

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

**OMNOVA SOLUTIONS, INC.,
A SELF-INSURER**

APPELLANT

VS.

CASE NO. 2008-WC-00500-COA

THERESA LIPA

APPELLEE

REPLY BRIEF OF APPELLANT OMNOVA SOLUTIONS, INC.

On Appeal from the Circuit Court of Lowndes County, Mississippi

(Oral Argument Requested)

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ATTORNEYS FOR THE APPELLANT

CERTIFICATE OF INTERESTED PERSONS

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

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Appellee

- (5) Theresa Lipa

Counsel for Claimant/Appellee

- (6) Roger Doolittle, Esquire

Circuit Judge

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

Administrative Judge

- (8) Honorable Tammy Green Harthcock
Mississippi Workers' Compensation Commission

Full Commission of the Mississippi Workers' Compensation Commission

- (9) Liles Williams, Chairman
(10) John Junkin, Commissioner
(11) Augustus L. Collins, Commissioner

Respectfully submitted,

OMNOVA SOLUTIONS, INC.

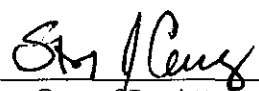
By: 
One of Its Attorneys

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I. RE-STATEMENT OF THE ISSUES

- A. The Mississippi Workers' Compensation Commission ("Commission") erred in ruling that Appellee Theresa Lipa ("Lipa") sustained a loss of wage earning capacity.**
- B. The Commission erred in considering the testimony of Doug Pugh because his identity was not adequately disclosed before the hearing on the merits.**
- C. The Commission erred in awarding Lipa penalties and interest.**

II. SUMMARY OF REPLY ARGUMENT

The Commission's award of benefits to Lipa for loss of wage earning capacity was not supported by substantial evidence, because Lipa did not overcome a presumption owed to Appellant/Employer Omnova Solutions, Inc. ("Omnova") and Lipa failed to meet the burden of proof required to establish a claim for loss of wage earning capacity. In her Response before the Court of Appeals, Lipa attempts to re-package the same insufficient evidence that she offered at the November 15, 2006 Hearing on the Merits ("Hearing") to give the illusion that she satisfied her burden of proof. Workers' compensation jurisprudence grants Omnova a presumption of no loss of wage earning capacity because Lipa returned to work in the same position at a comparable rate of pay. Despite this favored presumption, Omnova presented substantial additional evidence establishing that Lipa suffered no loss of wage earning capacity.

In her Response, Lipa confesses that her key witness—a witness that the Administrative Law Judge relied upon heavily in rendering her opinion—testified in violation of the Commission's own Procedural Rules. In defense of the violation, Lipa trivializes the importance of the Procedural Rules by supporting a trial-by-ambush strategy. Despite Lipa's baseless assumptions, it is clear that this testimony prejudiced Omnova at the Hearing, and was thus improper.

Finally, Lipa's Response makes a half-hearted attempt to address Omnova's appeal regarding the Commission's error in awarding Lipa penalties and interest in this matter—and with good reason. The applicable statutes clearly establish that the Commission erred in assessing penalties and interest against Omnova in this case.

Because Lipa failed to provide the evidence needed to overcome the presumption owed to Omnova and to meet her burden of proof, combined with the Commission's decision to allow the prejudicial testimony of an improper witness, the Commission's award of benefits was not supported by substantial evidence and its decision constitutes prejudicial error. Accordingly, the Commission's decision in this matter must be reversed and rendered in favor of Omnova.

III. ARGUMENT IN REPLY

Mississippi law empowers its appellate courts to overrule a decision of the Commission if that decision is not supported by substantial evidence, is arbitrary and capricious, is clearly erroneous, is contrary to the overwhelming weight of the evidence, or if the court finds prejudicial error. See Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317 (Miss. 1988); Miss. CODE ANN. §71-3-51. The Commission made three key errors in its ruling.

A. The Evidence Did Not Support the Commission's Ruling of a Loss of Wage Earning Capacity.

1. Despite Lipa's Unsupported Assertion to the Contrary, Mississippi Jurisprudence grants Omnova a Presumption of No Loss of Wage Earning Capacity.

In a loss of wage earning capacity case, a claimant bears the burden of establishing her alleged medical impairment, her alleged loss of wage earning capacity, and the fact that the alleged loss of wage earning capacity resulted from the work-related injury by "competent, credible evidence which is beyond speculation, conjecture and possibility." Guardian Fiberglass, Inc. v. LeSeuer, 751 So. 2d 1201, 1204 (Miss. Ct. App. 1999). In cases like the one before this

Court, where the employer allows the claimant to return to her pre-injury position and wage rate, the burden on the claimant is more arduous, because the law provides the employer with a presumption of no loss of wage earning capacity. See Agee v. Bay Springs Forest Products, Inc., 419 So. 2d 188 (Miss. 1982).

In her Response, Lipa broadly proclaims that Omnova is not entitled to this presumption of no loss of wage earning capacity. See Appellee's Brief to the Court of Appeals at 16. However, Lipa offers no briefing on this point—she offers no additional argument or authority for her position. Instead, she immediately transitions into her alternative argument. It is undisputed that following her achievement of maximum medical improvement, Omnova returned Lipa to her pre-injury job at her pre-injury wage rate. (Vol. 2 R. 61). Accordingly, Omnova was entitled to the Agee presumption and accordingly, Lipa bore the burden of overcoming this presumption regarding her alleged loss of wage earning capacity. Moreover, Lipa's failure to brief in opposition is tantamount to a confession under the law. See Turner v. State, 383 So. 2d 489 (Miss. 1980) (citing Lawler v. Moran, 148 So. 2d 198, 245 Miss. 301 (1963)).

2. Lipa Failed to Meet Her Burden of Proof in Establishing a Loss of Wage Earning Capacity.

At the Hearing, Lipa failed to overcome the Agee presumption which favors Omnova. In her Response, Lipa simply tries to re-package the same evidence she presented at the Hearing to give the illusion that she satisfied her burden of proof. At the outset, Lipa relies on her own testimony regarding her supposed difficulty in performing her job duties. However, Lipa's testimony only established that, following her medical release, she returned to her pre-injury job at her pre-injury wage rate until she lost her position for reasons not causally-connected to work-related injury. Moreover, the only evidence offered to support the claims of alleged difficulty in

performing her pre-injury job duties upon retuning to work was Lipa's own self-serving testimony. Lipa's strategy of solely relying on her own testimony and failing to offer corroborating testimony, affidavits or records of any kind has previously been rejected by the Mississippi Supreme Court. See Walker Manufacturing Company v. Cantrell, 577 So. 2d 1243, 1248 (Miss. 1991).

Lipa also attempts to rely on the testimony of Doug Pugh, an improperly-noticed witness.¹ In her Response, Lipa states that Pugh's testimony established that she was "stuck" in her job and pay level by the Union contract "forever." See Appellee's Brief to the Court of Appeals at 17-18. This argument greatly mischaracterizes the testimony offered by Pugh as it regards the impact of the Union contract on Lipa's situation. To the contrary, on cross-examination at the Hearing, Pugh testified under oath that the Union contract did **not** prevent Lipa from bidding on other jobs at Omnova which she can physically perform and for which she has the requisite seniority. (Tr. 38-39).

At the end of the day, although she provided a lengthy recitation of several factors and tests used in establishing a loss of wage earning capacity claim, Lipa's Response could not cure the overriding fact that she failed to meet her burden of proof in establishing a loss of wage earning capacity claim at the Hearing.

3. Omnova Presented Substantial Additional Evidence Which Established No Loss of Wage Earning Capacity.

While Lipa failed to meet her burden at the Hearing, Omnova took the extra steps of presenting substantial additional evidence to establish that she sustained no loss of wage earning capacity—even though Omnova could have rested on the benefit of the Agee presumption and Lipa's failure to meet her burden of proof. First, Omnova offered testimony from Kathy Brown,

¹ The issue of the improper disclosure of Doug Pugh is discussed in detail in Section III.B.

its corporate representative, who testified that, following Lipa's "bump" to a factory trucker position, the company posted several job openings with duties that Lipa could perform and that paid wages either at or exceeding the pay of her pre-injury position. Brown further testified that Lipa failed to bid on any of these jobs.

In her Response, Lipa takes issue with the Brown's testimony, arguing that she was not "laying out at the house claiming to be hurt eating bonbons." See Appellee's Brief to the Court of Appeals at 18. Omnova never claimed that Lipa did not make a reasonable effort to return to work as soon as possible. So the "bon-bon" argument is a red-herring. Omnova did, however, insist that Lipa be held to the standard historically required by the Courts—that a claimant must make a reasonable good-faith effort to seek post-injury employment. See Vardamann S. Dunn, Mississippi Workers' Compensation, §72.1 (citing Sardis Luggage Co. v. Wilson, 374 So. 2d 826 (Miss. 1979); Compere's Nursing Home v. Biddy, 243 So. 2d 412 (Miss. 1971)).

Here, although Lipa continued to work, she repeatedly had the opportunity to increase her post-injury wages but failed to take reasonable efforts to do so. She failed to bid on any of the multitude of higher wage jobs posted as open. Kathy Brown's testimony and the cross-examination of Doug Pugh confirmed Lipa's lack of effort to bid on job openings. Lipa cannot claim loss of wage earning capacity benefits when she lacked the required job-seeking diligence required under Mississippi law. Lipa's reasons for not bidding on the open jobs are specious and subjective. In fact, we will never know whether she would have been awarded a job because she failed to bid upon the job openings. Furthermore, other than her subjective belief that she could not perform the posted jobs, we will likewise never know if her "belief" was well founded because the jobs for which she could have been awarded—since she held the requisite seniority—were not bid upon by her, and she never attempted to perform these jobs.

Did she
hold out to bid on
the jobs
to argue
higher wages?
Dun Tt?

Omnova also offered testimony from Sam Cox, a vocational rehabilitation expert, who opined that Lipa did not sustain a loss of wage earning capacity resulting from her work-related injury. In her Response, Claimant broadly states that “Mr. Cox also admitted that if Ms. Lipa were not able to work at Omnova there would be a loss of wage earning capacity.” See Appellee’s Brief to Court of Appeals at 17. The summary of Cox’s testimony is a gross mischaracterization. Cox actually testified that, if Lipa were to ever leave Omnova’s employment, she would sustain an initial decrease in wage earning capacity. However, Cox also confirmed that Claimant’s wages would increase to the point that her compensation would equal her pre-injury wage rate with Omnova. (Tr. 97). *↳ But if raise (normal raise?)*

Omnova could have rested on the favorable presumption afforded it under Agee. Instead, Omnova took the affirmative steps of presenting substantial additional evidence to further establish that Lipa did not sustain a loss of wage earning capacity as a result of her work-related injury.

4. Lipa Failed to Establish That Her Post-Injury Reduction in Wages Was Related to Her Work-Related Injury.

While Lipa did sustain a reduction in her wages after her injury, that fact does not automatically qualify her for loss of wage earning capacity benefits. To prevail on a loss of wage earning capacity demand, a claimant must establish that her diminution in wages was a direct result of a work-related injury. See Guardian Fiberglass, 751 So. 2d at 1204; Packard Elec. Div., 523 So. 2d at 331. In its initial Brief on this appeal, Omnova demonstrated that Lipa returned to her pre-injury job at her pre-injury pay following her medical release, and that her post-injury wage reduction resulted from the operation of the union contract.

Lipa’s Response on this point misses its mark. Instead of focusing on the effect of the union contract on her alleged loss of earning capacity, Lipa claims that the union contract

“stuck” her forever in a lower paying position. Lipa also claims a five year line of “unbroken” case law controls on this issue. Both of these assertions are misplaced and in fact, support Omnova’s position—not Lipa’s. Russell v. Southeastern Utilities Co., 230 Miss. 272, 284 (1957)² applies only when an employer pays a disproportionately higher wage rate based upon sympathy and influence of a union. Here, there is no evidence that either sympathy or influence caused an inflated wage rate for Lipa after she returned to work. To the contrary, what Omnova argues is that the wage rate paid to Lipa was equal to the amount paid by Omnova to her pre-injury, and that after she began work, her wages were reduced by operation of the union contract (a factor beyond the control of Omnova) and Lipa’s refusal to bid on jobs available in the plant. The Russell decision is not applicable because sympathy and influence have not artificially “inflated” Lipa’s wages—instead, the operation of the union contract and Lipa’s choice not to bid on open positions has “artificially” reduced her wages—and this should not be held against Omnova.

5. Summary.

For the reasons demonstrated above, Lipa has failed to establish a loss of wage earning capacity resulting from her work-related injury. The law provides Omnova with a presumption of no loss of wage earning capacity due to her injury and Lipa did not present sufficient evidence to overcome this presumption. Nothing in Lipa’s Response changes these facts. Accordingly, the Commission’s decision to award Lipa benefits for loss of wage earning capacity was not

² The “long-line” of cases is actually non-existent, at least with regarding to union sympathy and influence. The Russell decision has been cited twelve times by Mississippi courts for the proposition that the Agee presumption is a rebuttable presumption and a question of fact. In fact, only two decisions refer to the sympathy factor. In Wilder v D.D. Ballard Constr. Co., 187 So. 2d 308, 311 (Miss. 1966), the Court refers to the sympathy factor, and, like this Court as well, held that the “claimant offered no proof in rebuttal as to the unreliability of post-injury earnings” and thus the claimant’s loss of wage earning capacity was rejected. In James F. O’Neil, Inc. v. Livings, 98 So. 2d 148, 151 (Miss. 1957), the Court likewise held that “earnings equal to pre-injury earnings are strong evidence of non-impairment of earning capacity” and the burden is on the claimant to rebut the presumption with evidence, such as hard proof of the union sympathy factor.

supported by substantial evidence and this Court should reverse the Commission's Order with judgment rendered in Omnova's favor.

B. The Mississippi Workers' Compensation Commission Erred in Allowing the Testimony of Doug Pugh Because His Identity Was Not Properly Disclosed Before the Hearing on the Merits.

In her Response, Lipa has admitted Omnova's second contention of appeal in this case concerning the testimony of Doug Pugh: "Mr. Pugh was not listed as a witness on the Claimant's Pre-Hearing Statement" See Appellee's Brief to the Court of Appeals at 22. Procedural Rule 5 of the Mississippi Workers' Compensation Commission mandates that each party specify the names of their lay witnesses in advance of a hearing on the merits. The Mississippi Court of Appeals has held that a violation of procedural rules can serve as grounds for reversal on appeal, if the aggrieved party establishes prejudice. See Greenwood Utilities v. Williams, 801 So. 2d 783, 789-90 (Miss. Ct. App. 2001).

As outlined in its initial Brief on this appeal, the Commission's decision to allow Pugh's improperly-noticed testimony at the Hearing clearly prejudiced Omnova. See Omnova's Brief at 11. In her Response, Claimant attempts to downplay the impact of this admitted violation of the Commission's Procedural Rules. In fact, in defense of her violation, Lipa trivializes the importance of the Procedural Rules. Lipa claims that, since Pugh's testimony related to loss of wage earning capacity and since loss of wage earning capacity was an obvious issue in this case, there is no prejudice. To adopt the standard apparently suggested by Lipa would negate the need to identify any witnesses at all in Pre-Hearing Statements, and allow the parties to call any surprise witnesses they want. This trial by ambush is the very outcome the Procedural Rules are designed to prevent.

Moreover, at the heart of this issue is the heavy reliance Judge Harthcock placed on Pugh's testimony in reaching her decision. Nearly half of Judge Harthcock's Order discusses

Pugh's testimony and how it supports Lipa's alleged loss of wage earning capacity; it is clear Pugh's testimony prejudiced Omnova. (Vol. 2 R. 60-67). The Commission's Procedural Rule 5 and the elements of Greenwood Utilities confirm that Judge Harthcock and the Commission clearly erred in allowing Pugh to testify. Omnova outlined its prejudice in its initial Brief. The Court should strike and disregard it. The testimony of Pugh should not be allowed to support Lipa's position on appeal.

C. The Mississippi Workers' Compensation Commission Erred in Awarding Lipa Penalties and Interest.

Lipa half-heartedly addresses Omnova's contentions regarding the Commission's error in awarding Claimant penalties and interest in this matter. At the time of the award, there were no payments due and owing to Lipa. Accordingly, there are no factors presently requiring the assessment of penalties and/or interest against Omnova in this case.

Section 71-3-37 of the Mississippi Code mandates a ten percent (10%) penalty on unpaid compensation benefits prior to an award. MISS. CODE ANN. §71-3-37(5). The 10% penalty is immaterial for purposes of this case because before the award from the Commission, there were no unpaid compensation benefits due and owing. Before the Hearing, both parties agreed that Omnova paid all total temporary disability benefits and medical benefits that had accrued at the time of the award. (Ex. 3 at 22-23). Given the nature of Lipa's injury, and the uncertainty of her loss of wage earning capacity claim, any award of permanent partial disability benefits in this case is not due and owing until after the Commission's order is final. In her Response, Lipa contends that the employer has the burden of showing that it paid compensation installments

when due. See Appellee's Brief to the Court of Appeals at 24. Omnova clearly satisfied this obligation. Thus, there is no basis for a penalty and/or interest assessment against Omnova.³

III. CONCLUSION



The Commission erred in reaching its decision in this case. Lipa failed to present sufficient evidence to overcome the Agee presumption and meet her requisite burden of proof. In fact, Omnova—though not bearing the burden of proof—presented sufficient evidence to establish that Lipa did not sustain a loss of wage earning capacity due to her injury. Additionally, Omnova was clearly prejudiced by the Commission's decision to allow testimony from a witness that Lipa admits she failed to properly disclose. Finally, Lipa's argument as to the assessment of penalties and interest is half-hearted at best. Omnova paid all benefits that had accrued at the time of the award, and thus, there is no basis for a penalty and/or interest assessment against Omnova.

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

OMNOVA SOLUTIONS, INC.

By: 
One of Its Attorneys

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³ Moreover, Judge Harthcock's Order only assessed penalties and interest if appropriate. As shown above, penalties and interest are not appropriate in this case.


CERTIFICATE OF SERVICE

I, Stephen J. Carmody, do hereby certify that I have this date mailed, via United States Mail, postage prepaid, a true and correct copy of this REPLY BRIEF OF APPELLANT OMNOVA SOLUTIONS, INC. to the following:

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

This, the 15th day of September, 2008.



Stephen J. Carmody