

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS**

WILLIAM M. SCOTT

APPELLANT/CROSS-APPELLEE

V.

NO. 2009-TS-00415

KLLM, INC., A SELF-INSURED

APPELLEES/CROSS-APPELLANTS

REPLY/REBUTTAL BRIEF OF APPELLANT/CROSS-APPELLEE

**APPEALED FROM THE CIRCUIT
COURT OF HINDS COUNTY,
MISSISSIPPI**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant/Cross-Appellee, William M. Scott, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. William M. Scott, Appellant/Cross-Appellee;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant/Cross-Appellee;
3. KLLM, Inc., Appellees/Cross-Appellants;
4. Richard M. Edmonson, Jr., Esq., Counsel for Appellees/Cross-Appellants.

THIS the 17 day of Sept, 2009.



JOHN HUNTER STEVENS

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INTRODUCTION

It appears that the one main common denominator in the brief of both Appellant and Appellees is basically that both parties agree that the Commission's Order is not based on substantial evidence and warrants reversal. It is quite obvious that the findings of the Commission, allegedly the fact-finder, do and will warrant reversal when considered by this Court due to the complete and total lack of any rational basis to support the findings of the Commission. The summary affirmance by the Circuit Court of the First Judicial District of Hinds County likewise warrants reversal since there is no discussion of the basis or factual issues, and, in fact, the Order does not even provide the appropriate administrative agency that it affirmed.¹ What warrants consideration is basically whether or not the findings of the Administrative Law Judge are in fact supported by the substantial evidence. This case, while both sides acknowledge the Commission's findings are not based on legitimate evidence or a logical interpretation of the law, this reply brief will instead address why the Administrative Law Judge's findings are supported by the substantial evidence and should be reinstated, and why the arguments of the Appellee/Cross-Appellant are without merit.

ARGUMENT

The single issue is whether or not there is substantial evidence to support the Administrative Law Judge's findings that the Claimant, even though not found to be permanently and totally disabled, has sustained a loss of wage-earning capacity in excess of the maximum allowable under the Act. To substantiate this, the Employer's brief can be summarized in two basic points. One, it argues that because of the Claimant's lack of treatment after the injury would somehow substantiate

¹ The Circuit Judge's Order reflects that the "decision of the Board of Review of the Mississippi Employment Security Commission should be and the same is hereby affirmed."

that he does not have a loss of wage-earning capacity. Furthermore, the Employer's argument is based on the additional fact that the employer's medical examination undertaken as a one-time visit, four years after the accident, wherein Dr. Weiss admitted that he could not come up with a diagnosis, and admitted his opinions were speculative should somehow substantiate the fact that the Claimant has no loss of wage-earning capacity. Finally, the Employer and Carrier urge the speculative assumption that had the Claimant come back and reapplied for a job with KLLM, they might have hired him back and accommodated his restrictions despite admitting he could not be a truck driver, but he might could work in a office position (shredding paper) in Jackson, Mississippi, (despite the fact that he has always lived in Nashville, Tennessee) or might possibly shuttle cars or people around. This is despite the fact that he was terminated and there isno evidence in this record as to how much wages he would have been paid based on this speculative position with Employer and Carrier. Even though the record is further devoid of evidence wherein they made any attempt whatsoever to offer him a position knowing full well what his restrictions were and that he could not return to his truck driving. Again, this is despite the fact that they basically accused him of lying and denied his claim for a period of four years. The fact that a speculative offer could be the basis of any evidence when no wage amount was even discussed in the record is not, sufficient evidence to warrant a reversal of the Administrative Law Judge's findings or to rebut the presumption of total disability since he was fired and not able to do his prior job as a driver.

With regard to the lack of treatment, this again is an argument that is self-defeating. Based on the evidence in the record, the Claimant was not treated significantly by his primary treating physician was based on the fact that the Employer denied the claim for over four years, which obviously affected the Claimant's ability to get proper and complete medical treatment. In addition,

although there is some indication that one doctor did indicate injections as treatment, but that the Claimant decided not to take make help his condition. There is no evidence in this record that those injections would have changed his work restrictions or ever allowed him to be able to return to work as a truck driver. In fact, just the opposite is obvious from the record. (Gen. Ex. 2 Powell Report of 7-26-05) One, even Dr. Weiss, who gave an admittedly speculative opinion (Weiss Depo. Pgs. 8, 13, 16, 19), concurred with Dr. Powell and Dr. Head's opinions that the Claimant should continue to take narcotic pain medication. (Ex. 13, Pgs. 17-18, 24, Weiss Depo.) The Employer's lone witness admitted and acknowledged that there was no way that her company would allow Mr. Scott to return to truck driving as long as he was on narcotic pain medications prescribed by his primary treating physician. (T. 63) Dr. Powell is the one who gave him permanent restrictions, and testified he could not return to driving a truck. Also, the same narcotic medication that Dr. Robert Weiss testified under oath was a legitimate medication legitimately prescribed by his physician. There is simply no evidence in this record to indicate that Dr. Weiss' admittedly speculative opinions refute the one overriding factor in this case who testified or gave evidence acknowledges that the Claimant cannot return to work as a truck driver. Therefore, the evidence is unequivocal that he has sustained a loss of wage-earning capacity.

The question is, as admitted by the Employer and Carrier, the findings of the Commission are not supported by the substantial evidence, or in fact, not supported by any evidence or law or even common sense is that how this Commission could amazingly reduce the award to 20% loss of wage-earning capacity. By doing so, this Commission is basically saying that the evidence in this record supports a finding that the Claimant still has a wage-earning capacity even though no one disputes that he cannot drive a truck, but that he is capable of earning \$620.00 per week, which is

the mathematical calculation if you find that he has a 20% loss of wage-earning capacity, based on an average weekly wage, stipulated by all parties to be \$775.00.

Claimant submits that the Commission's finding that Mr. Scott is capable of earning \$620.00 per week is unconscionable. Furthermore, the comments by the Commission in the Order by reducing the award to 20% while acknowledging that Mr. Scott could not return to his truck driving, and while acknowledging that he has sustained an impairment of 11%, and acknowledging that he is required to take narcotic pain medication realistically again states only that it appears as though the job search was "less than enthusiastic". It is nothing short of amazing that this Commission could cut the Claimant's award by 80%, yet in the same paragraph state "we don't discount the Claimant's loss of access to the type of work he was accustomed to performing. He could have returned to work at KLLM by all accounts in other suitable jobs, and his job search was less than enthusiastic, and was wasted in significant part in his pursuit of the same type of employment he was before his injury". This statement shows unequivocally that the Commission is not relying on legitimate evidence to justify an 80% reduction of the Administrative Law Judge's findings. It admits that he cannot be a truck driver, yet in the same statement states that KLLM would have taken him back to work, yet does not acknowledge any amount which they may have paid him to do a completely different job (that was never offered). It only states that the job search was not enthusiastic, yet indicates no evidence whatsoever it is not legitimate. Finally, apparently an attempt to penalize the Claimant for trying to find some type of employment in his profession that he had done for almost his complete work life. Sadly, this is part of the problem with the interpretation of the Mississippi Workers' Compensation Act. However, simply put, the findings of the Mississippi Workers' Compensation Commission must be based on at least some significant evidence. In this

case, it absolutely simply pulled this 80% reduction out of thin air. It ignores the liberal construction of the Act. Claimant submits that the Commission's findings require reversal.

CONCLUSION

The findings of the Mississippi Workers' Compensation Commission are against the overwhelming, substantial weight of the evidence. It ignores the undisputed testimony of the Claimant. It ignores the opinions of his primary treating physician, while admitting that the Claimant cannot return to his job as a long-haul truck driver. It surmises with speculation and conjecture that he is capable of earning \$670.00 per week, despite no evidence in the record to substantiate such a finding. Both parties admit that the Commission's findings are not based on legitimate evidence. The Claimant submits that the findings of the Administrative Law Judge are rational and based on legitimate substantial evidence, and should be reinstated. The Commission's reduction of the 80% loss of wage-earning capacity ignores the evidence in this case. As such, the Claimant respectfully submits that the findings of the Administrative Law Judge be reinstated, and the Commission's findings be reversed, and consequently the findings of the Circuit Court, which affirm the findings of the Commission.

Respectfully submitted the 17 day of Sept, 2009

WILLIAM M. SCOTT, CLAMANT

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CERTIFICATE OF SERVICE

I, John Hunter Stevens, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above foregoing document to:

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Hon. William Coleman
Hinds County Circuit Court Judge
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Mississippi Workers' Compensation Commission
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DATED, this the 17 of Sept, 2009



John Hunter Stevens