

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

BRIEF OF APPELLANT OMNOVA SOLUTIONS, INC.

On Appeal from the Circuit Court of Lowndes County, Mississippi

(Oral Argument Requested)

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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.

Appellant

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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. 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. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Self-insured employer Omnova Solutions, Inc. ("Omnova") has appealed the Order of Honorable Lee J. Howard ("Judge Howard"), dated February 27, 2008 ("Judge Howard's Order").

A. Procedural History

Lipa has alleged she sustained a loss of wage earning capacity resulting from a work-related back injury. On March 25, 2002, Lipa filed her workers' compensation claim. In her Petition to Controvert, Lipa alleged a work-related injury date of July 20, 2000. Administrative Judge Tammy Green Harthcock ("Judge Harthcock") conducted a hearing on the merits of Lipa's petition to controvert on November 15, 2006 ("Hearing"). In her January 3, 2007 Order, Judge Harthcock found that Lipa sustained a loss of wage earning capacity resulting from her back injury. Judge Harthcock awarded Lipa permanent disability benefits of \$30.02 per week beginning July 9, 2002 and continuing for a period of four hundred fifty (450) weeks. This award was based on the difference between the wages in Lipa's pre-injury job and the wages in the job Lipa was eventually placed in some five months after returning to work at Omnova. In addition, Judge Harthcock granted Lipa a ten percent (10%) penalty and interest award for each installment not timely paid. Judge Harthcock also credited Omnova for any payments of compensation it had made before her ruling. Finally, Judge Harthcock ordered Omnova to pay

for, furnish and provide Lipa with all reasonable and necessary medical services and supplies she requires due to her injury.

On January 18, 2007, Omnova appealed Judge Harthcock's Order. On June 5, 2007, the Full Commission affirmed Judge Harthcock's Order. On June 20, 2007, Omnova appealed the Order of the Full Commission to the Lowndes County Circuit Court. Judge Howard's Order was issued on February 27, 2008, in which he affirmed the Full Commission's Order.

On March 20, 2008, Omnova appealed Judge Howard's Order to this Court. Specifically, Omnova challenges the Commission's ruling of loss of wage earning capacity. Omnova also contends that Judge Harthcock erred in considering the testimony of a lay witness not disclosed in Lipa's discovery responses or pre-hearing statement. Additionally, Omnova appeals the Commission's imposition of penalties and interest.

B. Factual Summary

Lipa sustained a work-related back injury on July 20, 2000. (Vol. 2 R. 1)¹. After nearly two years of medical treatment, Lipa was released to return to work between June 20 and July 8, 2002. (Ex. 1). Her treating physician, Dr. Robert Smith, limited Lipa to "light duty" work for a six month period. Six months later, Lipa was released to advance toward full duty work. (Ex. 1).

At the Hearing, Lipa testified that, upon being medically released to return to work, Omnova placed her in her pre-injury position—a let-off operator—at her pre-injury wage rate. (Tr. 63). Lipa testified that she remained in her pre-injury job for a period of four to five months, at which point she was "bumped" from her position by another employee with greater seniority. (Tr. 15; 63). This "bump" was a direct result of the operation of the terms of the collective-

¹ Citations to the record will be abbreviated as follows: Exhibits – "(Ex. __)"; Clerk of the Lowndes County Circuit Court's Papers – "(Vol. 1 R. __)"; Clerk of the Mississippi Worker's Compensation Commission – "(Vol. 2 R. __)"; Transcript from the Hearing at the Mississippi Workers Compensation Commission on November, 15, 2006 – "(Tr. __)".

bargaining agreement between Omnova and its employees (“union contract”). As a result of the operation of the union contract, Lipa was transferred to a “factory trucker” position, which was a lower paying job.² (Tr. 64).

Between the time of her transfer to the factory trucker position and the Hearing, numerous positions within Omnova that were both higher paying and within Lipa’s work restrictions became available. (Tr. 79-80; Ex. 7). At the hearing, Omnova proffered testimony from Kathy Brown, Omnova’s corporate representative, who explained that nothing in the union contract prohibited Lipa from bidding on other positions after she was transferred to a factory trucker position. (Tr. 77-79). Despite this freedom to seek a higher paying job, both Lipa and Brown testified that, after being placed in the factory trucker position and continuing to work there for over three years, Lipa did not bid on or otherwise attempt to transfer to a higher paying job within Omnova. (Tr. 66; 81).

At the Hearing, Lipa offered testimony from Doug Pugh, the president of Lipa’s local union. However, Lipa did not disclose the identity of Pugh in her discovery responses or her pre-hearing statement. Pugh’s testimony was objected to by Omnova’s counsel during the hearing. (Tr. 9-10). Pugh confirmed that Lipa’s transfer was driven by the union contract. Over Omnova’s counsel’s objection, Pugh also offered testimony that Lipa was prohibited from bidding on another job within the plant by the operation of the union contract—a point directly contested by Omnova’s representative. (Tr. 15-16; 24; 77-79).

Also at the Hearing, Omnova presented testimony from Sam Cox, a vocational rehabilitation expert. In Cox’s expert opinion, Lipa did not sustain a loss of wage earning capacity as a result of her work-related injury. (Tr. 94). In reaching his opinion, Cox considered

² Specifically, Judge Harthcock found the job of let-off operator to pay approximately \$45.00 per week more than the job of factory trucker, and used this figure in computing her final award for loss of wage earning capacity. (Vol. 2 R. 66-67).

the fact that Lipa returned to her pre-injury position and pre-injury wages upon returning to work at Omnova, and that her lifting restrictions only prohibited work in heavy to very heavy categories. (Tr. 94-97). Moreover, Cox noted that Lipa possessed above-average education and training, and remained highly employable. (Tr. 95-96).

III. SUMMARY OF THE ARGUMENT

The Commission erred in affirming Judge Harthcock's award of loss of wage earning capacity, because Lipa failed to meet the requisite burden of proof in establishing a loss of wage earning capacity resulting from her work-related injury. While Lipa did experience a post-injury wage reduction, she did not experience a post-injury loss of wage earning capacity **as a result of her work-related injury**. To the contrary, Omnova returned Lipa to her pre-injury job at her pre-injury wage rate, where she worked for four to five months. The sole reason for Lipa's eventual reduction in wages was a result of the operation of the union contract. Lipa's lack of effort to bid on or seek higher paying jobs is the reason for her decline in wages. Furthermore, the Commission erred in allowing and relying heavily on the testimony of a witness who was not disclosed in her pre-hearing statement or discovery responses. Finally, the Commission erred in assessing penalties and interest.

IV. ARGUMENT

A. Standard of Review

In accordance with Mississippi jurisprudence, appellate courts are charged with reviewing all questions of law and fact rendered by the Commission. MISS. CODE ANN. §71-3-51. Generally, "[i]f the Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby." Id. However, appellate courts are empowered to overrule findings 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. Fought v. Stuart C. Irby Company, 523 So. 2d at 317 (Miss. 1988); §71-3-51.

B. The Mississippi Workers' Compensation Commission Erred in Ruling That Lipa Sustained a Loss of Wage Earning Capacity.

The Commission erred in finding a loss of wage earning capacity because Lipa failed to meet her requisite burden of proof. Dr. Smith assessed Lipa a 10% permanent impairment rating to the body as a whole stemming from the work-related injury. (Vol. 2 R. 65). In “whole body” injury claims, the extent of permanent disability is a multi-part assessment. See Guardian Fiberglass, Inc. v. LeSueur, 751 So. 2d 1201, 1204 (Miss. Ct. App. 1999); Robinson v. Packard Elec. Div., General Motors Corp., 523 So. 2d 329, 331 (Miss. 1988). A claimant not only must establish a medical impairment as a result of the work-related injury, but she also bears the burden of establishing: (1) her alleged loss of wage earning capacity, and (2) that her alleged loss of wage earning capacity resulted from the work-related injury—both by “competent, credible evidence which is beyond speculation, conjecture and possibility.” Guardian Fiberglass, 751 So. 2d at 1204; Packard Elec. Div., 523 So. 2d at 331. “Loss of wage earning capacity” in this context is determined by comparing a claimant’s pre-injury wages with post-injury wage earning capacity. Vardamann S. Dunn, Mississippi Workers’ Compensation §67 (3rd ed. 1982) (emphasis added); see also Karr v. Armstrong Tire & Rubber Co., 61 So. 2d 789 (Miss. 1953). Post-injury wage earning capacity is demonstrated through a variety of factors, including post-injury wages, physical limitations, the claimant’s age, whether the employer rehires the claimant and the ability of the claimant to find other employment given his or her medical condition. See, e.g., Packard Elec. Div., 523 So. 2d at 329.

1. Omnova Was Entitled to a Presumption of No Loss of Wage Earning Capacity, Which Lipa Failed to Overcome.

At the outset, it is important to note that Omnova receives the benefit of an important presumption under the law. When an employer allows a claimant to return to his or her pre-injury position and wage rate, Mississippi jurisprudence creates a presumption of no loss of wage earning capacity. See Agee v. Bay Springs Forest Products, Inc., 419 So. 2d 188 (Miss. 1982). Here, it is undisputed that following her achievement of maximum medical improvement, Lipa returned to her pre-injury job at her pre-injury wage rate with Omnova. (Vol. 2 R. 61). Accordingly, Lipa bore the burden of overcoming a presumption regarding her alleged loss of wage earning capacity. Lipa failed to provide the evidence necessary to overcome this burden.

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

At the Hearing, Lipa has failed to overcome the Agee presumption which favors Omnova. Lipa failed to put forth sufficient proof to establish that she actually sustained a loss in her capacity to earn wages. Before Judge Harthcock, Lipa testified as to the alleged difficulty she experienced in performing her job duties as a let-off operator after returning to her pre-injury job. (Tr. 63-64). However, her self-serving testimony was the only evidence offered by Lipa to support her claim of difficulty in performing her pre-injury job duties. Lipa's testimony merely established that, following her medical release, she returned to her pre-injury job at her pre-injury wage rate until such time as she lost her position **for reasons not related to her work-related injury**. Lipa testified that she could only perform her work duties because she received help from co-workers. However, no testimony or affidavits were offered from co-workers to support this claim. The Mississippi Supreme Court has previously ruled against workers ^{add or new Ch ?} compensation claimants who fail to produce "any witnesses to corroborate [their] statements of inability to work or perform the usual duties of [their] customary employment." See Walker

Manufacturing Company v. Cantrell, 577 So. 2d 1243, 1248 (Miss. 1991). Moreover, there is no record of any complaint being made by Lipa to Omnova management regarding her alleged difficulty.

(a) Omnova Presented Substantial Evidence Which Established No Loss of Wage Earning Capacity.

Even though it did not have the burden of proof, Omnova presented substantial evidence at the Hearing which confirmed that Lipa did not suffer a loss of wage earning capacity. First, Lipa's testimony about loss of wage earning capacity was directly refuted by expert testimony. Sam Cox, a vocational rehabilitation expert, testified that Lipa had not sustained a loss of wage earning capacity. (Tr. 94). In reaching this opinion, Cox considered the following uncontroverted facts: (1) Lipa returned to her pre-injury position and earned her pre-injury wages upon returning to work at Omnova; (2) Lipa successfully performed her duties at this position; (3) Lipa's work restrictions only prohibited work in heavy to very heavy categories; and (4) Lipa possessed an above-average education and training, and remained highly employable. (Tr. 94-97).³

Lipa's failure to seek higher paying jobs within Omnova after her collective bargaining agreement-"bump" forecloses her claim for loss of wage earning capacity. Although Lipa currently earns less than she did before her injury is due, this is a result of her own actions or inactions. Lipa has maintained her union contract-"bump" position for over three years. During this time period, Lipa possessed the right under the union contract to bid on other higher paying

³ While Cox testified that, if Lipa were to ever leave Omnova's employment, she would sustain an initial decrease in wage earning capacity, Cox went on to opine that Lipa's wages would increase, ultimately to the point of her pre-injury wage rate. (Tr. 97). Any decrease in wage rate Lipa may hypothetically sustain between Omnova and another employer would be attributable to the union contract—not because of Lipa's work-related injury.

positions as they came available.⁴ At the Hearing, Kathy Brown, Omnova's corporate representative, testified that following Lipa's "bump" to a factory trucker, at least two positions were available that Lipa could perform, for wages at or exceeding the pay in her pre-injury position. (Tr. 79-80). Brown further established Lipa failed to bid on those available job openings, and no employees with greater seniority bid on the open jobs. (Tr. 66; 81).

Mississippi courts have repeatedly conditioned worker's compensation loss of wage earning capacity awards on an employee making a reasonable good-faith effort to find post-injury employment. See Dunn, Mississippi Workers' Compensation at §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)). Similarly, Lipa has repeatedly had the opportunity to increase her post-injury wages but failed to take reasonable efforts to do so. Therefore, Lipa did not establish a loss of wage earning capacity.

(b) Lipa Was Not Entitled to a Presumption of Disability Under the Jordan Line of Cases.

Lipa's position is not supported by the line of "failure to rehire" decisions. In this line of cases, a presumption of disability in favor of a claimant is established only if an employer fails to rehire the employee and that employee cannot return to his or her pre-injury wage level. Jordan v. Hercules, 600 So. 2d 179, 183 (Miss. 1992); Marshall Durbin, Inc. v. Hall, 490 So. 2d 877 (Miss. 1986). While it is true that she does not make the same wages as employees currently working in her pre-injury position, Lipa is not however entitled to the Jordan presumption.

Recently, the Mississippi Court of Appeals clarified Jordan's application. In Entergy Mississippi, Inc. v. Robinson, a worker's compensation claimant sought to utilize the "failure to rehire" framework when her employer was unable to place her in her pre-injury position because

⁴ Claimant's witness, Doug Pugh, admitted that the union contract did not prevent Lipa from bidding on other jobs at Omnova which she could physically perform and for which she possessed the requisite seniority. (Tr. 38-39).

that position had been totally eliminated during her convalescence. 777 So. 2d 53 (Miss. Ct. App. 2000). The Court of Appeals held that, despite the employer's technical failure to rehire, the claimant still possessed the overall burden of establishing that she sustained a loss of wage earning capacity. Id. at 56-57.

The fact that a claimant's post-injury wages are lower than his or her pre-injury wages does not satisfy a claimant's burden of proof. A claimant **must** establish that, **as a result of a work-related injury**, he or she sustained a loss of wage earning capacity. Id. at 56. At the Hearing, Lipa failed to prove that her diminution in wages following her injury was a result of her work-related injury. Accordingly, she is not entitled to a presumption of disability under Jordan.

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

As stated above, to establish a claim for loss of wage earning capacity, a claimant must establish that her diminution in wages was a causal result of her work-related injury. See Guardian Fiberglass, 751 So. 2d at 1204; Packard Elec. Div., 523 So. 2d at 331. Lipa failed to meet the burden of establishing a loss of wage earning capacity claim, because her post-injury wage reduction was in no way related to her injury. To the contrary, Lipa's post-injury wage-reduction was a direct result of the operation of the union contract. After reaching maximum medical improvement and returning to her pre-injury job at her pre-injury wage rate for a four-to-five month period, Lipa was eventually "bumped" out of her position by another employee with more seniority. (Tr. 15; 63). As a result, Lipa was placed in a lower paying position solely in accordance with the terms of the union contract.

General workers' compensation law holds that a loss of employment or reduction in wages not based on a claimant's work-related injury—such as that which comes with a economic

conditions, the operation of “bump” clauses in a union contract, or the voluntary employment decision of the claimant—should not serve to support a finding of disability benefits. See 4-84 Larson’s Worker’s Compensation Law §84.02 (2008). In Mazziotto v. Brookfield Constr. Co., 40 A.D. 2d 245 (N.Y. 1972), after sustaining a work-related injury, a claimant returned to his pre-injury job. However, after returning to work, the claimant was temporarily laid off due to a lack of available work and eventually forced to retire as a result of the operation of the union contract. On appeal, the court held that, in worker’s compensation cases, a claimant has the burden of showing that any alleged wage loss was due to his injury—not due to the operation of his union’s regulations. Id. at 247. Similarly, Lipa cannot establish a loss of wage earning capacity by merely pointing to the difference between her pre-“bump” wages and her post-“bump” wages, because her “bump” had absolutely nothing to do with her work-related injury.

The case of Meyers v. Bell Aerosys., 43 A.D. 2d 869 (N.Y. 1974) dealt with a claimant who suffered a back injury while working for Bell. Following his recovery, the claimant was given a new job by Bell at his pre-injury rate of pay. However, the claimant later voluntarily quit this job at Bell because other employees were being laid off and the claimant decided to take a lower paying job with another employer that he considered to be more secure. The Bell court found that any loss of earning the claimant incurred due to his voluntary change of employment was not causally-connected to his work-related injury, and thus not compensable. Id. Similarly, Lipa’s decision to remain in her lower paying, post-“bump” position—despite having numerous opportunities to bid into higher paying jobs within the company—was a voluntary decision not causally-connected to her work-related injury, and is not compensable.

The Michigan courts have confirmed this general rule. In Jones v. Auto Specialties Mfg. Co., 177 Mich. App. 59, 64; 441 N.W.2d 1 (1988), the claimant began work for the employer in 1947. He injured his back in the early 1950’s, but continued in the same job until 1954, when he

bid for a different position. This new position reagravated his back injury, and he bid for a lighter job in 1969 and again in 1980. The claimant left work in June 1980, due to a strike, and elected early retirement in February 1981, due to the continued strike. He then filed for disability, listing injury dates of the early 1950's and June 1980. In determining the claimant's wage earning capacity, the Michigan's equivalent of the Commission determined that the jobs the claimant subsequently bid for constituted **self-imposed** "favored work," and therefore the claimant was entitled to loss of wage earning capacity finding. "Favored work" was work offered by the employer and, while the claimant may have bid on the subsequent jobs because of his back condition, they were given to him solely because of the union seniority system, not by the employer in a decision to provide lighter work to mitigate their liability. The Court reasoned that "there is absolutely no indication on the record that plaintiff's condition motivated defendant to place him in lighter work that constituted favored work in mitigation of disability compensation liability." Id. at 65. The Court cited Pigue v. General Motors Corp., 317 Mich. 311; 26 N.W.2d 900 (1947), to support its holding that where a worker is able to perform work, but declined to do so because of his union's strike, the worker was not entitled to benefits during the strike period.

The Jones Court specifically rejected the claimant's attempt to manipulate the bidding process to increase his disability payments:

[The Michigan Workers Compensation Commission] concluded that favored work can be self-imposed by the worker and that, by bidding down, plaintiff unilaterally entered into favored work. We disagree. **(Were this true, under Powell, supra, a worker could virtually assure a disability determination simply by bidding down following any injury. The favored-work doctrine should not be distorted to allow this result.)**

Jones, 177 Mich. App. at 64 (emphasis added).

Similar to the Michigan appellate court rulings, this Court should not allow Lipa to manipulate the bidding process to increase her loss of wage earning capacity. Lipa's "bump" down to a lower paying position was a direct result of her involvement in the union and by operation of the union contract. Lipa's lack of diligence in failing to bid upon open, higher paying positions should not be rewarded. She should not be allowed to distort the collective bargaining bidding process in her favor in order to receive loss of wage earning capacity disability benefits.

4. Summary

For the reasons demonstrated above, Lipa has failed to establish a loss of wage earning capacity resulting from her work-related injury. Omnova is entitled to a presumption that Lipa did not sustain a loss of wage earning capacity due to her injury and Lipa did not present sufficient evidence to overcome this presumption. Accordingly, the Commission's decision to award Lipa benefits for loss of wage earning capacity was not supported by substantial evidence and this Court should reverse the Commission Order with judgment rendered in Omnova's favor.

C. 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.

The Commission also erred in allowing the testimony of Doug Pugh, a union representative and a witness for Lipa. Pugh's testimony was a significant portion of Lipa's evidence used to establish her claim for a loss of wage earning capacity. Judge Harthcock relied heavily on his testimony in her Order. (Vol. 2 R. 60-67). In fact, nearly half of her Order discusses Pugh's testimony and how it supports Lipa's alleged loss of wage earning capacity. (Vol. 2 R. 60-67).

Judge Harthcock should not have allowed Pugh to testify because Lipa failed to disclose Pugh's expected testimony—either in her discovery responses or in her pre-hearing statement.

(Tr. 10-11). According to the Commission's own Procedural Rules, "each party must submit a prehearing statement . . . and set forth: . . . [the] [n]ame and address of each lay witness except those called for impeachment or rebuttal purposes" MISS. WORKERS' COMP. COMM. PROC. R. 5 (emphasis added). Pugh was presented by Lipa in her case-in-chief. Accordingly, failure to disclose Pugh as a testifying witness was a blatant violation of the Commission's procedural rules and resulted in a hearing by ambush.

In addressing omissions of witnesses from a pre-hearing statement, the Mississippi Court of Appeals held that it can be an abuse of discretion to allow testimony of witnesses whose identities were not disclosed in a pre-hearing statement. In Greenwood Utilities v. Williams, the Court of Appeals held that a party claiming a violation of Rule 5 must specifically demonstrate how it was prejudiced by the allowance of the testimony. 801 So. 2d 783, 789-90 (Miss. Ct. App. 2001). Here, Judge Harthcock and the Commission abused their discretion in allowing the testimony of Pugh.

The decision to allow this testimony clearly prejudiced Omnova. Judge Harthcock relied heavily on upon the testimony of Pugh. She discussed his testimony in great detail and gave his interpretation of the collective bargaining agreement greater weight than Omnova's representative. (Vol. 2 R. 62-64). If Lipa had disclosed that Pugh planned to testify in her discovery responses and/or pre-hearing statement, Omnova would have been able to take his deposition before the hearing. Moreover, a pre-hearing disclosure would have allowed Omnova an adequate opportunity to prepare a thorough cross-examination regarding his interpretation of the collective bargaining agreement. Finally, Omnova would have had adequate time to prepare and produce witnesses to refute Pugh's testimony. However, Omnova did not take any of these steps because it did not have adequate time to prepare for Pugh's testimony before to the hearing.

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. Pugh's testimony should be stricken and disregarded by this Court and should not be allowed to support Lipa's position on appeal.

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

The Commission erred in assessing penalties and interest on its award in this case. 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. MISS. CODE ANN. §71-3-37(5). The 10% penalty is immaterial for purposes of this case because before the Hearing and the ruling by the Commission, there were no payments due and owing. Omnova paid all total temporary disability benefits and medical benefits that had accrued at the time of the Hearing and the ruling by the Commission. Given the nature of Lipa's injury, any award of permanent partial disability benefits in this case is not due and owing until after the Commission's order is final. Thus, there is no basis for a penalty and/or interest assessment against Omnova in this case.

V. CONCLUSION

Lipa has failed to meet her burden of proof in establishing a loss of wage earning capacity **resulting from her work-related injury**. Lipa's inability to sustain her pre-injury wages was a result of the operation of the terms of a union contract. It was **not** a result of any nefarious motives on the part of Omnova, and most certainly was not a direct result of Lipa's work restrictions. The facts in this case do not lend themselves to an application of the Jordan presumption favoring Lipa. Instead, Omnova is entitled to a presumption of **no** loss of wage

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 BRIEF OF APPELLANT OMNOVA SOLUTIONS, INC. to the following:

Roger K. Doolittle, Esquire
460 Briarwood Drive, Suite 500
Jackson, Mississippi 39206

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

This, the 1st day of August, 2008.



Stephen J. Carmody