "If any installment of compensation payable without an award is not paid within fourteen (14) days after it becomes due as provided in subsection two (2) of this section, there should be added to such unpaid installment an amount equal to ten percent (10%) thereof, which shall be paid at the same time as, but in addition to such installment unless notice is filed under subsection four (4) of this section, or unless such non-payment is excused by the Commission after a showing by the employer that only due to conditions over which he had no control, such installment could not be paid within the period prescribed for the payment."

Accordingly, and pursuant to statute, with two narrow exceptions, (either the timely payment of temporary total disability and/or permanent disability benefits; or inability to pay same due to circumstances beyond the employer's control), imposition of penalties and interest

is mandatory, and not discretionary. Lanterman v. Roadway Express, Inc., 608 So. 2d 1340 (Miss. 1992); Mitchell Buick, Pontiac and Equip. Co. v. Cash, 592 So. 2d 978 (Miss. 1991); Borden, Inc. v. Eskridge, 604 So. 2d 1071 (Miss. 1991). Therefore the Commission certainly had the statutory right to order penalties and interest in this case.

Conclusion

Based upon the facts and applicable statutory and case law, Barbara Ann Price has sustained greater occupational loss of use of her bi-lateral upper extremities than that found by the Commission. A compelling argument can also be made that she, in fact, has sustained total disability as a result of her work injuries and the sequela of same. Secondly, in the absence of positive evidence as to the precise purpose of the short term and long term disability benefits, the Commission should not have found that the Appellee was entitled to a credit for same. Finally, penalties and interest are mandatory by statute and are warranted in the instant case.

RESPECTFULLY submitted, this the 25th day of August, 2008.

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CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Appellant herein, do hereby certify that I have this day forwarded regular mail, a true and correct copy of the above and foregoing **Reply Brief of the Appellant/Cross-Appellee** to:

1. Honorable Lee Howard
   Circuit Court Judge
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Respectfully submitted, this the 25th day of August, 2008.

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