IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

OMNOVA SOLUTIONS, INC., **APPELLANT**

VS. **CASE NO. 2008-WC-00500-COA**

THERESA LIPA **APPELLEE**

APPELLEE'S BRIEF TO THE COURT OF APPEALS

On Appeal From The Circuit Court of Lowndes County, Mississippi

(Oral Argument Requested)

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CERTIFICATE OF INTERESTED PARTIES

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

Appellant
(1) Omnova Solutions, Inc.

Counsel for Appellant
(2) Stephen J, Carmody
(3) Christopher R. Fontan
(4) Brunini, Grantham, Grower & Hewes, Inc.

Appellee
(5) Theresa Lipa

Counsel for Claimant/Appellee
(6) Roger K. Doolittle

Circuit Judge
(7) Honorable Lee J. Howard, Lowndes County Circuit Court

Administrative Judge
(8) Hon. Tammy G. Harthcock, MWCC

Mississippi Workers' Compensation Commission
(9) Liles Williams
(10) John Junkin
(11) Augustus L. Collins

This 28th day of August, 2008

By: _____
Roger K. Doolittle [redacted]
Attorney for Appellant

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STATEMENT OF ISSUES

1. Whether the Mississippi Workers' Compensation Commission erred in ruling that Appellee Therese Lipa sustained a loss of wage earning capacity.

2. Whether the Commission erred in considering the testimony of Dough Pugh.

3. Whether the Commission erred in awarding Lips penalties and interest.

RESPECTFULLY SUBMITTED,

THERESA LIPA

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STATEMENT OF THE CASE

This matter came for hearing before Administrative Judge Tammy Harthcock in the Oktibbeha County Courthouse on November 15, 2006. After a hearing on the merits Judge Harthcock entered an Order in favor of the Appellee. The Appellant appealed to the Full Commission which affirmed the Order of the Administrative Judge. Feeling aggrieved the Appellant appealed to the Circuit Court. Losing again in the Circuit Court, the Appellant brings this appeal to the Mississippi Court of Appeals.

STATEMENT OF STIPULATIONS

At the hearing the parties stipulated to the following facts:

1. The Appellee had a work related accident on July 20, 2000 and injured her back.
2. The Appellee's average weekly wage at the time of her accident was $915.53.
3. The Appellee reached Maximum Medical Improvement on July 2, 2002.
4. There were no remaining issues of temporary total disability benefits.
5. There were no remaining issues regarding the medical treatment of the Appellee.

STATEMENT OF FACTS AND TESTIMONY

References are listed according to the MWCC hearing transcript page number.

Prior to the hearing, the Administrative Judge and counsel for the parties discussed the proposed testimony of Dough Pugh as a witness for the Appellee and the admission of certain documents not listed on Appellant's PreHearing Statement which were being offered as evidence by the Appellant. Mr. Pugh had not been listed as a witness on the Claimant's PreHearing Statement, however counsel for the Appellant had been given written notice ten days before the hearing that Mr. Pugh would be called as a witness and had discussed this with Appellee's counsel about seven days before the hearing. Appellant's counsel stated he was aware that bidding on open jobs was going to be an issue in the case, that Mr. Pugh would testify regarding bid openings and bidding on jobs and that the documents in question reflected job openings at the Employer from 2003 to 2006. (P. 6-7). The Administrative Judge allowed the Appellee to call a witness not

listed on a PreHearing Statement and the Appellant to introduce documents not listed on a PreHearing Statement.

Testimony of Doug Pugh

Mr. Pugh was employed at Omnova Solutions. (p.12, 1. 28) He knew the Appellee from work but not socially. (p. 13,1. 6-12) Mr. Pugh was the president of the Local Union (p. 13,1. 17-18) and had worked for Omnova for 30 years (p. 13,1. 22) He had been a Union Steward in the plant for over 20 years. (p. 14, 1. 1) All hourly employees in the plant are governed by the collective bargaining agreement. (p. 14,1. 2-5) This agreement has been in effect since 1963. (p. 14,1. 8) For the last six years Mr. Pugh had been in charge of interpreting and administering the collective bargaining agreement [for the Union]. (p. 14,1. 11-15) He identified Ms. Kathy Brown, human resources manager for the Appellant as being present at the hearing and stated she had been there for about two years. (p. 14,1. 20-25)

Mr. Pugh testified that at the time of the hearing the Appellee drove a forklift in the plant. (p. 14,1. 19) This is a hourly wage position covered by the collective bargaining agreement. (p.15, 1. 29) When she had returned to work with restrictions she had returned to her calendar let-off job. (p. 16,1. 11-17) After she returned to work she was bumped off her job by a higher seniority employee. (p. 16,1. 27-28)

The collective bargaining unit that the Appellee worked under contained language relative to employees with restrictions. (p. 18, 1. 1-5) The last three contracts all had the same language. (p. 18, 1. 21-24) A copy of one of the collective bargaining agreement was admitted into evidence. (p. 19,1. 24-29) Mr. Pugh had interpreted the language in question several times over the last six years. (p. 21, 1. 25-29)

Mr. Pugh testified that under the collective bargaining agreement that if there is a job that one can perform with restrictions then an injured employee will be placed into that job. If not, the injured employee goes to the bottom of the seniority list until a job is found which accommodates those restrictions. (p. 22, 1. 14-19) An employee with restrictions is not allowed to bump more

senior people and once an employee with restrictions accepts a permanent job that employee is not allowed to bump at all. (p. 22, 1. 25-28) Once the factory trucker job became available the Appellee had to take it. (p. 24, 1. 1-6) And once the Appellee took the factory trucker job, she was prohibited from bumping any other employee. (p. 25, 1. 10-16) Further, the collective bargaining agreement prohibited an employee who had restrictions from trying to bid out and the Appellee would have been barred from bidding on any jobs on the bid sheets. (p. 13-28) Under the terms of the contract the Appellee is stuck in her job. (p. 37, 1. 17-19)

Mr. Pugh testified that at the time of the hearing there were other employees at the plant with work restrictions and none of these have bumped other employees to move into other positions. (p. 55,1. 11-20)

Finally, Mr. Pugh testified that the reason Ms. Lipa was bumped was that she had low seniority and that there was no way that she could have acquired additional seniority over the people who were already in her department. (p. 58,1. 23-29 and p. 59,1. 1-6)

Testimony of Theresa Lipa

Ms. Lipa testified that while she was aware of the jobs listed in Exhibit 7, that she either did not have the seniority to get the job or was not physically able to do the jobs. (p.59, 1. 19-26) When she went to the board and saw that a person with more seniority had bid on a posted job, that she did not put in her name. (p. 71,1. 23-27) To her knowledge no calendar job has become available that she had enough seniority to bid on. (p. 77,1. 22-25)

At the time of the hearing Ms. Lipa had worked for Omnova for 18 years. Before that she had worked in a warehouse for 12 to 13 years where she loaded boxes weighing 50 to 70 pounds on pallets. (p. 60) She did work in a glass company for one year. (p. 62, 1. 9-10)

Ms. Lipa graduated from High School. After finishing school she took a couple of night courses, one in management and one in computers. She took the courses in the late seventies. (p. 61) She has not taken any other vocational training. (p. 62, 11-2)

Ms. Lipa testified that she was injured when she was run over by a forklift and that she was out of work for two and one-half years. (p. 61-62) That when she came back to work she had to have help from a co-worker or she could not have performed her job. (p. 64, 1. 8-15) She complained about her difficulty in performing her job to her supervisor (p. 65, 1. 1-3) and the nurse Patsey Winkleblack (p. 65, 1. 4-12) While there were hoists available to lift some items, they would not work with the items she had to lift manually. (p. 67,1. 17-21) She had no knowledge of the company ever having accommodated the physical restrictions of any other employees. (p. 68, 1. 15-19)

Testimony of Kathy Brown

Ms. Brown testified that she was of the opinion that the Appellee did not have a permanent disability, although she did have work restrictions. (p. 79, 1. 11-12) She did not think that Ms. Lipa fit within the contract language. (p. 80, 1. 7) She did testify that before Ms. Lipa would be allowed to take a job, she would have to undergo a functional capacities evaluation to protect the company. (p. 82,1. 13-19) Ms. Brown finally conceded that Ms. Lipa had a permanent disability. (p. 91, 1. 10-12) (p. 93, 1. 14-16) She continued to insist that the contract only applied to people who were "permanently and totally disabled". (p. 93,1. 24-29)

Testimony of Sam Cox

Mr. Cox is a vocational consultant. (p. 94,1. 29) He initially testified that he was of the opinion that Ms. Lipa did not have a lost wage capacity. (p. 95, 1. 93) However, on cross-examination, Mr. Cox truthfully admitted that if Ms. Lipa were not able to work at Omnova she would suffer a loss of wage earning capacity. (p. 97, 1. 16-17) Mr. Cox further admitted under cross-examination that whatever course she took in computers 20 years ago would be vastly different then the computers in use today (p. 99,1. 6-14), that Ms. Lipa could not return to the work she did at Revco without accommodations (p. 99, 1. 19-22) and that he had not found any bookkeeper jobs for a woman with a high school education in the tri-county area which

would pay $50,000.00 a year. (p. 99, 23-26) Mr. Cox also admitted that when he evaluated Ms. Lipa's work situation to give his opinion on wage earning capacity, that he did not factor in the union environment where her employment was protected by the collective bargaining agreement. (p. 101,1. 23-27)

Testimony of Dr. Robert Smith

Dr. Smith's testimony was admitted via his medical records under affidavit and he was of the opinion that Ms. Lipa suffered a couple of bulging discs and a herniated nucleus pulposus at L4-5. She was assigned a 10% whole body impairment and she was restricted to lifting less then 20-25% of her body weight and carrying less then 20% of her body weight. (Exhibit 1)

STATEMENT OF LAW

Standard on Review

Under Mississippi law, the Workers' Compensation Commission is the ultimate finder of facts in compensation cases, and as such, its findings are subject to normal, deferential standards upon review. *Walker Mfg. Co.* v. *Cantrell,* 577 So. 2d 1243, 1245-47 (Miss. 1991). The Commission is free to accept or reject the ALJ's findings, so long as the Commission's actions are based on substantial evidence. *Day-Brite Lighting* v. *Cummings,* 419 So. 2d. 211, 213 (Miss. 1982). Appellate courts are bound by the decision of the Mississippi Workers' Compensation Commission, if the Commission's findings of fact and order are supported by substantial evidence. *Day-Brite Lighting* v. *Cummings,* 419 So. 2d 211,213 (Miss. 1982). This is so, even though the evidence could convince the appellate Court otherwise, were it the fact finder. The Commission serves as the ultimate fact finder in addressing conflicts in medical testimony and opinion. It is only in rather extraordinary cases that an appellate court should reverse the findings of the Commission.

The "substantial evidence" scope of judicial review of administrative agency decisions is that the courts may interfere only where the agency action is arbitrary and capricious.

Arbitrariness and caprice are in substantial part a function of the absence *vel non* of credible evidence supporting the agency decision. Where there is substantial evidence, a reviewing court has no authority to interfere with the decision of the Commission. *Walker Mfg. Co.* v. *Cantrell,* 577 So. 2d 1243, 1245-47 (Miss. 1991).

It is the sole responsibility of the Commission to determine the credibility of the witnesses before it and, when conflicts in credible evidence arise, to determine where the preponderance of the evidence lies. The Court must affirm its decision so long as it is supported by substantial evidence. *Richardson* v. *Johnson Elect. Auto.,* 962 So.2d 146, 150 (Miss.App. 2007)

The standard of review in workers' compensation cases is limited and deferential: The substantial evidence test is used. See *Walker Mfg. Co.* v. *Cantrell,* 577 So. 2d 1243, 1245-47, (Miss. 1991). The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. This Court can overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact. *Georgia Pac. Corp.* v. *Taplin,* 586 S. 2d 823,826, (Miss. 1991). Reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Smith* v. *Jackson Constr. Co.,* 607 So. 2d 1119,1124, (Miss. 1992). *Weatherspoon* v. *Croft Metals, Inc.,* 853 S2. 2d 776, 778, (Miss. 2003) (emphasis added).

In *Hale* v. *Ruleville Health Care Ctr.,* 687 So. 2d 1221, 1224-25 (Miss. 1997), the Court stated:

> The function of an appellate court in an appeal from rulings of the Workers' Compensation Commission is to determine whether there exists a quantum of credible evidence which supports the decision of the Commission. It is not the role of the appellate courts to determine where the preponderance of the evidence lies when the evidence is conflicting, given that it is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not. *Metal Trims Industries, Inc.* v. *Stovall,* 562 So. 2d 1293 (Miss. 1990). *Total Transportation Inc.* v. *Shores,* 2005-CT-01951-SCT (Miss. 9-20-2007) at page 6.

Claimant's Opinion

Any witness including the Claimant, who has evidentiary facts within his personal knowledge, gained through any of his senses, is competent to testify. A nonprofessional witness may describe personal injuries. Physical pain, weakness, exhaustion and the like are matters one may testify about. Such a non-expert witness may testify as to his own health or physical condition and objective physical symptoms and may state simple inferences drawn by him from his own subjective sensation as to his physical condition, such that he became ill or had been troubled with nervousness, was under the influence of drugs or had a bad cold. One sustaining a back injury has been allowed to testify that pain was suffered as a result of the injury and that the resulting condition prevented work activity. *Mississippi Workers' Compensation, Dunn, Third Edition, Paragraph 278.*

Credibility of Witnesses

The issue of credibility should be determined by the judge who actually heard the testimony. As the Mississippi Supreme Court held in *Simpson* v. *City of Pickens,* 761 So.2d 855 (Miss. 2000), "This is basically a case of one party's word against the other; and therefore, the trial judge is in a much better position than this Court to determine whether the evidence presented meets the requisite burden of proof. She saw these witnesses testify. Not only did she have the benefit of their words, she alone among the judiciary observed their manner and demeanor. She was there on the scene. She smelled the smoke of battle. She sensed the interpersonal dynamics between the lawyers, the witnesses, and herself. These are indispensable.

The Open Labor Market

Accommodation by an employer does not prove the Claimant has not suffered a post-injury loss of wage earning capacity. This is because wages which are attributable to the kindness and generosity of one single employer, are not indicative of the employee's actual capacity to command a certain wage on the open labor marker. *0 'Neal* v. *Multi-Purpose Mfg.*

Co., 243 Miss 775, 781, 140 So. 2d 860.863 (1962) The injured employee has no assurance that he or she will continue to be the beneficiary of the employer's magnanimity. The employer does not command the open labor market or economic conditions which might force even the most well intentioned employer to lay of its work force or to even go out of business.

Loss of Wage Earning Capacity

The trier of fact is not allowed to simply look at the pre-injury average weekly wage and the post-injury wage. It is not allowed to simply look at whether the Employer has offered the Claimant a job. Claimant is still entitled to an award of loss of wage earning capacity even where he has gone back to work for the same Employer at a higher wage. In *Smith v. Picker Service Company,* 240 So. 2d 454 (1970) the Mississippi Supreme Court explained that:

> Earning capacity is a more theoretical concept. The test is one of capacity. The trier of fact, the Commission, must make the best possible estimate of future impairment of earnings, on the strength of both actual post-injury earnings and any other evidence of probative value on the issue of earning capacity. This is essentially a question of fact for the Commission.

While earnings equal to post-injury earnings is evidence of nonimpairment of earning capacity, it may be rebutted by the various factors referred to below.

In *Georgia-Pacific Corporation v. Gregory,* 589 So. 2d 1250 (1991) the Mississippi Supreme Court affirmed the Commission in finding a loss of wage earning capacity despite higher post-injury wages and held:

> "We cannot say the Commission incorrectly concluded that, despite Gregory's increase in wage earnings, his wage earning capacity and his employability in the market place has been reduced. The presumption of earning capacity commensurate with post-injury earnings is rebutted in this case by the following factors which strongly suggest that Gregory's actual post-injury earnings are a less reliable indicator of earning capacity."

In *Cox v. International Harvester Company,* 221 So. 2d 924 (1969) the explained that:

> "Earning capacity is a more theoretical concept. The test is one of capacity. The trier of fact, the Commission, must make the best possible estimate of future

impairment of earnings, on the strength of actual post-injury earnings and any other evidence of probative value on the issue earning capacity."

Reviewing these cases reveal certain rules set forth by the Mississippi Supreme Court for determining a loss of wage earning capacity. First, post-injury earnings should not be confused with earning capacity after the injury. The two items are not the same. Second, the Judge is to determine earning capacity after the injury. Third, earning capacity is a more theoretical concept. The test is one of capacity. The trier of fact, the Commission, must make the best possible estimate of future impairment of earning. Fourth, the Judge must consider the Claimant's future earning capacity in a normal labor market, not just restricting the scope of the investigation to the Employer's plant. Fifth, the Administrative Judge must evaluate a Claimant and determine whether his employability in the general market place has been reduced.

Next, the Administrative judge must consider:

1. Whether the injury is life long in nature;
2. Whether it affects the activities of daily living, both occupationally and socially;
3. Whether the Claimant's physical problems would put him at a disadvantage in an industrial setting.
4. Whether the Claimant would have reasonable fears of additional injury either caused by the physical impairments suffered as the result of his injury or his weakened physical condition; and
5. Whether there has been an increase in general wage levels for all employees in Claimant's class since the date of injury.

Finally, the Administrative Judge must determine whether the post-injury earnings are unreliable due to the Claimant's own greater maturity or training, to longer hours worked by claimant after the accident, to payment of wages disproportionate to capacity out of sympathy to claimant, to Union influence, and whether there is any temporary and unpredictable character of post-injury earnings.

The Administrative Judge must evaluate a Claimant and determine whether his employability in the market place has been reduced. Where one's employability in the market place bas been reduced, one bas a loss of wage earning capacity.

Plaintiff's Burden

There is well-established law that a claimant in a workers' compensation claim bears the burden of establishing a loss of wage-earning capacity. *Robinson* v. *Packard Electric Division,* 523 So.2d 329, 331 (Miss. 1988). The issue of loss of wage-earning capacity in the final analysis is largely factual and is to be left largely to the discretion and estimate of the Commission. Often the estimate of loss of wage-earning capacity involves a compromise of medical estimates, and the result is generally sustainable in appeal to the courts. The loss is to be determined in each case from the evidence as a whole. *Vardaman* S. *Dunn, Mississippi Workers' Compensation Law and Practice Rules and Forms,* § 68 (3d ed. 1982 & Supp. 1990).

Jordan /Thompson Presumption

The presumption arises where a claimant with a permanent injury proves a request to return to work with a refusal by the former employer and then proves reasonable efforts to obtain work from other available employers. *Thompson* v. *Wells-Lamont Corp.,* 362 So.2d 638, 640 (Miss. 1978). *Jordan* v. *Hercules, Inc.,* 600 So.2d 179, 183 (Miss. 1992); *Pontotoc Wire Products Co.* v. *Ferguson,* 384 So.2d 601,603 (Miss. 1980). *Hale* v. *Ruleville Health Care Center* 687 So.2d 1221 (Miss. 1997) *Entergy Mississippi, Inc.* v. *Robinson,* 777 So.2d 53, 56 (Miss.Ct.App.2000).

Procedural Rule 5

The Mississippi Workers' Compensation Commission is vested with broad administrative discretion to determine the proper procedural flexibility under the Rules of the Mississippi Workers' Compensation Commission. The Courts have emphasize that the Commission is an

administrative agency, not a court. It has broad discretionary authority to establish procedures for the administration of compensation claims. It has like authority to relax and import flexibility to those procedures where in its judgment such is necessary to implement and effect its charge under the Mississippi Workers' Compensation Act. It is a rare day when the Court will reverse the Commission for an action taken in the implementation and enforcement of its own procedural rules. *Delta Drilling Co.* v. *Cannette,* 489 So.2d 1378, 1380-81 (Miss. 1986).

While it is true that an Employer may be surprised by the identity of a particular witness who appears at the administrative hearing, the Employer should not be surprised that evidence would be presented concerning a claimant's loss of wage earning capacity. The Employer is put on notice with the filing of the petition to controvert which specifically states that loss of wage earning capacity would be an issue at the hearing. The loss of wage earning capacity is one aspect of permanent disability. Thus the Employer needs to be prepared at the hearing to indicate to what extent, if any, it believes that the Claimant had not suffered a loss of wage-earning capacity. Without a showing that the Employer would have done anything meaningfully different had it known a particular witness would testify on the issue, there is no abuse of discretion in allowing the testimony of a witness not listed on a prehearing statement. *Greenwood Utilities* v. *Williams,* 801 So.2d 783,790 (Miss.App. 2001).

Automatic Operation of Miss. Code Ann. § 71-3-3 7

The Employer's failure to comply with the Act's mechanisms for the payment of benefits does not disturb the operation of the Act. The Act itself provides remedies for these failings, if any. See, Miss. Code Ann. § 71-3-37 (5). *Washington's* v. *Tem's,* 981 So.2d 1047, 1051 (Miss.App. 2008).

The Employer has the burden of proving that it should not be assessed interest and penalties. If the Employer does not affirmatively provide the Commission positive proof of three circumstances where it is excused for not paying benefits, Miss. Code Ann. §71-3-37(5) functions automatically to impose interest and penalties.

Mississippi Code Annotated Section 71-3-37 (Rev. 2000), provides:

> If any installment of compensation payable without an award is not paid within fourteen (14) days after it becomes due, as provided in subsection (2) of this section, there shall 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 (4) of this section, or unless such nonpayment is excused by the commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.
>
> ****
>
> If any installment payable under the terms of an award is not paid within fourteen (14) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, such compensation unless review of the compensation order making such award is had. Miss. Code Ann. § 71-3-37(5) & (6) (Rev. 2000).

Three conditions are set forth in *South Central Bell* v. *Aden,* 474 So.2d 584, 597 (Miss. 1985), which allow an employer to claim relief from the burden of the penalty: (1) the employer has paid compensation installments within fourteen days of when they became due, (2) the employer has filed a notice to controvert within fourteen days of the day he received notice of the injury, (3) that nonpayment, if it occurred, was as a result of conditions over which the employer had no control. In addition, the Supreme Court has determined that an employer can avoid statutory penalties in circumstances where the employer has paid claimant payments via a company benefit plan within the fourteen days of when statutory payments were due. *Kemper Nat. Ins. Co.* v. *Coleman,* 812 So.2d 1119, 1126 (Miss.App. 2002)

Time In Which To Determine Post-Injury Wages

As long as a workers' compensation claim remains open the Claimant can seek an award of permanent disability benefits based on loss of wage earning capacity. While the Act fixes the time to be considered before the date of injury to arrive at the average weekly wage, it does not fix any definite period of time to be considered after the date of injury in which to determine the post-injury wages. However, the Act affords the Claimant protection by its specific provision that

during the continuance of disability the Commission may on its own motion or upon application of any party in interest reconsider the degree of impairment. The furnishing of medical services and supplies is the payment of compensation for the purpose of tolling any statute of limitations that might apply. So that until one year passes following the proper filing of a MWCC B-31 form with the Commission, the Claimant can litigate the issue of permanent impairment based on a post-injury loss of wage earning capacity. *Graeber Bros., Inc. v. Taylor*, 237 Miss. 691, 115 So.2d 735 (1959), *Cox v. International Harvester Company*, 221 So.2d 924 (Miss. 1969), *Broadway v. International*, 982 So. 2d 1010, 1012 (Miss.App.2008)

Union Influence And Union Sympathy

Union negotiated, across-the-board pay increases are not a reliable indicia of post-injury wage earning capacity especially where the Claimant would average substantially less pay than her current earnings in non-union positions if the Claimant had to seek work with other employers. *Levi Strauss & Co. v. Studaway*, 930 So.2d 481, 486 (Miss.App. 2006) One of the relevant factors to be considered in determining loss of wage earning capacity is where an increase in wages is not due to the merits of the Claimant, but are a wage paid on the basis of a contract negotiated between the employer and local union, of which the Claimant is a member and the increase in wages has been an increase that applied to all other employees in his classification. *Georgia-Pacific Corp v. Gregory*, 589 So.2d 1250,1255 (Miss. 1991)

It has been the unbroken rule of law in the State of Mississippi for **fifty-one years**, that the presumption of nonimpairment of earning capacity based on post-injury wages being equivalent to pre-injury wages is not conclusive, but is rebutted by showing that the Claimant only has his job due to union influence. The temporary and unpredictable character of his post-injury earnings is demonstrated where in a normal labor market the Claimant would not be able to hold the job in question and could not maintain his current job without the strenuous help of the union exercising its assignment powers. This demonstrates the Claimant has been paid wages disproportionate to his earning capacity, because of the influence and sympathy of the union. *Russell v. S.E. Utilities Service Company*, 230 Miss. 272, 284 (1957)

Asking a union representative for help in finding a job is proof of seeking employment. *Aluman Extrusions, Inc. v. Hankins*, 902 So.2d 586, 592 (Miss.App. 2005)

Return To Work At Increased Earnings Without Looking For Work Outside of Employer

The Courts have affirmed payment of permanent partial disability benefits to Claimant's who have returned to work with an Employer and who are making more money then before the injury, based on the Claimant's testimony that the activities at work caused pain. For a Claimant to receive benefits, it is not necessary for her to prove that she actually looked for employment outside of the Employer at the time of the work related injury. *Levi Strauss & Co. v. Studaway, infra.*

The Court of Appeals in *Levi Strauss* noted that the Supreme Court reiterated this view in *Meridian*, quoting the following language from Judge Southwick's concurrence to the Court of Appeal's opinion in that case:

> [W]hen a claimant seeks benefits based on an enhanced occupational effect of an injury to a schedule member, a variety of evidence is relevant to whether in fact the claimant is unable to perform the substantial acts of the employment . . . a worker making this claim must convince the Commission that employment comparable to his occupation prior to the time of injury was no longer attainable.

Id. at 748(¶ 23) (quoting *Meridian Prof'l Baseball Club v. Jensen*, No. 1999-WC-02098-COA, at (¶ 37) (Miss.Ct.App. Oct. 10, 2000) (Southwick, P.J., concurring) (emphasis added)). The Court of Appeals found that the Commission properly considered a variety of evidence in determining that the Claimant suffered a loss of wage-earning capacity and industrial loss of use. It also found that the Commission's decision to award the Claimant benefits for permanent partial disability was supported by substantial evidence. The Court also cited the long-standing rule that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purposes of the statute. E.g., *Meridian*, 828 So.2d at 744-45(¶ 10); *Marshall*

Durbin Cos. v. Warren, 633 So.2d 1006, 1010 (Miss. 1994), *Levi Strauss & Co. v. Studaway*, 930 So.2d 481, 486 (Miss.App. 2006).

SUMMARY OF ARGUMENT

A. Standard of Review. The Order of the Mississippi Workers' Compensation Commission was supported by substantial evidence and should be affirmed.

B. The Mississippi Workers' Compensation Commission did not err in ruling that Lipa sustained a loss of wage earning capacity. The Order of the Mississippi Workers' Compensation Commission was correct as a matter of fact and law and should be affirmed.

1. If Omnova was entitled to a presumption of no loss of wage earning capacity, Lipa easily overcame this presumption by substantial and overwhelming evidence.

2. Lipa met her burden of proof in establishing a loss of wage earning capacity.

(a) Omnova failed to present substantial evidence in support of its assertion that there was no loss of wage earning capacity.

(b) Lipa has never plead and the Commission did not invoke the Jordan/Thompson rule.

3. Lipa proved by substantial, clear, convincing and overwhelming evidence that her post-injury wage was related to her work-related injury.

C. The Mississippi Workers Compensation Commission did not err in allowing the testimony of Dough Pugh because the admission of his testimony was within the broad discretionary administrative authority of the Mississippi Workers' Compensation Commission and the Appellant did not demonstrate that, considering that it had advance written notice of the nature of Mr. Pugh's testimony, that it called a witness in rebuttal and introduced documentary evidence supporting its rebuttal, that the failure to list Mr. Pugh caused any meaningful difference in the way it would have prepared its case or presented it at the hearing.

D. The Mississippi Workers'' Compensation Commission did not err in awarding Lipa Penalties and Interest.

ARGUMENT

A. Standard of Review. The Order of the Mississippi Workers' Compensation Commission was supported by substantial evidence and should be affirmed. The "substantial evidence" scope of judicial review of administrative agency decisions is that the courts may only interfere where the agency action is arbitrary and capricious. Arbitrariness and caprice are in substantial part a function of the absence *vel non* of credible evidence supporting the agency decision. Where there is substantial evidence, a reviewing court has no authority to interfere with the decision of the Commission. The testimony of Ms. Lipa, Mr. Cox, Dr. Smith and Mr. Pugh constitute not only substantial evidence but compelling evidence to support the decision of the Mississippi Workers' Compensation Commission and it should be affirmed.

B. The Mississippi Workers' Compensation Commission did not err in ruling that Lipa sustained a of wage earning capacity. The Order of the Commission was correct as a matter of fact and law and should be affirmed. This is because wages which are attributable to the kindness and generosity of the union in asserting its assignment powers and in protecting the Claimant's employment are not indicative of the employee's actual capacity to command a certain wage on the open labor marker. The Administrative Judge must evaluate a Claimant and determine whether her employability in the general market place in the locality where she resides has been reduced. Where one's employability in the market place in which she lives has been reduced one has a loss of wage earning capacity. The Appellant's own vocational expert clearly established that the Appellee's employability in the open labor market had been diminished by her on the job injury.

1. Omnova was not entitled to a presumption of no loss of wage earning capacity and if it was then Lipa overcame this presumption by substantial, clear and convincing evidence as a matter of law. While the Appellant's expert initially testified that there was no loss of earning capacity, it was soon demonstrated under cross-examination that his opinion was based solely on the Appellee's employment with the Appellant. That is not the law in Mississippi. Further, an expert opinion which does not take into account all of the facts is not credible. Mr. Cox admitted

under cross-examination that he did not take into account the influence of the Union contract when giving his original opinion, which he was mandated by case law to consider. Mr. Cox also admitted that if Ms. Lipa were not able to work at Omnova there would be a loss of wage earning capacity. Finally, Mr. Cox admitted that whatever course she took in computers 20 years ago would be vastly different then the computers in use today, that Ms. Lipa could not return to the work she did at Revco without accommodations and that he had not found any bookkeeper jobs for a woman with a high school education in the tri-county area which would pay $50,009.00 a year. When Mr. Cox was asked to consider all relevant factors, as he was required to do under long standing Mississippi law, he had to admit that Ms. Lipa had suffered a loss of wage earning capacity. The Appellant's own vocational expert proved the Appellee's case and overcame any presumption of no loss of wage earning capacity. Mr. Cox's expert testimony mandates an Order in favor of the Appellee.

Ms. Lipa testified that she could not perform her regular duty job without help from co-workers and she suffered pain in doing her work. She specifically testified that she had reviewed the job openings posted for bidding at the Employer's plant and that she either (1) did not have the seniority to bump other employees or (2) that she was not physically able to perform these jobs due to her permanent restrictions.

Dr. Smith established that Ms. Lipa had permanent physical impairment and permanent work restrictions resulting from objectively established injuries to her spine.

Sam Cox, testified that if Ms. Lipa ever left work with the Appellant that she would have a loss of wage earning capacity, could not return to any past jobs at which she was employed prior to working for the Appellant without accommodation for her permanent restrictions and he could not find any jobs in the general labor market for a person with her education and skills which would pay Ms. Lipa $50,000.00, which is what she was making with the Appellant.

Mr. Pugh established that the Appellee was essentially "stuck" in her job and pay level by the Union contract. That while the Union contract protected the Appellee from discharge and

compelled the Appellant to find her a job, once she was placed in a permanent position accommodating her permanent physical disability, she was essentially in that job forever.

Even should the Court strike the testimony of Mr. Pugh, the testimony of Ms. Lipa, Mr. Cox and Dr. Smith establish a prima facie case for the Appellee. The Order of the Commission is not only supported by substantial evidence, it is compelled by the evidence.

2. Lipa met her burden of proof in establishing a loss of wage earning capacity. The Appellee is a long term employee of 18 years. Her previous job she held for 13 years. That is not the profile of a malingerer. There is no question that she has serious injuries. She was ran over by a fork lift and suffered permanent injuries verifiable by an MRI. She returned to work and had maintained her employment until the time of the hearing. Her testimony was that it hurt her back to lift when the medical evidence proves she has a ruptured disc at L4-5. A person with the Appellee's work history would have not taken a long term cut in pay if she could have possibly avoided it. In fact, the contention of the Appellant that the Appellee deliberately chose to stay in a job which substantially reduced her wages is both insulting to the Appellee and the intelligence of the trier of fact. The Appellee convincingly testified that she did not bid on the posted jobs because when she looked at the postings these were either (l) for positions she could not physically perform or (2) for which another employee with greater seniority had already bid. The law does not require a person to perform a meaningless act. Does the Appellant really expect the Court to believe that Ms. Lipa would work for three years at a lower paying job if she could move to one making more money. Ms. Lipa was not laying out at the house claiming to be hurt eating bonbons. She was getting up every day and going to work at the plant. Ms. Lipa is hurt, not stupid. If she could have bumped someone and made more money, she would have done it. That is clear to anyone reading this brief.

(a) Omnova failed to present substantial evidence in support of its assertion that there was no loss of wage earning capacity. The Appellant tendered testimony from two witnesses, Mr. Cox and Ms. Brown.

The testimony of Sam Cox, vocational expert for the Appellant, provided substantial and compelling evidence in support of the Order of the Full Commission. Mr. Cox admitted under cross-examination he did not take into account the influence of the Union contract, which he was mandated by case law to consider. And, when Mr. Cox was asked to take into account all factors which case law mandates a Judge must consider, he admitted that the Claimant did have a loss of wage earning capacity. The Appellant's own vocational expert proved the Appellee's case and gave testimony adverse to the Appellant which mandates an Order in favor of the Appellee. Sam Cox testified that if Ms. Lipa ever left the Appellant she would have a loss of wage earning capacity, could not return to her work prior to the Appellant without accommodation for her permanent restrictions and he could not find any jobs in the general labor market for a person with her education and skills which would pay what she made with the Appellant. That totally rebuts any presumption in favor of the Appellant and clearly establishes every factor the Appellee is required to establish to prove a loss of wage earning capacity. Mr. Cox's testimony demands an Order in favor of the Appellee.

Ms. Brown's testimony was a total disaster for the Appellant. Ms. Brown did not directly contradict Mr. Pugh's testimony, so much as make a stubborn and probably desperate attempt to convince the Administrative Judge that a woman with a 10% permanent impairment and life time permanent work restrictions from being run over by a fork lift did not have permanent disability. This testimony was given to a Judge who is an expert in the definition of permanent disability and who knows this testimony is gibberish. Further, she stubbornly continued to insist that the collective bargaining agreement language in question only applied to persons who were totally and permanently disabled. That would be a pretty good trick as "totally and permanently disabled" means one can never work again. Therefore, under Ms. Brown's rationale the language of the collective bargaining unit dealing with employees with disability would only apply to permanently disabled employees who could never work again. One has to wonder why the contract dealing with people working at the plant would have language dealing with people who can never work again? Her testimony is so totally illogical and contrary to common sense that she impeaches

herself. And, she finally did admit that the Claimant had a permanent disability, which brings into operation the language she so desperately tried to avoid with her convoluted and illogically tortured contractual interpretations. Again, it did not matter who the Appellant called, if they were going to try to advance the same incredible defense as Ms. Brown, no one would believe them.

(b) Lipa has never plead and the Commission did not invoke the Jordan/Thompson rule. In order to invoke the Jordan/Thompson rule one must first testify that one did not return to work with the employer. To the contrary Ms. Lipa testified that she was working for the employer. Appellee cannot understand why this argument is even made as this fact situation and issue does not even exist in this case. This is the equivalent of arguing that the statute on death benefits does not apply, which is equally as true, because no one has died. However, Lipa does not concede anything except that this argument does not even belong in this appeal.

3. Lipa proved by substantial, clear and convincing and overwhelming evidence that her post-injury wage was related to her work-related injury. Without the necessity of needlessly repeating the evidence referenced at other places in this brief, it is simply restated herein that the testimony of Ms. Lipa, Dr. Smith, Mr. Cox and Mr. Pugh constitute substantial, clear and convincing and overwhelming evidence proving that her post-injury reduction in wages was caused by her work-related injury.

The Appellant also raises issues on appeal to the Court of Appeals not raised before the Commission or even before the Circuit Court. Appellee objects to the consideration of issues on appeal not first raised before the Commission in the trial of this claim. However, without waiving this objection in an excess of caution the Appellee will address the Appellant's attempt to invoke out of state cases as authority in this case.

First, the Appellant offers case law from other states as precedent for the interpretation of Mississippi Statute Law, without introducing copies of the out of state workers' compensation statutes in the states whose cases are being cited. The definition of permanent disability, its application and award in the State of Mississippi is a function of the language in Mississippi

statute law. Before an out of state case can be offered for consideration, the Appellant must introduce a copy of the out of state statute being interpreted by the other state, in order for the Court of Appeals to determine that the out of state statute has the same wording as the Mississippi statute. If the out of state statute has different wording then the Mississippi statute, the other state's case law is not applicable in the interpretation of Mississippi statute law.

Why not?

Nor can the Courts of Mississippi take judicial notice of the statute law of another state. So an essential factor in the consideration of out of state case law interpreting out of state statute law is missing. We do not even know if the other states in question even define permanent disability as does the State of Mississippi.

Second, the Appellant for some strange reason overlooks fifty-one (51) years of case law dealing with the effect of union influence on loss of wage earning capacity which interestingly enough supports the Appellee's case and mandates affirmation of the Commission order. The foundation case on this issue has been cited 26 times to Appellee counsel's count and has not even been criticized, let alone modified or overruled.

One would think that in making an argument to the Court of Appeals one would advise the Court of 51 years of Mississippi precedent, instead of citing out of state cases and presenting this issue as a case of first impression. One would think the Appellant would have a duty to disclose this line of case law to the court.

Simply put, under the facts in this case, established Mississippi case law for the last 51 years demands affirmation of the order of the Mississippi Workers' Compensation Commission.

C. The Mississippi Workers Compensation Commission did not err in allowing the testimony of Dough Pugh because the admission of his testimony was within the broad discretionary administrative authority of the Mississippi Workers' Compensation Commission and the Appellant did not demonstrate that, considering that it had advance written notice of his testimony, was aware of the subject matter and nature of Mr. Pugh's testimony, called a witness in rebuttal and introduced documentary evidence supporting its rebuttal, that the failure to list Mr. Pugh caused any meaningful difference in the way it would have prepared its case or presented it

at the hearing. While Mr. Pugh was not listed as a witness on the Claimant's PreHearing Statement, counsel for the Appellant was notified in writing that he would be called as a witness ten days prior to the hearing. The Employer was not ambushed by the unanticipated appearance of Mr. Pugh at the hearing, but was in fact given ample time to provide for a rebuttal witness and in fact had Kathy Brown at the hearing to do so and also introduced documentary evidence in support of her testimony. The length of time one needs to prepare for a witness is based on what issue that witness will testify about. In discussing the documents first produced by the Appellant the morning of the hearing, Counsel for the Appellant admitted that he was aware of the nature of Mr. Pugh's testimony and was tendering the documents as part of his rebuttal. The Administrative Judge exercised her broad discretionary authority to waive certain requirements of Procedural Rule 5 for Mr. Pugh to testify and also for Appellant to introduce previously undisclosed documents into evidence. Both sides benefited from the Administrative Judge's exercise of judicial discretion, but only the Appellant is complaining.

Mr. Pugh simply testified about how the collective bargaining agreement worked relative to employees with restrictions. (p. 18, l. 1-5) The Employer had operated its business under that collective bargaining language for years and the last three contracts all had the same language. Appellant's management team by necessity knew the collective bargaining agreement's terms and operation. In its brief the Appellant argues that it could have deposed Mr. Pugh and called other witnesses to testify as to the effect of the language in the collective bargaining unit. However, it does not state who it would have called or proffered in its brief what they would have testified to, This is nothing but smoke and mirrors. Appellant's Counsel admitted to the Administrative Judge that he already knew what Mr. Pugh was going to testify about, that was why he brought written documentation of job openings to the hearing. Kathy Brown's testimony specifically dealt with the subject matter about which Mr. Pugh testified. This proved that the Appellant knew loss of wage earning capacity was going to be at issue at the hearing for months, was put on notice by the petition to controvert and had already determined the identity of its witnesses regarding loss of wage earning capacity. Determining the availability of jobs with an employer suitable to a

claimant's impaired condition is the first step in an employer's defense to a loss of wage earning capacity case. It is Workers' Compensation 101. It would be negligent for a defense counsel to come to a hearing on loss of wage earning capacity without this information already in hand and a witness to testify to the subject matter of Mr. Pugh's testimony already chosen. If Appellant had wanted other rebuttal witnesses he had a week to pick up the phone and simply call the manager and probably half a dozen other individuals working at the plant. Mr. Pugh's testimony did not concern a matter about which the Appellant would have to seek an out of state expert. Mr. Pugh's testimony concerned the terms of the collective bargaining agreement. A matter which the Appellant management team dealt with on a daily basis and which was common knowledge to everyone who worked at the plant including the employees. All Appellant's counsel had to do was pick up the phone and call his client to summon an army of company witnesses to testify. The problem that the Appellant had was not with Mr. Pugh testimony, but with the outlandish and unbelievably illogically tortured version of the collection bargaining agreement Ms. Brown advanced before the Administrative Judge in a doomed attempt to support an unfeasible defense contrary to facts, law and reason. Quite frankly it did not matter who the Appellant called as a witness in support of this quite "unique" defense. Anyone who gave the same testimony as Ms. Brown was simply not going to be believed by anybody in the room. Incredibly, Ms. Brown testified that the employment contract only applied to permanently and totally disabled people, who by definition cannot be employed because they are permanently and totally disabled. Her next most incredible testimony was that people who had permanent physical impairment and permanent physical restrictions issued by medical doctors documenting the permanent loss of body functions had no permanent disability. Mother Therese could not have convinced the Administrative Judge this was the truth.

The Administrative Judge exercised her broad administrative discretion to relax the requirements of Procedural Rule to allow both for the Appellee to call Mr. Pugh and for the Appellant to introduce documents to support Ms. Brown's rebuttal testimony. This was well within the boundaries of the Commission's broad administrative discretion in the implementation

of its own rules and provided due process and equal protection to both parties. The Appellant was well aware of the proposed testimony of Mr. Pugh long before the hearing and produced both a rebuttal witness and documentary support to the hearing. It not only was put on notice by the statement of issues in the Petition To Controvert, but it's counsel also knew the substance of Mr. Pugh's testimony well before hand and formulated a detailed and complex trial strategy to rebut it.

The Appellant already knew all the relevant facts and had plenty of time to prepare it's case. The Appellant did not demonstrate that there would have been a material difference in the case it would have put on before the Administrative Judge if Mr. Pugh had been listed on the PreHearing Statement. A canned recitation of standard litigation discovery procedures is not what is required under these circumstances. The Appellant simply chose a horrible witness to provide bizarre testimony in support of a defense so unbelievable that it lost. There is no surprise or ambush when one is put on notice by the filing of the petition and later given ample notice in time to produce a rebuttal witness and tender supporting evidence.

Finally, the testimony of Mr. Pugh was not necessary for the Commission to find in favor of the Appellee. The combined testimony of Ms. Lipa, Dr. Smith and Sam Cox constituted substantial, clear and convincing evidence to support the Order of the Commission and in fact demanded a verdict for the Appellee. Therefore, even if the testimony of Mr. Pugh was admitted in error, it was not reversible error and the decision of the Commission should be affirmed.

D. The Mississippi Workers' Compensation Commission did not err in awarding Lipa Penalties and Interest. In order to avoid the imposition of interest and penalties the Employer has the burden to show that it (1) the employer has paid compensation installments within fourteen days of when they became due, (2) the employer has filed a notice to controvert within fourteen days of the day he received notice of the injury, (3) that nonpayment, if it occurred, was as a result of conditions over which the employer had no control. In addition, the Supreme Court has determined that an employer can avoid statutory penalties in circumstances where the employer has paid claimant payments via a company benefit plan within the fourteen days of when statutory

payments were due. The employer never alleged it did any of this. In the absence of these circumstances penalties and interest are automatically applied as a matter of law.

CONCLUSION

The Appellee offered credible, rational witnesses whose testimony clearly provided substantial evidence to support the Order of the Commission. The Appellant offered one witness whose testimony was so internally illogical that she impeached herself and a vocational expert who established every fact that the Appellee needed to prove to win her case. The Order of the Mississippi Workers' Compensation Commission is supported by substantial evidence, is in full compliance with the law and its affirmation by the Circuit Court was meet and proper. The Order of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this day caused to be served via hand- delivery, a true and correct copy of the above and foregoing **APPELLEE'S BRIEF TO THE COURT OF APPEALS** via United States Mail, postage prepaid, to the following:

Stephen J. Carmody
Christopher R. Fontan
Brunini, Grantham, Grower & Hewes, PLLC
Post Office Drawer 119
Jackson, MS 39205-0119

Honorable Lee J. Howard
Lowndes County Circuit Court Judge
P. O. Box 1344
Starkville, Mississippi 39760

This 28th day of August, 2008.

Roger K. Doolittle
Attorney for Appellee