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-APPELLANTS**

ON APPEAL FROM ORDER THE CIRCUIT COURT OF LOWNDES COUNTY

BRIEF OF THE APPELLANT/CROSS-APPELLEE

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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 15th day of April, 2008.

LAWRENCE J. HAKIM
MS BAR NO. [redacted]

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II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSTION BELOW

On October 19, 2001, Appellant/Cross-Appellee, Barbara Ann Price, ("Barbara") filed her Petition to Controvert, alleging February 8, 2000, bi-lateral carpal tunnel injuries to her upper extremities.

On November 15, 2001, Appellee/Cross-Appellant, (hereinafter "Employer"), answered, admitting the injury.

A Full Hearing on the Merits was held July 27, 2004, before the Honorable Cindy P. Wilson, Administrative Judge.

On or about March 24, 2005, the opinion of the Administrative Judge was entered. Said Order found that Barbara had sustained a twenty-five percent (25%) loss of wage earning capacity as a result of her work-related bi-lateral carpal tunnel syndrome. Said Order further found that the Employer was entitled to a credit for short and long term disability benefits and paid Barbara, and that Barbara was not entitled to penalties or interest.

On April 8, 2005, Barbara filed Claimant's Petition for Review of Opinion of the Administrative Judge. On April 11, 2005, the Employer filed its, "Motion for Clarification and Reconsideration of the Order."

On April 20, 2005, the Employer filed its Cross-Appeal and Renewal of Motion of Clarification/Reconsideration.[1]

On February 27, 2006, the Full Commission heard oral argument on the Appeal and Cross-Appeal.

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[1] Rule 10 of the Procedural Rules of the Mississippi Workers' Compensation Commission requires that cross-appeals be filed within 10 days after the petition for review is filed, but that a cross-appellant must not have less than 20 days from the date of decision/award to file its cross-appeal.

On August 16, 2006, the Full Commission Order was entered. Said Order confirmed in part and amended in part the March 24, 2005, Opinion of the Administrative Judge as follows:

1. The Full Commission found that Barbara had sustained a twenty-five percent loss of use of her right upper extremity for wage earning purposes and a twenty percent loss of use of her left upper extremity for wage earning purposes;

2. The Full Commission further found that the Employer would be allowed a credit for short term and long term disability benefits paid to Barbara from 2000-2003.

3. The Full Commission finally found that Barbara would still be entitled to mandatory penalties and interest on any compensation due that has not been timely paid.

On August 21, 2006, Barbara filed her Notice of Appeal and on August 28, 2006 the Employer filed its Notice of Cross-Appeal.

On August 22, 2007, the Circuit Court of Lowndes County affirmed the August 16, 2006, Full Commission Decision. On August 28, 2007, Barbara filed her Notice of Appeal and on or about September 14, 2007, the Employer filed its Cross-Appeal.

B. SUMMARY OF THE FACTS

Appellant/Cross-Appellant, Barbara Ann Price ("Barbara") was born August 10, 1959. (R. 12) She is a widow. (Id.) Barbara received a high school diploma, and attended a junior college without graduating from same, or receiving any type of degree, diploma or certificate. (R. 12-13) She has never held a clerical or secretarial position. (R. 13) Apart from a two year period at Pizza Hut, Barbara's primary work experience has been as a factory laborer. (R. 13-14) In these positions she had to use her hands extensively and repetitively. (R. 14)

Barbara began working for the Employer herein on or about May 4, 1987. (R. 16) The Employer is a factory, which manufactures wall covering products, as well as seat covers. (Id.)

Barbara's first position with the Employer was as a "wide print helper". (R. 17) Barbara's next position was in "wind up". (R. 18) Barbara's next position was "final inspection". (R. 19) Finally, Barbara was placed in the "strike off" position. (R. 20) In this position Barbara would have to inspect the print rollers for damages, match colors with the order, and was required to lift and carry rollers that weighed more than twenty pounds. (R. 21) It was while in this position that Barbara first began noticing problems with her upper extremities that included numbness, coldness, and the inability to hold on to things. (R. 23) Barbara's symptoms also including tingling and swelling in her hands. (R. 24) Because of these symptoms she presented to the emergency room on February, 2000, and in turn was referred, by the emergency room physician, to Orthopedic Surgeon, Scott Jones, M.D. (R. 24) Barbara was eventually referred to Tupelo Neurologist Donna Harrington, M.D. and to Neurosurgeon, Dominic Cannella, M.D., and in turn Dr. Cannella referred Barbara to Dr. Kurt Thorderson. (R. 25)[2]

Dr. Thorderson's deposition was taken March 1, 2004. (Claimant's Exhibit 1) Dr. Thorderson first saw Barbara May 25, 2000, upon referral from Dr. Donna Harrington/Dr. Dominic Cannella. (Exh. 1 at 6)

Based upon the history that Barbara provided, Dr. Thorderson's physical examination, and available electro-diagnostic tests, Dr. Thorderson diagnosed Barbara with "carpal tunnel syndrome, worse on the right than on the left and right wrist ulnar neuropathy." (Id. at 8)[3]

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[2] Because of the severity and duration of Barbara's work-injuries, she also saw other physicians, including orthopedic surgeon Felix Savoie, M.D. and pain specialist Jeff Summers, M.D. However, since Dr. Thorderson was the surgeon and treated Claimant the longest and was relied upon by both the Administrative Judge and Commission, only his records will be addressed in the instant brief.

[3] Barbara is right hand dominant.

Dr. Thorderson performed a right carpal tunnel release and a right ulnar nerve neurolysis at the wrist June 9, 2000. (Id. at 9)

Dr. Thorderson attempted to return Barbara back to work on September 11, 2000. He originally intended for Barbara to start working four hours per day for two weeks and then begin regular duty starting September 25, 2000. (Id. at 10)

Barbara returned to him approximately two weeks later because she was having problems with bi-lateral upper extremity pain on the job and was not able to perform her work. (Id. at 9)

Dr. Thorderson opined that Barbara reached maximum medical improvement for her work injuries on March 15, 2001. (Id. at 11). Dr. Thorderson assigned Barbara a ten percent (10%) impairment rating to both the right and left upper extremities due to the carpal tunnel syndrome and an additional seven percent (7%) to the right upper extremity due to the ulnar nerve injury. (Id. at 12)

Dr. Thorderson opined that the left and right upper extremity problems that he treated Barbara for were due to her work injury. (Id. at 11)

Dr. Thorderson also placed permanent work restrictions of no lifting more than twenty pounds and no highly repetitive use of her hands. Dr. Thorderson defined highly repetitive as something Barbara would have to do over and over again, all day long. (Id. at 20)

Barbara described problems that she was having on her attempt to return to work:

> A. We had to turn the print roller in order to clean it with the acetone. That's the ink cleaner that cleaned up the ink off the print roller, which she couldn't – what you couldn't let happen was let the ink dry in the cells of the print roller because that would damage your print roll. That could cause problems. So we had to clean the print roller before – once we finished it, we had to clean it back up to get all the ink off of it."
>
> Q. You were gesturing. Could you describe what you were doing with your hands a moment ago?

A. I am turning the print roll to clean it.

Q. And you are doing that with both hands?

A. One hand turns and this hand has a rag with a chemical on it where we are cleaning it.

Q. So you are cleaning with the right hand and you are turning with the left hand; is that correct?

A. Correct.

Q. Alright. How heavy are the rollers? Do you know?

A. The rollers are heavy because they are steel.

Q. Do you have to turn them manually or is there a crank or a motor that turns them for you? By manual, I mean with your hand.

A. Our machine, we hand to turn with our hand.

(R. 32-33)

Because of Dr. Thorderson's final restrictions, the Employer informed her that they had no job she could do within those restrictions and encouraged her to apply for long term disability. (R. 42)

Barbara put on an extensive, but largely unsuccessful job search. (R. 49-61)

The Employer/Carrier's vocational expert, Sam Cox, met with Barbara. (R. 53) Mr. Cox provided Barbara with a list of potential job openings Barbara applied for, but she was not offered any jobs. (Id.) None of the jobs that Mr. Cox listed and Barbara applied for, would have paid remotely close to what she was earning with the Employer herein.[4]

At the time of her hearing, Barbara was working part-time, helping make sandwiches for her brother's barbeque business. (R. 62) Barbara was just trying to help her brother out and at the time of her hearing and was not being paid for same. (R. 63)

[4] The parties stipulated at hearing that Barbara's weekly wage at the time of her injuries was **$921.87**.

Barbara's current symptoms include numbness and coldness in her hands and she drops objects. (R. 61) Barbara requires the help of her eighteen year old son, who lives at home to do the housework. (R. 64)

III. SUMMARY OF THE ARGUMENT

Based upon the totality of the lay and medical evidence, Barbara Ann Price has sustained occupational loss of use of her bi-lateral upper extremities, as a result of her work injury, far in excess of the 25% and 20% the Commission awarded her. Alternately, under the same set of facts and prevailing case law in this state, Barbara Ann Price has sustained permanent and total loss of wage earning capacity as a result of her bi-lateral work injuries.

In the absence of evidence that short term disability benefits Barbara received were intended as compensation the Employer is not entitled to a credit for payment of same.

IV. ARGUMENT

A. STANDARD OF REVIEW

An appellate court must reverse a decision of the Commission if, a.) said decision is not based on substantial evidence, b.) is arbitrary or capricious, c.) is based on an erroneous application of the law, d.) was beyond the power of the Commission to make, or e.) if it violates a statutory or constitutional right of the Appellant. Smith v. Jackson Construction Co., 607 So. 2d 119, 1124 (Miss. 1992); Piney Woods Country Life School v. Young, 2005-WC-01839-COA (Remanded in part, August 8, 2006); URCCC 5.03.

A decision is said to be based on substantial evidence if it is not clearly erroneous and contrary to the overwhelming weight of the evidence. Piney Woods Country Life School at ¶ 5.

Even though the Commission is the ultimate fact finder, the appellate court will reverse when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence. DiGrazia v. Parkplace Entertainment, 914 So. 2d 1232 (Miss. Ct. App. 2005).

The substantial evidence rule is sufficiently flexible to permit an appellate court to examine the record as a whole and where such record reveals that the Order of the Commission is based on a mere scintilla of evidence and is against the overwhelming weight of the evidence, the court will not hesitate to reverse. Smith v. Commercial Trucking Co., Inc. and USF&G, 742 So. 2d 1082, 1085 (Miss. 1999).

An appellate court has the power to broaden the Commission's authority to meet the beneficent purpose of the Workers' Compensation Act. 742 So. 2d at 1087.

If the Workers' Compensation Commission commits prejudicial error, the appellate court does not need to defer to Commission decisions on issues of fact and witness credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454 (Miss. 2005).

Where the Commission merely affirms the Administrative Law Judge's decision, the appellate court must examine the findings of fact made by the Administrative Judge as those of the Commission. McDowell v. Smith, 856 So. 2d 581 (Miss. Ct. App. 2003).

An appellate court is charged with determining whether there has been an error of law made by the Workers' Compensation Commission and judicial review of errors of law is *de novo*. Weatherspoon v. Croft Metals, Inc., 881 So. 2d 204 (Miss. Ct. App. 2002).

A finding of the Workers' Compensation Commission is clearly erroneous when although there is slight evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been made by the Commission in it's

findings of fact and in it's application of the Worker's Compensation Act and where only a scintilla of evidence supports the Commission decision the Appellate Court must reverse. Mississippi Dept. of Transp. v. Moye, 850 So. 2d 114 (Miss. Ct. App. 2002).

Finally, an Appellate Court has a duty to review the facts contained in the record of a Worker's Compensation proceeding, and to determine whether those facts substantiate the Order of the Commission; Appellate review of the facts will determine whether the Commission was manifestly in error in its interpretation of those facts. Flake v. Randall Reed Trucking Co., 458 So. 2d 223 (Miss. 1984).

B. APPELLANT/CROSS-APPELLEE, BARBARA ANN PRICE HAS SUSTAINED LOSS OF USE OF HER LEFT AND RIGHT UPPER EXTREMITIES FOR WAGE EARNING PURPOSES IN EXCESS OF WHAT THE MISSISSIPPI WORKERS' COMPENSTION COMMISSION FOUND

Based upon the totality of the lay and medical evidence and vocational testimony, it is abundantly clear that Barbara has sustained, at the very least, loss of use of her bi-lateral upper extremities far in excess of that found by the Commission. However, a strong case can be made that Barbara has also sustained permanent and total disability as a result of her disabling injuries, as well.

The most relevant and probative medical records, opinions and testimony are those of Dr. Thorderson, who operated on Barbara and treated her longer than any other doctor of record.

The Mississippi Worker's Compensation Act is "liberally construed to carry out its beneficent remedial purpose. . ." Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308 (Miss. 1997); Stuarts, Inc. v. Brown, 543 So. 2d 649, 652 (Miss. 1989).

Moreover, if any doubt exists regarding the sufficiency of medical evidence, the benefit of the doubt goes to the claimant. Mueller Copper Tube Co., Inc. v. Upton, No. 2004-WC-

01493-COA, Petition for Writ of Certiorari, denied June 6, 2006; Siemens Energy & Automation, Inc. v. Pickens, 732 So. 2d 276, 286 (Miss. Ct. App. 1999).

A workers' compensation claimant is only required to prove his/her case with a preponderance of the evidence. Cooper Tire & Rubber Co. v. Harris, 837 So. 2d 789 (Miss. Ct. App. 2003).

The totality of the lay, medical and expert evidence and testimony proves that Barbara has sustained a *heightened* industrial/occupational loss of use of her bi-lateral upper extremities for wage earning purposes that is tantamount to total loss of use of at least the right upper extremity, or alternatively, (and more persuasively) Barbara is permanently and totally disabled as a result of her work injuries.

There is no question that given her ongoing symptomatology and the restrictions placed on her by Dr. Thorderson, Barbara is unable to return to any of her past relevant work.

The evidence is further clear and ***undisputed*** that following Barbara's release by Dr. Thorderson, the employer herein determined that it could not accommodate her restrictions and instead recommended that Barbara apply for long-term disability.

Finally, the evidence of record is further undisputed that Barbara engaged in a diligent and bonafide job search, but was unable to find work.[5]

The law in Mississippi is clear, that with regard to scheduled member injuries, an injured worker must be awarded the greater of functionally disability or industrial disability. Meridian Prof. Baseball Club v. Jensen, 828 So. 2d. 740, 745 (Miss. 2002). The Full Commission only found 25% loss of use to the right upper extremity, and 20% to the left upper extremity essentially and merely "doubling" each impairment rating. However,

[5] Despite the Employer's objections to testimony of Barbara's job search, said testimony nevertheless is contained in the record and was never struck by the Commission. (R. 49-61)

> ". . . mere estimates of the medical or functional loss may have little value when compared with the 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 attempts to work *or who have refused to employ their Claimant because of his apparent infliction.*"
>
> In any case medical estimates, even when related to industrial loss of use are not conclusive if disputed by Claimant's own positive evaluation of disability. In fact, anything less than the most positive medical testimony as to Claimant's ability to work may be insufficient as a basis for an award of less than total loss of use and medical estimates have been considered on review as insufficient in view that Claimant suffers pain and has tried and is unable to work, and has been unable because of his injury to obtain work that he could perform.

Dunn, Mississippi Workmen's Compensation §86 (3d Ed.) (emphasis added) Such a finding was clearly erroneous. Apparently, the Commission was "swayed" by the bought-testimony of Sam Cox that Barbara, despite the severity of her injuries and extent of her work restrictions was still "employable".

The Commission unfortunately and contrary to the credible evidence was skeptical of Barbara's job search.

> As the Administrative Judge noted correctly, Ms. Price made questionable, or marginally efforts to return to gainful employment after being released by her treating physician. Ms. Price claims to have applied for work with Holiday Inn Express, Comfort Suites, Brewskis, Best Western, Homes and Transportation, and Pizza Hut, yet, there is only her word to support these claims. No applications or other documentation is available to substantiate these job search efforts.

Full Commission Order at 2. Based upon recent pronouncements of law from this Court, the sincerity of a Claimant's job search has little or no relevance in the analysis and determination of whether a Claimant has sustained *total* loss of use of the injured scheduled member, when the anatomical impairment rating is *less* than 100%. In fact, in a recent Court of Appeals Decision, the Claimant's failure to look for work, did not bar a finding that the Claimant

had sustained an occupational loss of use of a scheduled member far exceeding the anatomical rating, and in another recent case, an insufficient job search did not bar a finding of total loss of use to the scheduled member. Lifestyle Furnishings v. Tollison, No. 2006-WC-01993-COA (March 25, 2008); Neill v. Waterway, Inc./Team America, No. 2007-WC-00346-COA (March 25, 2008).

In Lifestyle Furnishings, Claimant, an assembly line upholsterer, sustained a left shoulder injury resulting in a 50% impairment rating to her left upper extremity. Id. at ¶¶3,4 Claimant's treating orthopedic surgeon opined: "Even though she does have a full range of motion, this essentially is not useful [sic] as she is unable to sustain any motor activity repetitively throughout her range of motion on a regular basis." Id.

A pain specialist opined that secondary to medication side effects the Claimant was restricted from work that required driving, operating machinery, and that Ms. Tollison would have difficulty doing work requiring concentration, such as accounting; however, the Claimant could drive to and from her job. Id. at ¶5

A FCE indicated that Ms. Tollison was capable of performing at the medium level of work. Id. at ¶6, FN. 1

The Claimant was a high school graduate and had one year of college in a pre-nursing school. Id. at ¶8 Claimant's primary employment was assembly line work, although she also worked for three years in customer service in a retail store. Id.

Based upon, a.) vocational testimony that the Claimant remained employable, b.) questions raised about the sincerity of Claimant's job search, and c.) the fact that Claimant had made an attempt to return back to work with Lifestyle Furnishings *prior* to being placed at maximum medical improvement, (with no attempts to return back to Lifestyle Furnishings *after*

she reached MMI), the Commission concluded that the Claimant had failed to prove a total loss of wage earning capacity under Smith v. Jackson Const. Co., scenario. ***However, the Commission despite a finding that the Claimant remained employable in some capacity, nonetheless found that Ms. Tollison had sustained a 100% occupational loss of use for wage earning purposes to her left upper extremity, which finding the Court of Appeals affirmed.*** (Id. at ¶24-26, 31)

In Neill v. Waterway, Inc./Team America, Claimant sustained bi-lateral orthopedic injuries to his upper extremities, resulting in a 10% permanent impairment to the left hand, 10% impairment to the left upper extremity, 8% impairment to the right hand and 8% impairment to the right upper extremity. One of Claimant's medical experts assigned Claimant an impairment rating of 20% to each upper extremity and opined that the Claimant could perform light, sedentary work. Another one of Claimant's medical experts opined that Claimant had "81% vocational disability and that Claimant was essentially permanently and totally disabled." (Neill, at ¶¶9,11)

At hearing, Claimant asserted he was permanently and totally disabled as a result of his work injury; however, the Commission instead found that the Claimant sustained a ***60%*** loss of industrial use of both the right and upper extremities, which decision the Court of Appeals affirmed. (R. 15)

What is significant about the Neill decision is that apart from a brief attempt to return to light duty work with his employer, the Claimant performed no job search. (Neill, at ¶¶7,12) Again the case law is clear that a suspect job search, or in fact no job search at all, is not an impediment to a finding of loss of use approaching, or even equaling total loss of use of the scheduled member.

As noted above, in the instant case the evidence was overwhelming that Barbara was restricted from returning to her pre-employment work. In fact, the Employer accepted the fact that because of her work injuries and resulting symptoms and restrictions, Claimant could not return back to its plant and therefore directed Barbara to apply for short and long term disability.

Thus, under the facts of this case and in light of the current case law, the Commission was mandated to find occupational loss of use of the bi-lateral upper extremities approaching or equaling total loss of use of same. Accordingly, its failure to do so was prejudicial error as a matter of law and fact.

C. ALTERNATELY, APPELLANT/CROSS-APPELLEE, BARBARA ANN PRICE HAS SUSTAINED PERMANENT AND TOTAL LOSS OF WAGE EARNING CAPACITY UNDER SMITH v. JACKSON CONST. CO. AND MCDONALD v. I. C. ISAACS NEWTON CO.

Under an alternate scenario, the Commission could have easily found Barbara has sustained total loss of wage earning capacity. The law in Mississippi states:

> "If a claimant is permanently and totally occupationally disabled, he should be entitled to compensation for a permanent total occupational disability, not a permanent partial disability. . .
> to say that a person with a loss or loss of use of a schedule member has but a permanent partial disability fails to take account of loss of wage earning capacity."

Smith v. Jackson Const., Co., 607 So. 2d 1119, 1127 (Miss. 1992).

The Court in Smith, held that permanent partial disability benefits payable pursuant to §71-3-17 (c):

> "Precedes on the faith that the worker will be able to resume the same or other employment after he adapts to his disability. If after this period of adjustment the worker remains permanently and totally occupationally disabled, he by definition does not have a permanent partial disability and so the schedule found in §71-3-17 (c) can not control."

> "Such a person should of right receive permanent and total disability compensation. Any other result is a travesty of justice which denies an employee injured in the course of his employment the compensation that he is lawfully entitled to receive."

607 So. 2d at 1128.

The Mississippi Supreme Court concluded:

> Where an employee suffers an injury covered by the schedule and §71-3-17 (c) and where that injury results in a permanent loss of wage earning capacity within §71-3-17 (a), the latter section controls exclusively and the employee is not limited to the number of weeks of compensation prescribed in §71-3-17 (c)'s schedule.

Id. The Mississippi Court of Appeals has affirmed the above statements of law. McDonald v. I.C. Issaacs Newton Co., 879 So. 2d 489 (Miss. App. 2004) *Cert. Denied* 882 So. 2d 234 (Miss. 2004). In McDonald, Claimant, Debra McDonald, a forty year old seamstress with a high school education sustained injuries to her bi-lateral wrists. McDonald, at 487.

She was assigned a 5% impairment rating to the left wrist with limitations of no repetitive use of both hands over an extended period of time. 879 So. 2d at 488

Another physician assigned Ms. McDonald a 10% impairment to her right upper extremity and 0% impairment to the left upper extremity and restricted her to no over head work of any nature, including occasional overhead, no lifting greater than 15 lbs. occasionally, no greater than 20 lbs. of pulling or pushing, and no bi-laterally repetitive motion. Id.

The Employer closed its plant before Ms. McDonald was released to return to work. 879 So. 2d at 488 Subsequently, Ms. McDonald made an unsuccessful job search in her area, but she also refused the assistance of the Employer/Carrier's vocational expert to help her locate a job. Id.

Further, Ms. McDonald also worked as a part-time custodian at her church *both before and after* her work injury and resulting surgery with accommodations to her physical limitations. Id.

Also of note, the Employer/Carrier's vocational expert testified that while Ms. McDonald could not return to her assembly line job at the Newton Company, she nonetheless remained employable. Id.

The Administrative Law Judge found that Ms. McDonald suffered a 25% loss of industrial use of the left upper extremity and a 50% loss of industrial of her right upper extremity, which the Commission affirmed. Id.

Ms. McDonald ultimately appealed to the Mississippi Court of Appeals, which reversed finding that Ms. McDonald in fact, sustained a total loss of wage earning capacity and was entitled to compensation pursuant to §71-3-17 (a). 879 So. 2d at 491. In explaining it's holding, the Court noted:

> "The proof was that all of the jobs that McDonald had held prior to her injury were assembly line/production tasks, which required repetitive use of her hands and arms for grasping and lifting. As a result of her injury McDonald is forever barred from the performance of this kind of activity. At the time of the hearing, McDonald was forty years old, with only a high school education. Her only employment at that time, was as of a part-time church custodian with wages that were far less that what she earned in her previous job."

McDonald at 490.

The set of facts in McDonald are nearly identical to the facts in the instant case with the exception that Barbara was not able to find even part-time employment (that paid her a comparable salary) and was older at the time of her hearing than Debra McDonald was.

The Court in McDonald went on to find that there was no proof as required by Meridian Profession Baseball Club v. Jensen, 828 So. 2d 740 (Miss. 2002) to rebut the presumption of

total disability, even though the Employer/Carrier's Vocational Expert testified that there were other jobs available for Debra McDonald within thirty miles of her home and for which she was qualified. McDonald at 491, 492.

> The dissent concedes that under the holding of *Meridian Baseball* the presumption arose that McDonald could no longer work at the position she held when she was injured. It claims, however, the presumption was overcome by evidence that there were other positions available for which McDonald was suitable; therefore, this Court should affirm the Commission's decision. As stated previously in this opinion, the rebuttable presumption of total occupational loss of members created by *Meridian Baseball* must be overcome by proof of the Claimant's ability to earn the *same* wages, which the Claimant was receiving at the time of injury. Neither the Commission, or the Newton Company, nor the dissenting opinion, offered any proof of that. In the absence of any proof that McDonald has the ability to earn the same wages that she received at the time of her injury, she is entitled to permanent and total disability compensation.

Id. (emphasis supplied)

The Commission's analysis in McDonald has a direct bearing on the instant case, to-wit:

The Employer's expert witness proffered a list of jobs that he speculated Barbara could perform. What is most significant, however, about this job proffer is the ***salary ranges*** of same. These ranges were $5.15 per hour to a maximum salary of $8.25 per hour.

As noted above, the parties stipulated at hearing that Barbara's average weekly wage on the date of her injury was ***$921.87.*** Therefore assuming, *arguendo* that Barbara was, a.) able to find work that paid her $8.25 per hour, and b.) was able to perform that work from a functional standpoint, (in light of her injuries, symptoms and restrictions), 40 hours per week, the difference between her pre-injury average weekly wage, and post-injury average weekly wage is immediately ***$591.87 per week.***

Therefore, the resulting loss in wages to Barbara is $30,777.24 for one year. Even more significant, two-thirds of the difference between Barbara's pre-injury average weekly wage and

post-injury average weekly wage, for 450 weeks is striking: $177,606.00, or $41,098.50 over the life-time disability maximum of $136,507.50 for injuries incurring in the year 2000.

As such the testimony of Sam Cox actually demonstrates and proves Barbara's inability to *earn the same wages* which she was receiving at the time of her injuries. McDonald, 879 So. 2d at 491.

McDonald is nearly on point with the instant case. The credible and competent medical testimony from Dr. Thorderson, coupled to Barbara's testimony, demonstrates that she is totally disabled, and the Employer/Carrier simply did not rebut this presumption. If anything, the testimony of Employer's witness, Sam Cox reinforces the presumption of total disability.

Accordingly, it was error as a matter of law and fact, to limit Barbara's recovery to only 25% industrial loss of use of the right upper extremity, and 20% to the left upper extremity.

C. APPELLEE/CROSS-APPELLANT IS NOT ENTITLED TO A CREDIT FOR SHORT TERM DISABILITY AND/OR LONG TERM DISABILITY BENEFITS PAID

Miss. Code Ann. §71-3-37 (11) states as follows:

> "If the Employer has made advance payment of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due."

Miss. Code Ann. §71-3-3(j) states:

> "Compensation" means the money allowance payable to an injured worker or its dependents as provided in this chapter, it includes funeral benefits provided therein."

Both the Administrative Judge and the Full Commission *presumptively* ruled that the Employer would be entitled to a credit for short term disability, ("STD") and long term disability, ("LTD") benefits paid to Barbara. Specifically, the Administrative Judge stated:

"Payments for short and long term disability are fully and totally company supported with Omnova paying the premiums."

The Administrative Judge then concluded:

"Further, the Employer is entitled to credit for short and long term disability benefits it paid Claimant pursuant to its disability plan. This disability plan is self-funded by the Employer with no premiums withheld from Claimant's wages."

While the Full Commission Order recognized that penalties and interest are mandatory under the Act and would be awarded on unpaid compensation in the instant case, it nonetheless similarly ruled on the credit issue:

"Not only is the Employer entitled to credit against the above award for any permanent disability benefits previously paid, but, as correctly held by the Administrative Judge, the Employer should also be allowed to take credit for short term and long term disability benefits paid to the Claimant during the years 2000, 2001, 2002, and 2003, as detailed in exhibits 13 and 14. Credit for these payments shall be taken in accordance with principles set forth in Sturgis v. International Paper, 525 So. 2d 813 (Miss. 1988)."[6]

Full Commission Order at page 4.

However, the issue for credit for STD and LTD benefits is not as straight forward and can not be summarily treated as it was in the case *subjudice:*

Because a worker can not waive the right to statutory benefits, when a worker seeks statutory benefits allowance of credit for a nonstandard payment would conflict with the non-waiver statute. However, the statute also allows credit against unpaid and future installments for advance payment of compensation. The issue of entitlement to a credit for nonstandard payments turns primarily on whether *positive evidence* shows that payments were intended at that time as such advance payments. In the absence of such evidence, the court has ruled that a difference characterization is presumed (often a donation or gratuitous payment), meaning that the statutory obligation is not reduced by the payment.

Mississippi Workers' Compensation, John R. Bradley and Linda A. Thompson 2006 §5:65 (emphasis added)

[6] Employer exhibits 13 and 14 are simply handwritten summaries purporting to show what Barbara received in long term and short term disability payments.

As Professor Bradley and Judge Thompson write:

> If there is evidence the nonstandard payments were *intended* as compensation, the employer is normally entitled to credit to a credit for same.

Id. The clear language of the cases on this issue declare that there must be *evidence* of the *intent* of such payments in order to determine if the employer/carrier are entitled to a credit for same. Id.

In the instant case, a review of the record indicates that there is scant, if any, evidence that the STD and LTD benefits in question were intended to be, or paid in lieu of, compensation. The sole testimony concerning the said benefits is as follows:

> Short-term disability or sickness in accident benefits is a benefit under our collective bargaining agreement with the Union and that in an employee who presents disability, be it occupational or non-occupational is allowed to receive for up to 52 weeks, $340.00 per week. In the event that it occupational, rather than non-occupational, the difference between what Mississippi deems payable under the Workers' Comp Standard and the $340.00 a week must be compensated for up to 52 weeks. To apply for this benefit the employee must present to me certification from their physician that they are disabled for whatever reasons. According to the disability, a waiting period may exist or may not exist and that weekly amount of $340.00 or the difference thereof is paid to them.
> (R. 84)

The long term disability program was explained as follows:

> In the event that an employee is not able to return to work if they have ten years service with the company, then they are eligible to apply for this benefit. It they are deemed disabled then they are able to begin payment of these benefits at that time. It is a type of disability that they then continue. There is – it is contingent in the contract that they can be examined for total disability at any time according to the company's wishes.
> (R. 85)

The employer representative went on to explained that the contract book specified that an employee can not draw full payment on both a public pension or public amount and long term disability, such as Barbara received. (R. 86)

At hearing, the Employer never explored the *intent* of the short STD and LTD payments to Barbara, nor did its company representative ever offer clarifying testimony regarding same, let alone put on positive evidence. Further, a review of the record suggests that there are no documents in evidence purporting to show, explain, or clarify the intent of said of STD and LTD payments.

Accordingly, it was error *as a matter of law* for the Commission to summarily find the Employer herein was entitled to a credit for said benefits.

CONCLUSION

Based on the above and foregoing lay and medical facts, testimony and evidence, as well as the above arguments and authorities, the decision of the Commission should be reversed and this matter remanded back to the Commission with a finding that Barbara has sustained a total loss of use of each of her upper extremities for wage earning purposes, or, alternatively that she is permanently and totally disabled, and a further finding that based on the evidence of record and the applicable law, the Employer is not entitled to a credit for the STD and LTD benefits Barbara received.

RESPECTFULLY submitted, this the 15th day of April, 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 **Brief of the Appellant/Cross-Appellee** to:

1. Honorable Lee Howard
   Circuit Court Judge
   Lowndes County Circuit Court
   P. O. Box 1387
   505 2nd Avenue North
   Columbus, MS 39703-1387

2. Honorable Stephen J. Carmody
   Brunini, Grantham, Grower & Hewes, PLLC
   Attorneys at Law
   Post Office Drawer 119
   Jackson, Mississippi 39205
   ATTORNEY FOR APPELLEE/CROSS-APPELLANTS

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

LAWRENCE J. HAKIM

ADDENDUM

A.) Mississippi Workers' Compensation Commission Procedural Rule 10

B.) Vardaman S. Dunn, *Mississippi Workmen's Compensation, 3rd Ed.* §86

C.) John R. Bradley and Linda A. Thompson, *Mississippi Workers' Compensation* §5:61 *et seq.*

from the administrative expense fund upon the filing of the deposition with the Commission, together with a written request for reimbursement. Only one such reimbursement may be made to the claimant in each case, and the reimbursement counts as one of the two allowed by Procedural Rule 18.

7. The affidavits shall not contain opinions or other matters composed by attorneys for the signature of physicians. The Commission intends for this rule to pertain to narrative notes and reports composed and generated by the physician in the ordinary course of medical practice.

8. The affidavit used for the introduction of medical records shall be in the form prescribed by the Commission.

The Rule shall be in force and effect on and after September 1, 1993.

PROCEDURAL RULE 10

REVIEW HEARINGS. In all cases where either party desires a review before the Full Commission from the decision rendered at the evidentiary hearing, the party desiring the review shall within twenty (20) days of the date of said decision file with the Secretary of the Commission a written request or petition for review before the Full Commission. Any other party to the dispute may cross-appeal by filing a written cross-petition for review within ten (10) days after the petition for review is filed in the office of the Commission, except that in no event shall a cross-appellant have less than twenty (20) days from the date of decision or award within which to file a cross-petition for review.

Oral argument is not required but will be granted if one or more of the parties request same by filing a written request within fifteen (15) days after the date the petition for review is filed with the Commission. The Commission may also request the parties to give oral argument. Arguments of counsel will be limited to twenty (20) minutes for each party.

In any case pending for review before the Commission, a party may submit a brief of law and fact, which may be in the form of a letter or of the format required by the Supreme Court of Mississippi. The party filing a brief shall file the original and two copies and serve a copy to opposing parties. Briefs previously prepared for the administrative judge are not a part of the record on review and are not considered by the Commission.

If oral argument has been requested, and a party desires also to submit a written brief, he must file the brief not less than five (5) days before the hearing date. If oral argument is not requested, the petitioner shall have thirty (30) days following the date the record is mailed to the parties within which to submit a brief. The opposing party then has an additional thirty (30) days from that date (or a total of sixty days from the date the record is mailed to the parties) within which to submit a response, if desired.

The parties filing a petition for review, cross-petition for review or briefs shall certify that copies have been provided to the opposing party; provided, however, that failure to file such certification shall not be a bar to the review requested.

This Rule shall be in force and effect on and after September 1, 1993.

PROCEDURAL RULE 11

APPEAL FROM COMMISSION AWARD. Should either party desire to appeal from an award of the Commisison, the party desiring to appeal within thirty (30) days of the date of the award will file a notice of appeal with the Secretary of the Commission. The notice shall set out the style of the case, the grounds upon which the appeal is taken, and certification that copies of the notice of appeal have been filed with the opposing parties.

When a notice of appeal to the Circuit Court is filed with the Commission, the Secretary shall, with a proper letter of transmittal, place the matters possessed by this Commission and pertaining to the appealed case in the hands of the Circuit Court within thirty (30) days after such notice of appeal is received by the Commission.

Following rendition by the Circuit Court or Supreme Court of any order or decree affecting any matter over which

ployment for which he may appear to be qualified. A mere estimate of medical or functional loss of use may be sufficient as a basis for an award, or denial of an award if undisputed, but it is, at best, of only circumstantial value upon the ultimate issue and, when disputed in relation to work capacity, may be insufficient to either persuade the trier of the facts[28] or to sustain an award based thereon.[29]

Indeed, mere estimates of the medical or functional loss 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.[30]

[28] Lucedale Veneer Co. v. Keel (1955), 223 Miss. 821, 79 So.2d 233; Modern Laundry, Inc. v. Williams (1955), 224 Miss. 174, 79 So.2d 829.

McManus v. Southern United Ice Co. (1962), 243 Miss. 576, 138 So.2d 899: Here, the medical estimate of loss of the use of the arm was 20%. A commission award of 100% was affirmed. In Bill Williams Feed Service v. Mangum (1966), 183 So.2d 917, the medical estimate was up to 50% of the leg and a commission award of 100% was affirmed. Cf. Harris & Johnson Const. Co. v. Ward (1966), 187 So.2d 26.

[29] Cf. Ebasco Services, Inc. v. Harris (1956), 227 Miss. 85, 85 So.2d 784. This case involved a back injury and not a scheduled member, but the principal involved is the same on this point.

Hale v. General Box Mfg. Co. (1959), 235 Miss. 301, 108 So.2d 844: Here, the medical estimate of disability from a back injury was 20% and the commission awarded on that basis, but this was increased to 50% by the court on lay testimony that claimant had been able only to do occasional odd jobs since the injury and over a substantial period with average earnings of $6.00 as compared to a pre-injury average of $35.00. The court observed that medical evidence is entitled to great weight but is not conclusive. In Tyler v. Oden Const. Co. (1961), 241 Miss. 511, 130 So.2d 552, the medical rating was 50% of the leg and the commission awarded on this basis, but the court reversed and allowed 100%. But Cf. Johnson v. Pearl River Sand & Gravel Co. (1961), 242 Miss. 349, 134 So.2d 434, where the commission's award on a medical estimate of 33% of the arm was affirmed despite lay testimony indicating a greater loss of use.

[30] Lucedale Veneer Co. v. Keel (1955), 223 Miss. 821, 79 So.2d 233; Modern Laundry, Inc. v. Williams (1955), 224 Miss. 174, 79 So.2d 829. Cf. Harris & Johnson Const. Co. v. Ward (1966), 187 So.2d 26, where an award of 100% of the leg was reversed with emphasis on the medical evidence.

Hale v. General Box Mfg. Co.

In any case, medical estimates, even when related to industrial loss of use are not conclusive if disputed by claimant's own positive evaluation of disability. In fact, anything less than the most positive medical testimony as to claimant's ability to work may be insufficient as a basis for an award of less than total loss of use, and medical estimates have been considered on review as insufficient in view of the claimant's statements that he suffers pain and has tried and is unable to work and has been unable because of his injury to obtain work that he could perform.

In such cases, the testimony of the physician that he can find nothing objectively to account for disabling pain, or total incapacity, has not generally been considered sufficient to sustain an award for less than total loss of use.[31]

However, subject to a rather liberal view of the testimony in favor of the claimant, the rule is that the question of the degree of loss is one for the determination of the commission from the evidence as a whole, including medical estimates and lay testimony.[32]

(1959), 235 Miss. 301, 108 So.2d 844; Tyler v. Oden Const. Co. (1961), 241 Miss. 511, 130 So.2d 552; McManus v. Southern United Ice Co. (1962), 243 Miss. 576, 138 So.2d 899. Cf. Taitel & Son v. Twiner (1963), 248 Miss. 785, 157 So.2d 44: This case dealt with a back injury and not a scheduled member, but the opinion contains an enlightening discussion of the relative importance of functional and industrial incapacity.

[31] M. T. Reed Construction Co. v. Martin (1952), 215 Miss. 472, 61 So.2d 300. In this case, the claimant, a carpenter by trade, was awarded 20% loss of the use of a leg. The court reversed and allowed 100% loss of use. The medical testimony was conflicting but was reconciled with claimant's testimony as to actual total incapacity.

[32] Lucedale Veneer Co. v. Keel (1955), 223 Miss. 821, 79 So.2d 233; Modern Laundry, Inc. v. Williams (1955), 224 Miss. 174, 79 So.2d 829. In both of these cases, the commission awarded total loss of use of arms upon medical estimates of from 25% to 60% loss of functional use and lay testimony indicating total work disability. Affirmance was based upon the right of the commission to determine the question on the evidence as a whole.

Text quoted in Pearl River Hampers, Inc. v. Castilow (1959), 234 Miss. 768, 108 So.2d 200, wherein the commission's award of 60% loss of the use of the hand was affirmed on conflicting evidence. But Cf. Hale v. General Box Mfg. Co. (1959), 235 Miss. 301, 108 So.2d 844; Malone & Hyde of Tupelo, Inc. v. Kent (1964), 250 Miss. 879, 168 So.2d 526 (citing Text); Bill Williams Feed Service v. Mangum (1966), 183 So.2d 917.

Legal Encyclopedias
Am. Jur. 2d, Workers' Compensation §§ 412 to 424
C.J.S., Workers Compensation §§ 607 to 617

§ 5:61 Generally

Research References
West's Key Number Digest, Workers Compensation ⇨903, 934

The issue arises as to whether the statutory obligation to provide workers' compensation benefits is subject to being reduced by other payments made in respect of a work injury or death. The other payments sometimes come from recovery from a third-party tortfeasor, sometimes from other insurance or other benefits provided either by the employer or by the employee, and sometimes from other payments by the employer. The statute addresses directly only a few of several situations in which the issue may arise.

§ 5:62 Statutory credits

Research References
West's Key Number Digest, Workers Compensation ⇨903, 934

The statute provides that an employer or carrier that has paid benefits is entitled to be reimbursed from recovery against a third party tortfeasor and can also receive credit against an obligation to pay future benefits. An employer who has not paid can receive a credit against future liability for benefits.[1]

In three instances, the statute expressly allows as a credit against a future obligation amounts by which benefits have been overpaid, this when benefits are reduced by apportionment due to preexisting disease;[2] and when benefits are reduced by a decision on reopening;[3] and

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[Section 5:62]

[1]Miss. Code Ann. § 71-3-71 contains these and other provisions. The statute should be read with an eye toward precision. This statute preserves rights against third parties (as does Miss. Code Ann. § 71-3-15(4)). The topic is within a section below.

[2]Miss. Code Ann. § 71-3-7(d).

[3]Miss. Code Ann. § 71-3-53.

when "an employer has made advance payments of compensation."[4] The Commission General Rule 13 on accelerating payment in certain instances also allows a credit for such "overpayments."

§ 5:63 Right to statutory benefits protected

Research References

West's Key Number Digest, Workers Compensation ⚿903, 934

The statute does not address directly issues that arise in several other situations. In general, the decisions protect against the statutory right to benefits being eliminated, diluted, or impaired. This accords with express statutory protections: prohibition on waiver of the right to benefits;[1] invalidation of assignment or release of the right, and levy or attachment by creditors.[2] Outside of workers' compensation law, the cases establish protection against dilution of these statutory rights, rights both of an injured worker and of the paying employer's entitlement to reimbursement from a third-party who may be liable for the injury or death. The cases establish that the fact or amount of workers' compensation benefits having been paid cannot be introduced as evidence in the worker's action against a third person.[3] This rule disallows a mechanism in the third-party action which could result in a tendency to regard that portion of an injury as already having been compensated. In this way, the value of the workers' compensation benefit and especially the employer's right to reimbursement is not diluted.[4]

As a general rule payments from "collateral sources" do not go toward reducing the statutory obligation to provide workers' compensa-

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[4]Miss. Code Ann. § 71-3-37(11). As discussed below, issues arise as to whether a given payment is such "an advance payment of compensation" or is a gratuity or other type payment.

[Section 5:63]

[1]Miss. Code Ann. § 71-3-41 (last sentence).

[2]Miss. Code Ann. § 71-3-43. However, Miss. Code Ann. § 71-3-129 allows a lien on a worker's benefits for certain of the worker's family support obligations.

[3]Ethridge v. Goyer Co., 241 Miss. 333, 131 So. 2d 188 (1961); Coker v. Five-Two Taxi Service, 211 Miss. 820, 52 So. 2d 835 (1951).

[4]As noted above, this protection may accrue to the employer or its insurer by enhancing the right to reimbursement. In some instances the insurer has waived its right of reimbursement, in which case the entire recovery from the third part goes to the worker. Either way, the statute and the rule are designed to keep money in the workers' compensation system, ultimately helping to provide benefits to injured workers.

tion benefits. For example, the fact that benefits were paid from medical insurance bought by the worker does not relieve the employer of the obligation to pay the amount of expenses incurred for medical services.[5] In a similar vein, the court protected the value of workers' compensation benefits to a worker by not allowing that value to be diminished indirectly. The court refused to allow workers' compensation benefits to reduce another insurer's obligation to pay under an uninsured motorist policy, a policy whose amount was regulated by a separate statute.[6]

§ 5:64 No credit for payments by uninsured employer

Research References

West's Key Number Digest, Workers Compensation ⇐903, 934

An employer who has *not complied* with the statutory requirement to "secure payment"[1] by the statutorily required method of obtaining workers' compensation insurance or qualifying as a self-insurer stands in default on a basic principle of workers' compensation law.[2] By specifying these as the only two methods of compliance, the statute undertakes to assure with certainty that financial resources will be available for medical, disability, and death benefits. It is not left to the employer to decide whether or how to comply with the statutory mandate. Consequently, the statute deals sternly with a defaulting employer, providing serious consequences of such a default and thus a potent incentive to comply.

For example, the worker still can obtain workers' compensation benefits from the uninsured employer,[3] collecting, from the employer's own resources or, if needed, the personal assets of certain corporate officers.[4] Fine and imprisonment are other statutory sanctions for default,[5] along with a $10,000 civil penalty.[6] Special protections against asset transfers to avoid payment also demonstrate how seri-

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[5]Bowen v. Magic Mart of Corinth, 441 So. 2d 548 (Miss. 1983) (currently medical insurance virtually always excludes coverage of workers' compensation injuries).

[6]Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 31 A.L.R.5th 797 (Miss. 1994).

[Section 5:64]

[1]Miss. Code Ann. § 71-3-7 (next to last sentence).

[2]Miss. Code Ann. § 71-3-75.

[3]Miss. Code Ann. § 71-3-9.

[4]Miss. Code Ann. § 71-3-83(1).

[5]Miss. Code Ann. § 71-3-83(1).

ously the statute regards default[7]. Indeed, without nearly universal compliance the Workers' Compensation Law cannot accomplish its purposes. One entitled to benefits for a work injury or death can forego a workers' compensation claim and elect a common-law tort suit against the defaulting employer, and the employer is stripped by statute of important common-law defenses.[8]

If a plaintiff pursues a common-law tort suit, the defaulting employer cannot buy the benefits of the exclusive remedy provision of workers' compensation by paying a funeral bill or by offering to pay statutory workers' compensation benefits. In that instance the work-injury death occurred during a two-month, uninsured period between policies. The employer paid funeral expense at the survivor's request, offered to pay death benefits in accord with workers' compensation law, and paid amounts equal to workers' compensation benefits to other injured workers. The court held that the employer, not having complied with the statutory method to "secure payment," could not come within the protection of the statute by paying the funeral expense or offering to pay statutory benefits.[9]

If a claimant pursues a workers' compensation claim, the defaulting employer is obligated to pay the benefits. The employer cannot have its obligation to pay workers' compensation death benefits reduced by having paid for a life insurance policy whose proceeds were paid to the worker's estate.[10] That is, purchasing this form of insurance does not lessen the statutory obligation to pay statutory benefits. Insurance to pay for the accidental death of a worker does not substitute for the statutory-method obligation to secure coverage, and those insurance proceeds do not serve as a credit against the statutory obligation to pay death benefits. The unequivocal rulings have been that the life insurance proceeds, not providing coverage as required by the workers' compensation law, are not workers' compensation benefits

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[6]Miss. Code Ann. § 71-3-83(4).

[7]Miss. Code Ann. § 71-3-83(2).

[8]Miss. Code Ann. § 71-3-9. Not only is the exclusive remedy protection unavailable, usual defenses are made unavailable also.

[9]McCoy v. Cornish, 220 Miss. 577, 71 So. 2d 304 (1954). Survivor's obtaining payment of funeral expense by employer was not an election of workers' compensation remedy, and the uninsured employer could not be credited with having met the statutory obligation to "secure payment" by being willing to pay statutory benefits.

[10]Hedgpeth v. Hair, 418 So. 2d 814 (Miss. 1982) (workers' compensation claim; no credit for life insurance proceeds).

and thus are neither a credit toward the statutory obligation nor an advance payment of workers' compensation benefits.[11]

§ 5:65 Credits for payments by insured employer

Research References

West's Key Number Digest, Workers Compensation ⇨903, 934

Unlike an employer who has defaulted on the obligation to insure, an employer who has secured payment by the statutory method of obtaining workers' compensation insurance or qualifying as a self insured in some instances is entitled to credit against its statutory obligation to pay benefits for payments which are not in standard form. Because a worker cannot waive the right to statutory benefits,[1] when a worker seeks statutory benefits allowance of credit for a nonstandard payment would conflict with the nonwaiver statute. However, the statute also allows credit against unpaid and future installments for advance payment of compensation.[2] The issue of entitlement to a credit for nonstandard payments turns primarily on whether positive evidence shows that payments were intended at that time as such advance payments. In the absence of such evidence, the court has ruled that a different characterization is presumed (often a donation or gratuitous payment), meaning that the statutory obligation is not reduced by the payment.

(a) *Payments Intended as Compensation.* If there is evidence the nonstandard payments were intended as compensation, the employer normally is entitled to credit as a reduction of its statutory obligation. In one case a self-insured employer had negotiated a labor contract by collective bargaining with a labor union which contained a plan in which the employer agreed to provide disability, pension, death, and other benefits to the worker. The employee made no direct payment toward the benefits. The collectively bargained labor contract contained a specific provision that in case benefits due under the plan overlapped with benefits due to the employee or beneficiaries under any law (such as workers' compensation), the plan would only be obligated to pay the amount by which the plan's payments would exceed those due under the law. That is, the labor contract recognized that

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[11]Riddell v. Cagle's Estate, 227 Miss. 305, 85 So. 2d 926 (1956) (workers' compensation claim; no credit for life insurance proceeds).

[Section 5:65]

[1]Miss. Code Ann. § 71-3-41

[2]Miss. Code Ann. § 71-3-37(11).

when there was an overlap between a plan benefit and a statutory benefit, the payment was to be regarded first as a statutory benefit and any payment in excess of the statutory requirement as a plan benefit. The employer paid death benefits as specified by the plan and claimed those benefits as an advance payment of workers' compensation death benefits. The court agreed that since the labor contract made clear that the payment by the employer was an advance payment of workers' compensation by the employer, the employer was entitled to a credit to reduce its obligation to pay workers' compensation death benefits.[3]

Credit for advance payment was more problematical in other cases. In these the employer continued the worker's salary but there was no direct evidence of the employer's intention at the time of making a continued salary payment. In all of the cases the worker did not perform services during the salary-continuation period. Intent to make

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[3]Western Elec., Inc. v. Ferguson, 371 So. 2d 864 (Miss. 1979) (the negotiated pension and disability plan expressly recognized that certain of its benefits were to be treated as payments under laws such as workers' compensation).

Unless the labor contract has a satisfactory provision, an issue could arise if the statutory death beneficiaries are different from the plan beneficiaries. The problem should be resolved by an understanding that the labor contract cannot affect the claims of statutory beneficiaries.

However, benefits of the contractual plan can be reduced by the statutory benefits. This is because the contractual plan cannot operate to waive the statutorily-mandated benefits. On the other hand, there is no statutory prohibition on allowing the statutory benefits to reduce the amount of a contractual arrangement.

Another way of expressing this is that while a contractual agreement cannot eliminate or lessen the statutory benefits, such agreement can eliminate or lessen its own benefits by the amount of statutory benefits. The Mississippi cases give an express agreement effect by holding it to be evidence that the employer intended the contractual payments as workers' compensation benefits up to the weekly amount of statutory benefits.

In South Cent. Bell Telephone Co. v. Aden, 474 So. 2d 584 (Miss. 1985), the parties agreed that the employer was entitled to credit due to a negotiated labor contract similar to that in the Western Electric case. The only issue about the credit went to the amount of credit, and the court held the maximum credit to the employer was the lower of the amount of the payment or the weekly statutory benefit for this worker.

The language in the Aden opinion (p. 596) that the statute "provides for a steady though modest stream of income to the disabled worker" goes only to capping the credit at the statute's weekly maximum, lest the worker be left without the modest income even during the statutory period.

Likewise, the language in the Ferguson opinion (p. 868) about giving credit to employers to encourage voluntary payments is in the context of the evidence being unmistakably clear that the benefits were intended as workers' compensation.

advance workers' compensation payments was inferred in two cases and a benevolent intent was inferred in two others.

In one case workers' compensation benefits and salary were paid for an extended period. The court ruled that the particular facts were such that an intent to make advance payment of workers' compensation should be inferred, partly because the two payments exceeded the salary if working full time and partly because there was no direct evidence of a gratuitous intent. The court noted that "[i]n other circumstances, a different conclusion might be reached."[4] In the other case, the court ruled that an employer who paid one month's salary during a time a worker was hospitalized was entitled to have the amount credited as an advance payment of workers' compensation. Although there was no direct evidence of employer's intent at the time of payment, the court stressed that since there was no affirmative evidence of a donation by the employer, the payment should be regarded as salary in lieu of compensation.[5]

(b) Payments Intended Other Than as Compensation. A third case produced a different result. The court ruled that an employer who continued the full salary for more than three years along with workers' compensation benefits without claiming that the salary continuation was advance payment of workers' compensation should be regarded as having demonstrated a "benevolent" intent. Such payments were not intended as being in lieu of compensation and no credit was given to reduce the statutory obligation.[6]

The court focused in all of the cases on collateral evidence of *intent of the employer* in making the payments in determining whether payments were an advance payment of workers' compensation.[7] In Western Electric the employer's intent was clearly expressed in the labor contract. In two other cases there was no direct evidence of intent at

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[4]George S. Taylor Const. Co. v. Harlow, 269 So. 2d 337 (Miss. 1972) (paid full salary of $110 for nine months along with workers' compensation benefits at the $40 weekly maximum rate).

[5]Koestler's Bakery, Inc. v. Boland, 299 So. 2d 205 (Miss. 1974).

[6]City of Kosciusko v. Graham, 419 So. 2d 1005 (Miss. 1982) (permanent total disability; credit asserted only when pay was sought for home nursing care by family member).

The Court of Appeals, reversing the Commission, reached the same result in Cox v. S.B. Thomas Trust, 755 So. 2d 52 (Miss. Ct. App. 1999) (no credit for voluntary salary payments for about five months made in addition to statutory temporary disability benefits; no evidence payments then were intended as advance workers' compensation payments).

[7]In Brown v. F. W. Woolworth Co., 348 So. 2d 236 (Miss. 1977), the employer noted on a substitute for Form B-31 that $29.13 had been paid as "Salary in lieu of

the time of payment, and the court expressed a willingness to infer an intent that the payment be regarded as going toward the statutory obligation unless a contrary intent is shown or more properly inferred from the particular facts. In *City of Kosciusko* a contrary intent was so inferred from telling facts—the salary payments were made for more than three years without claiming credit. The only reasonable inference was a benevolent intent toward the worker, not an intent of payments going toward the statutory obligation.

A serious inquiry into the employer's intent when making the payment should include other factors as well. If the employer made salary or salary-type payments and if the insurance carrier made workers' compensation payments, it could be realistic to think the employer intended a gesture of kindness toward the injured worker rather than to satisfy the statutory obligation of the carrier to pay benefits. On the other hand, if the employer was self insured and alone made payments of both types, it could be realistic to think the employer's extra payment was intended to go toward the statutory obligation.

One of the strongest indicators would be whether deductions were made from the salary or salary-type payments in respect of social security taxes and income tax withholding and other items. If deductions were made, the reasonable inference is that the payments were not workers' compensation benefits inasmuch as no social security or income taxes are levied on those benefits. Those deductions would be an almost overwhelming indicator that the employer intended the worker to have these payments as something quite different from the statutory workers' compensation benefits.

§ 5:66 No credit for earned: sick pay, vacation pay, other insurance, wages

Research References

West's Key Number Digest, Workers Compensation ⚖903, 934

The employment manual or employment agreement often describes "sick pay" and paid vacation days as being among the benefits of employment. Although such provisions take a variety of forms, it is not uncommon for a worker to *earn* credit for a stated number of days of sick pay or vacation pay per stated number of months of employment. If an employee is unable to work due to being incapacitated, the salary is paid for the days missed up to the number of days of sick

comp." This was regarded as compensation for the purpose of deciding a statute of limitations question.

pay accumulated. For example, a worker may have earned 20 days of sick pay at the time a worker is unable to work due to an injury for which the employer is obligated to pay disability benefits. An issue arises as to whether the statutory obligation to pay workers' compensation benefits is reduced by the amount of sick pay the employer paid the worker or vacation pay to the worker.

In this instance, the continued salary payment does not operate as a credit against the obligation to pay workers' compensation benefits. Instead, the court has ruled that such payments were pursuant to an employment policy by which the worker earned sick pay or vacation pay in exchange for services rendered. The payments were earned, made in respect of services rendered in the past, not in lieu of statutory workers' compensation benefits.[1]

Similarly, if a worker's period of *permanent disability* (inability to earn) is interrupted by occasions when the worker is employed and paid wages, the wages paid normally are in exchange for services rendered (often pursuant to contract or wage and hour law), not as workers' compensation benefits. Consequently, it would appear that the wages paid for services do not reduce the employer's statutory obligation for permanent disability benefits.[2]

If noncash compensation for services performed includes disability insurance coverage, benefits from such insurance would seem to have

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[Section 5:66]

[1]Staple Cotton Services Ass'n v. Russell, 399 So. 2d 224 (Miss. 1981) (sick pay); Pet, Inc., Dairy Division v. Roberson, 329 So. 2d 516 (Miss. 1976) (sick pay). In Lanterman v. Roadway Exp., Inc., 608 So. 2d 1340 (Miss. 1992) (vacation pay treated by same rule as for sick pay).

[2]This is the express holding in Siemens Energy & Automation, Inc. v. Pickens, 732 So. 2d 276 (Miss. Ct. App. 1999) ("Pickens did not receive what has been defined as compensation, but merely received those wages which he worked for and was rightly entitled. The employer is not entitled [sic] credit for 'earned wages' ").

By contrast, the ruling in Sturgis v. International Paper Co., 525 So. 2d 813 (Miss. 1988) appears to give credit for wages earned. However, the opinion does not reveal that there was any dispute on the fact of credit, the issue being whether the credit should be capped at the then statutory weekly maximum of $98. The court expressly held that the amount of the credit was so limited to $98. There is no discussion or explanation of why the employer would receive credit for wages paid for services, and these 12 quoted words (credit "for the number of weeks Sturgis continued to work after his injury") are puzzling and aberrational.

If *temporary* benefits were being paid, giving "credit for wages paid" reflects the fact that the period of inability to earn did not continue in those weeks when services were rendered and wages paid. However, if benefits are being paid for *permanent* disability, while the inability to earn may be interrupted temporarily by a period of ability to earn, the wages paid would not operate as a credit to reduce the statutory

been earned by the worker in exchange for services just as with sick pay and vacation pay. Logically then, the employer's statutory obligation for benefits would not be reduced by the disability insurance paid by such a policy.

This result was reached (no credit) as to "long-term disability benefits" in a 1999 court of appeals decision, but a different result was reached (credit allowed) as to "short-term disability benefits."[3] The court's reasoning for *no credit* was that, unlike *Western Electric v. Ferguson* above, the worker contributed to the cost of *long-term* coverage and "because claimant contributed to the payment . . . these benefits . . . thereby represent an earned benefit of his employment." The reasoning for *credit for short-term* benefits was that the Ferguson rule gives credit when the employer pays the entire cost. This seems to be an inaccurate reading of *Ferguson* and other cases.

It is understandable that when the worker contributes to the cost, there is unlikely to be a contractual provision that such benefits are intended as workers' compensation as was true in *Ferguson*. That is, the result of *no credit* is consistent with *Ferguson* but the actual reason is that the *Siemens* contract did not evidence an intent that the benefits be workers' compensation benefits.

The decision of *credit for the short-term* benefits was explained in *Siemens* as follows.

> If an employer makes a payment voluntarily it should be permitted to claim the benefits of those payments. If the court refused credit it would only urge employers to be less generous.

The language comes from *Ferguson*, where the court used the sentences to address whether to give effect to the unmistakably clear language of the negotiated, contractual benefit plan. Because there was no indication of such a contract in *Siemens*, the quoted sentences are entirely out of context and do not apply to the *Siemens* facts. The actual rationale of *Ferguson*, logic and the cases on sick pay and vacation pay lead to the conclusion that no credit should be given for the short-term benefits unless there was evidence—such as a contractual provision as in *Ferguson* and in *Aden*—that the benefits were intended to be workers' compensation benefits.

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obligation to pay benefits for 450 weeks, assuming the period of inability to earn returns quickly and extends that long.

[3]Siemens Energy & Automation, Inc. v. Pickens, 732 So. 2d 276 (Miss. Ct. App. 1999) (worker contributed to cost of long-term insurance; employer paid all cost of short-term insurance).

§ 5:67 Limitation on amount of the credit

Research References

West's Key Number Digest, Workers Compensation ⇐903, 934

In the instance when the employer is entitled to a credit against the statutory obligation to pay workers' compensation benefits, the entire amount of the "advance payment of compensation" has not been allowed as a credit. Instead, the credit is limited to a weekly amount equal to the amount of workers' compensation benefits the employer would be obligated to pay.

In one case, the employer paid the full weekly salary of $221.29 for twenty-six weeks and half salary for another twenty-six weeks. The court expressly limited the credit to the employer's statutory obligation of the $91 weekly maximum, ruling that only that amount could be regarded as an advance payment of compensation. The excess payments *did not carry over as a credit* toward the employer's obligation after the fifty-two-week period for which credit was given.[1] Similarly, when the employer paid the full salary of $110 weekly for nine months, the credit the employer received reduced statutory workers' compensation obligation only by the amount of the statutory $40 weekly obligation. No credit was given for the amount paid in excess of the weekly obligation.[2]

XI. MEDICAL BENEFITS

Research References

Additional References

Employer's agreement with physician--Medical services to be furnished to employees. Am. Jur. Legal Forms, Workers' Compensation § 267:22

West's Key Number Digest

Workers Compensation ⇐961 to 1002

[Section 5:67]

[1]South Cent. Bell Telephone Co. v. Aden, 474 So. 2d 584 (Miss. 1985). The opinion does not give details about the provisions in the labor contract in this regard. The case is cited and followed on the limited amount of the credit in Sturgis v. International Paper Co., 525 So. 2d 813 (Miss. 1988) and Siemens Energy & Automation, Inc. v. Pickens, 732 So. 2d 276 (Miss. Ct. App. 1999). In other respects, these latter two decisions are questionable on other issues of credits, as discussed in the section above.

[2]George S. Taylor Const. Co. v. Harlow, 269 So. 2d 337 (Miss. 1972) ($40 was weekly maximum for this 1970 injury).