IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

JUAN LOPEZ — APPELLANT

V. — NO. 2009-WC-00123-COA

ZACHARY CONSTRUCTION CORPORATION AND
ZURICH AMERICAN INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF CHOCTAW COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Claimant files this appeal of the Circuit Court's affirmance of the Commission Order and Administrative Law Judge's Order awarding permanent disability benefits to the claimant. The findings of the Commission Order which was affirmed do not adequately compensate the Claimant for his actual loss of wage earning capacity. The Claimant submits that the Order should be amended to reflect, at a minimum, the amount of loss of wage earning capacity acknowledged by the Employer and Carrier's own Vocational Rehabilitation specialist, which is a minimum wage job. Any other proof to award an amount less than that is based on the conjecture and speculation, including the speculative testimony of the Claimant, wherein he indicated that he might possibly be able to do a construction type job. Furthermore, the Claimant should not be penalized for temporary total disability benefits paid for periods when he was unable to work at a doctor's excuse after the first maximum medical improvement date of December 2, 2003 for those periods when he had a legitimate doctor's excuse showing he was unable to work.

A hearing was initially had before the Administrative Law Judge and an Order of the Administrative Law Judge was entered January 3, 2008. The Claimant subsequently filed a Motion for Additional Evidence which was denied by the Commission and the findings of the Administrative Law Judge was affirmed on June 19, 2008. Subsequently, Claimant timely appealed the findings of the Full Commission on about June 28 to the Circuit Court. Subsequently, the Circuit Court of Choctaw County affirmed the findings of the workers' compensation Commission on December 16, 2008. The Appellant timely appealed this matter to the Mississippi Supreme Court

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II. STATEMENT OF FACTS

Mr. Lopez is 30 years of age and resides in Carthage, Mississippi, in Leake County. He has three children, ages ten, seven and two. Mr. Lopez went to the eleventh grade in high school and entered job corps for auto body repair. He did not finish the job corps. According to vocational testing administered by the Employer/Carrier's vocational rehabilitation case manager, his testing indicated a level between the 4th and the 8th grade equivalency. (Gen. Ex. 2)

Prior to working at Zachary Construction Corporation, he worked as a laborer, machine operator, stock clerk, carpenter and maintenance. All of which were at the medium and heavy level, except for one job as a cashier. His job at Zachary was a labor worker in the construction industry, involved heavy lifting of construction materials. He worked long hours, usually at least fifty hours per week. (Tr. at 8 & 9)

The subject admitted injury occurred when he was lifting sheet metal and slipped. He was initially treated by a local physician, Dr. Jose Paz, who ultimately referred him to Dr. Lyon Alexander, who at one point indicated the possibility of surgery. He further referred him to Dr. Ken Staggs, a pain management physician in Meridian, Mississippi. He diagnosed him with L4-5, L5-S1 Disk Extrusion.

Mr. Lopez was eventually released with restrictions and made efforts to return to work including meeting with Dawn Paradis, a rehabilitation case manager, hired to assist him in finding employment. He was laid off, and was not offered re-employment with Zachary Construction. Ms. Paradis' initial evaluation was on November 3, 2004. In addition to job searches attempted by the claimant on his own, he was also sent numerous job openings by Ms. Paradis. (Tr. at 13 & 14) His work searches were submitted to Dr. Staggs for his approval as to the physical requirements of the

job. On December 29, 2004, Dr. Staggs approved a job as a cashier at the Wal-Mart Super Center in Carthage, Mississippi which paid between $5.25 and $5.50 per hour. He also submitted a potential job opening for a courier which Dr. Staggs indicated that the injured worker could not perform inasmuch as he would be aggravated by the driving. This was a full time position that Dr. Staggs said he could not perform. Dr. Staggs approved a job as a customer service representative for the Movie Gallery in Forest, Mississippi, which paid $5.15 per hour. Dr. Staggs approved a job as a preparation worker at Subway which paid $5.25 per hour located in Carthage, Mississippi. Ms. Paradis sent a job profile for a meat, poultry and fish cutter, which the doctor opined that he could not perform inasmuch as he was limited to 30 pounds lifting. This was signed and dated by Dr. Staggs on December 29, 2004. (See Ex. 2) The claimant was not offered a position at any of these jobs. (Tr. at 14 & 15)

The Claimant continues to have problems with his back and has requested on other occasions to see other neurosurgeons; however, it does not appear as though there was any evidence that he saw any additional neurosurgeons, including a request to see Dr. John Neill. Based on the reports by the vocational rehabilitation specialists on behalf of the employer and carrier, Ms. Dawn Paradis indicates that the claimant is capable of being employed as a cashier or food preparation worker with a potential to be employed for wages between $5.25 and $5.50 per hour. This is not disputed by the employer and carrier. (Ex. 1 & Ex. 3)

The Claimant testified that he had undertaken job search efforts; however, as a result of his personal situation at the present time, he is not looking for work at the present time inasmuch as he is the primary care giver to his young children. He testified that his wife had obtained a job making wages at a poultry plant near Carthage, Mississippi, and as a result, it was economically feasible, due

to the age of his young children, for him to be a stay at home father, at least for the foreseeable future until his children are able to go to school full time. (Tr. at 15)

Mr. Lopez testified that he did not believe that he was permanently and totally disabled, and believed that he was able to be employed at a job within the restrictions of his medical providers in a modified duty position. (Tr. at 14) Although he testified that he would not be able to return to any type of construction with his symptoms, and the long hours required. He testified that he did not believe that he would be able to do any job working for Zachary as well. (Tr. at 18) This was not disputed. He had attempted to do some work around the house, and again, believes he is employable, but more than likely acknowledges this would be in a light duty job, which is based on his level of experience and education, and based on the job availability from the employer's expert vocational rehabilitation specialist would be somewhere of between $5.25 and $5.50 per hour. Again, the Claimant believed that he would be able to do work within that range. (Tr. at 16)

The Employer and Carrier had no additional evidence to refute the Claimant's loss of wage earning capacity, except reports which were put into evidence from its vocational specialist. It is noted that it does not appear that there is any evidence put forth by the Employer and Carrier to refute the restrictions and impairment rating of the Claimant's physicians, or that he would not be able to return to his prior employment at Zachry based on the restrictions.

III. ARGUMENT

The scope of review of a workers' compensation case before this Court is limited to a determination of whether the decision of the Commission is supported by the substantial evidence. *Westmoreland v. Landmark Furniture, Inc.*, 752 So.2d 444, 447 (¶7) (Miss. Ct. App. 1999). While the Commission sits as the ultimate finder of fact, its findings can be reversed if the Commission

rulings are found to be unsupported by the substantial evidence, and have matters of law that are clearly erroneous, or the decision is arbitrary and capricious. *Hale v. Ruleville Health Care Ctr.*, 687 So.2d 1221, 1225 (Miss. 1997). [A] finding can be found to be clearly erroneous when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act. *J.R. Logging v. Halford*, 765 So.2d 580, 583 (¶13) (Miss. Ct. App. 2000) (citation omitted). The Appellant submits that if you look at these findings of the Administrative Law Judge which is ultimately affirmed by the Commission and Circuit Court based these findings not on the undisputed evidence, but on speculation that the Appellant thought he might could do a portion of a job. This is in direct contradiction to the evidence submitted by the Employer and Carrier and the Appellant's primary treating physicians that there are significant jobs that he could not do and that he could only do a minimum wage job. His treating physician's reports prove he cannot return to his previous job. As such, the award should be amended to reflect the substantial evidence and not mere speculation. The evidence above is undisputed. It is clear that the Employer and Carrier's own expert opined that the Claimant was only capable of doing only a minimum wage job. No one, including the Judge herself, and even the attorney for the Employer and Carrier thought that it was unreasonable for the Claimant to stay home for at least a time period as the primary care giver of his young children while his wife had a good paying job with good benefits, including health insurance. The Claimant should not be penalized for doing something that is reasonable under the circumstances, considering he had been out of work for quite a period of time with this admitted on-the-job injury. To award anything less than the difference between his pre-injury wage of $488.70 per week and a minimum wage type job would not be based on the substantial evidence and even contradicts the carrier's own expert.

While the Claimant did graduate from high school, and had job corps training, testing by the employer and carrier's vocational rehabilitation case manager indicate his education level between the 4th and 8th grades. His employment history, with the exception of being a cashier, indicates medium to heavy work, both of which is doubtful based on the unrefuted medical and the testimony of the Claimant that he would be unable to return to most of those positions.

Considering the record as a whole, including the nature of the Claimant's impairment, his educational background, and work experience, which comprised primarily of manual medium to heavy labor, and working long hours, the geographical location where he resides, the Claimant has sustained a loss of wage earning capacity based primarily on the testimony of not only the Claimant, but the employer and carrier's vocational case manager who was able to find approximately only five or six job leads for the Claimant since his release in 2003. The highest wages was that of a poultry worker, which would have paid $5.90 per hour; however, it was subsequently found by Dr. Staggs that he could not do this job. (Ex. 2) The jobs approved of were paid wages between $5.15 per hour and $5.50 per hour. Considering the testimony, this evidence from the Employer and Carrier and Claimant's testimony does not believe he is permanently and totally disabled, and is capable of working, even though he is not actively pursuing employment, it is not unreasonable that he is now working as a stay-at-home father since his wife does have a job making wages higher than he is capable of making based on the Employer and Carrier's expert, considering the cost of child care. He is employable within the jobs approved by Dr. Staggs, and found by the Employer and Carrier's rehab case manager. Taking the average of those jobs which he is capable of doing, that would show an average wage of $5.33 per hour.

The Claimant on cross-examination testified that there was some work that he thought he was

able to do. In addition, on cross-examination, the Claimant acknowledged that he quite possibly could do work as an interpreter, since he does speak English. However, there was no credible evidence, other than speculation as to if he could do this on a full time basis, let alone 50 hours a week, and how much he could earn. As such, it was nothing more than speculation. However, when relying on the only proof submitted by the Employer and Carrier, that of their case manager, any testimony of what the Claimant believes he may be able to do in the way of construction type work is speculation, and the most reliable proof is that proof submitted by the Employer's vocational rehabilitation case manager. However, noting that the minimum wage has risen, effective July of 2007 to $5.85 per hour, assuming 40 hours per week, reveal a post-injury wage earning capacity of $234.00 per week on a 40 hour week. Subtracted from his pre-injury average weekly wage of $488.70 per week, that would show a loss of wage earning capacity of $254.70 per week, two-third's of which would be $169.80 per week, post-injury, for a loss of wage earning capacity based on the Employer's only evidence.

CONCLUSION

Evidence utilized in determining the amount of a loss of wage earning capacity must be based on credible evidence, not speculation. In this case, the credible evidence legitimately justifies and shows that the Claimant has a loss of wage earning capacity of $254.70 per week, based on the Employer and Carrier's own proof, 2/3'rds of which would mean that he should be awarded $169.80 per week for 450 weeks. This is based on the legitimate evidence, not speculation of not only the Claimant, but the Employer and Carrier's attorney. There is no way with the admitted restrictions that he could return to any type of construction type work despite the fact that he testified that he was willing to try. Claimant respectfully submits that the Judge awarding only a $15.00 loss of wage

earning capacity is inaccurate, speculative and should be reversed through the appropriate finding based on the overwhelming evidence, including the evidence of the Employer itself, and its expert testimony in the way of vocational rehab. He could not return to his prior occupation, and that despite his limited job search and his reasonable decision to be a primary care giver, at least for a period of time, should not minimize that loss of wage earning capacity. As such, Claimant respectfully submits that this Commission, based on a true finding of the actual facts, amend the Judge's award to find a permanent partial disability rating of $169.00 per week, and continuing for a period of 450 weeks from the date of maximum medical improvement.

The Claimant would also request that the Employer and Carrier should not be allowed a credit for a period when the Claimant was paid TTD benefits in 2005 after his physicians had taken him off work, at least for a period of time. During those weeks, the Claimant would acknowledge that he would not be entitled to permanent partial disability benefits.

RESPECTFULLY submitted, this the 7 day of May, 2009.

JUAN LOPEZ, APPELLANT

BY: _____
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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 and foregoing document to:

Hon. Joseph H. Loper, Jr.
Circuit Court Judge of Choctaw County
P. O. Box 616
Ackerman, MS 39735

H. Byron Carter, III, Esq.
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DATED, this the 20 day of May, 2009.

John Hunter Stevens