IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2009-WC-00699-COA

BARRY L. GREGG — APPELLANT

VS.

NATCHEZ TRACE ELECTRIC POWER ASSOCIATION — APPELLEE

AND

ELECTRIC POWER ASSOCIATIONS OF MISSISSIPPI
WORKERS' COMPENSATION GROUP, INC. — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Barry L. Gregg ---------- Appellant

2. Natchez Trace Electric Power Association and
Electric Powers Associations of Mississippi
Workers' Compensation Group, Inc. ---------- Appellee

3. Bennie L. Turner---------- Counsel for Appellant

4. Amy K. Taylor---------- Counsel for Appellee

Submitted on this, the 23rd day of September, 2009.

Amy K. Taylor
Attorney of Record for the Appellee

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WHETHER THE COMMISSION'S DECISION THAT CLAIMANT HAS NOT SUSTAINED ANY PERMANENCY OR ATTENDANT LOSS OF WAGE EARNING CAPACITY AS A RESULT OF THIS INJURY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

Barry L. Gregg (Claimant/Appellant) sustained a work-related injury to his back on July 21, 2004, while employed with the Natchez Trace Electric Power Association (Employer/Appellee). The injury of the claimant has been accepted as compensable by the employer and carrier. Prior to the hearing the parties stipulated that the claimant had a pre-injury average weekly wage of $840.21, and that the claimant had a post-injury average weekly wage of $891.22. (R. at 3). Further the parties stipulated that the claimant has been back at work for the employer in his pre-injury position of service man since December 15, 2005. (R. at 3). Also, the parties stipulated the date of maximum medical improvement (MMI) for the claimant was May 2, 2006. (R. at 3). Claimant alleged that, although he is performing the position of a service man, there are certain activities that he cannot now perform in that position which would entitle him to permanent disability benefits. (R. at 3). Employer and Carrier disagreed that the claimant was entitled to permanent disability benefits, and a hearing was held in this matter before an Administrative Judge of the Mississippi Workers' Compensation Commission on September 12, 2007.

During the hearing on the merits the claimant testified on his own behalf and called no further witnesses in corroboration. Employer and Carrier presented the testimony of Mr. Kase C. Pulliam, Mr. Lamar Dumas, and Mr. Craig McClusky. Medical records of The Eupora Family Medical Clinic and Dr. Thomas J. McDonald were entered into evidence as General Exhibits 1 and 2.

On December 19, 2007, the Administrative Judge issued an opinion that the employer is not liable for any permanency of disability. (RE at 8, AJ Order at 8). In that regard the

Administrative Judge noted that the claimant had not suffered any permanency or attendant loss of wage earning capacity as a result of this injury. (RE at 8, AJ Order at 8). On January 4, 2008, the claimant filed a Request for Full Commission Review of the Order of the Administrative Judge . Thereafter, on June 26, 2008, a majority of the Full Commission affirmed the Order of the Administrative Judge dated December 19, 2007. (RE at 9, FC Order at 1). On June 30, 2008, the claimant then filed a Notice of Appeal to the Circuit Court of Webster County, Mississippi.

On April 14, 2009, the Circuit Court of Webster County issued an Order affirming the Order of the Full Commission. (RE at 19). Thereafter on April 21, 2009, the claimant failed a Notice of Appeal with the Mississippi Supreme Court.

difficulty with his back upon his return to work. They testified that the claimant would only mention his back on occasion, if at all.

Also, the claimant testified that he had missed a good deal of work due to back pain since his return from his injury, and there were days that he had to miss work because he simply could not get out of bed in the morning. The testimony by his supervisor at the hearing contradicted that fact, as well, as the claimant had only missed three (3) days in the one (1) year period of time prior to the hearing, and only a few hours on several other days during that period of time. Furthermore, his supervisor testified that he always knew ahead of time when the claimant was going to be off work on sick leave, leading one to the conclusion that the sick leave days must have been for scheduled doctor appointments.

The claimant argued that the fact that he was placed back in his same post-injury job following his accident must be attributed to the generosity of the employer. The evidence, however, did not support that position, either. There was ample evidence presented that this employer accommodates all of its employees' restrictions whether they are received under workers' compensation or otherwise, and is something that the employer prides itself on doing. It was no surprise to any of the witnesses at the hearing that the employer accommodated the claimant. The claimant testified he has never felt that his job was in jeopardy.

The claimant attempted to support his rebuttal with the fact that he no longer "pulled call" as often as he did prior to the injury. There was testimony presented, however, that there is a supervisory capacity available to the "on call" employees, about which the claimant testified that he never inquired.

The claimant also takes the position that, because he can no longer climb poles in his

position as a serviceman, he must be entitled to some type of loss of wage earning capacity finding. There was further testimony at the hearing, however, that not all of the servicemen employed with the employer throughout its three (3) district offices climb poles. There was also evidence that specifically stated that, in this day and age, it is very rare that a serviceman even has to climb a pole.

The claimant alleged some other matters that simply were not supported by evidence in this matter. He alleged that when helping the construction crew he was required to do heavy lifting that caused him pain. He also alleged that lifting chainsaws and ladders were problematic for him. There was no testimony provided by the two (2) co-employees of that construction crew, however, that even vaguely supported the claimant's assertion.

In light of the prevailing case law and the evidence presented at the hearing on the merits, therefore, this claimant has wholly failed to rebut the presumption that no loss of wage earning capacity exists since he returned to his pre-injury position at a greater rate of pay. Since the presumption cannot be rebutted, the presumption stands. As such, the decision of the Mississippi Workers' Compensation Commission and the Circuit Court of Webster County, Mississippi should be affirmed.

STATEMENT OF THE FACTS

Claimant was employed by the employer as a service man at the time of his injury. (R. at 5). Claimant testified that his job duties in that position involved reading meters, restoring power, climbing poles, climbing ladders, hooking up service, and disconnecting service by either request or for nonpayment. (R. at 5). Claimant continues to be employed with the employer in the position of service man. (R. at 6). Claimant testified that Dr. Thomas McDonald provided him a permanent restriction of "no pole climbing". (R. at 10). Claimant testified that he could only perform approximately fifty percent (50%) of his service man duties after he received the permanent restriction and returned to his position following his injury. (R. at 7). He testified that the remaining fifty percent (50%) of his job as a service man involved climbing poles. (R. at 17).

Claimant testified that, prior to his injury, he was "on call" two (2) weeks out of the month. (R. at 8). Claimant testified that the reason he was "on call" once every two (2) weeks was by choice because he voluntarily took someone else's call. (R. at 16, 17). Claimant testified that not everybody with the employer pulled calls. (R. at 17). Claimant testified that the number of actual calls he would have to answer varied from week to week, and sometimes there may be only one (1) call or no call. (R. at 8). Claimant testified that after he returned to his position as a service man in December, 2005, he did not "pull the call." (R. at 9). Claimant agreed with regard to the call schedule that a supervisor actually receives the call and then dispatches another employee to the job. (R. at 16). The supervisor does not physically go on the call but is still considered "on call". (R. at 16). Claimant testified that he has not inquired about that supervisory position. (R. at 16).

Claimant testified that he is currently taking pain medication for his lower back in the form of Ultram, two (2) pills twice per day. (R. at 11). Claimant testified that he takes that medication every day because he cannot function without taking the pain medication. (R. at 11). Claimant testified that Dr. David Booth prescribed that pain medication for him. (R. at 12, 28). He testified that he has pain in his lower back, and working aggravates the pain. (R. at 12). Claimant testified that the pain in his lower back affected his ability to perform his duties as a service man. (R. at 12).

Claimant testified that he is still able to climb ladders, and that he is only restricted from pole climbing. (R. at 13). Claimant testified that Dr. McDonald did not put a lifting restriction on him. (R. at 15). Claimant testified that he has been working for the employer for a twenty (20) year period of time. (R. at 13). Claimant testified that the company accommodated his light duty restriction for five (5) or six (6) months prior to his receipt of the permanent restriction. (R. at 14). Claimant testified that the employer then accommodated his permanent restriction in May, 2006, immediately with no hesitation. (R. at 15). Claimant agreed that he is making more money now than he did prior to his accident. (R. at 15). He testified that, since his return to work, he never had any occasion where he felt his job was in jeopardy. (R. at 13, 14).

Claimant testified that the employer had two (2) other offices, and he has helped the other offices out during storm duty. (R. at 17). Claimant testified that he was unsure whether everyone employed with the employer climbs poles. (R. at 17). Claimant testified that there were other service men employed by the employer but he was unaware which of those men actually climbed poles. (R. at 9).

Claimant agreed that he had not been back to see Dr. Thomas McDonald since May,

2006, when he was released. (R. at 14, 19). Claimant testified that Dr. McDonald released him medically and told him to get his medicine refilled by going to his family physician. (R. at 19). Claimant testified that since May, 2006, he has seen Dr. David Booth, Dr. James Booth and Dr. Guy Farmer for pain medication. (R. at 19, 20). Claimant was unsure why the medical bills for those physicians had not been submitted to workers' compensation for payment. (R. at 20). He testified that he had seen all of those doctors so many times that he could not recall the dates. (R. at 20).

Claimant testified that when he saw Dr. David Booth in February, 2007, he was there for multiple complaints of pain. (R. at 20). Claimant testified that was the date that Dr. Booth referred him to Dr. Huffman, a rheumatologist in Tupelo. (R. at 20). Claimant testified that he first saw Dr. Huffman in March, 2007 and that Dr. Huffman first prescribed the Ultram that day. (R. at 18, 19). Claimant testified that his back pain is his main problem but he does have additional pain. (R. at 18). Claimant testified that he reported to Dr. Huffman that he had joint pain and pain in his feet. (R. at 22). Claimant testified that Dr. Huffman diagnosed him with arthritis, and that he was still treating with Dr. Huffman in that regard. (R. at 22). Claimant treats with Dr. Huffman for his hand, neck, shoulders and foot. (R. at 18).

Claimant testified that it had been a few months prior to the hearing since he had been to the doctor for back pain; he thinks he saw Dr. David Booth at The Eupora Family Medical Clinic at that time. (R. at 21). Claimant testified that he last saw Dr. David Booth after he was referred to Dr. Huffman, so he agreed it had been in the six (6) months prior to the hearing. (R. at 28). Claimant testified that he had been taking pain medication since the date of his accident, but could not specifically state which doctor prescribed it. (R. at 29). Claimant testified that he

currently takes Ultram and a muscle relaxer. (R. at 29). He has not had the muscle relaxer refilled, however, and admitted that he does not take it on a daily basis. (R. at 29). Claimant testified that he also takes over-the-counter medication in the form of Ibuprofen when he runs out of his prescription medication. (R. at 31).

Claimant testified that he has missed some work since he returned to work for the employer. (R. at 21). He testified that the majority of the work that he has missed has been for scheduled appointments. (R. at 21). Claimant testified that, at times, he gets up in the morning and cannot function so he cannot report for work. (R. at 21). Claimant testified the last time that occurred was a few months prior to the hearing. (R. at 21). Claimant testified that the last time he woke up one morning and could not get out of bed he called in sick. (R. at 22). He testified that the reason he could not go to work on that date was strictly because of his back pain. (R. at 22).

Claimant agreed that, as a service man, he had some desk work involved in his job. (R. at 23). Claimant estimated that he was at his desk at least an hour per day or at least moving between the desk, the filing cabinet and the front office during that period of time. (R. at 23). Claimant testified that he was not having problems doing his job once he was accommodated concerning the pole climbing restriction. (R. at 23, 24).

Claimant recalled a job in August, 2007, when he assisted the construction crew after a car struck a utility pole in town. (R. at 24). Claimant testified that he worked with the construction crew at that time, and that it was an all day job. (R. at 25). Claimant agreed that he worked with the construction crew all day with no complaints. (R. at 25).

Claimant testified that he was physically not able to do the things that he used to do. (R.

at 26). Claimant testified that he is a forty-two (42) year old gentleman. (R. at 26). He agreed that part of that difficulty was probably due to his age, and a portion of his pain was due to his arthritis. (R. at 26). Claimant testified that he has not treated for his back, hip or leg pain in the recent past because he did not know that he could do so. (R. at 27, 28). Claimant testified that he had spoken to some woman concerning a request to return to a doctor approximately a year prior to the hearing, but he had not followed up on same. (R. at 27). Claimant testified that he had experienced constant back pain since his release by Dr. McDonald in May, 2006. (R. at 31).

Claimant testified that he knew Ms. Norma Kilgore, General Manager for the employer, and that she had an "open door" policy with the employees. (R. at 30). Claimant agreed that he had never spoken with Ms. Kilgore concerning a request to return to the doctor or about any concerns he had that his accommodation was only for a temporary period of time. (R. at 30). Claimant testified that the office in Eupora where he works is a very small office, and that he has a good relationship with his branch manager, Mr. Kase C. Pulliam. (R. at 30). Claimant testified that he never discussed any concerns he had that his accommodation was only for a temporary amount of time with Mr. Pulliam. (R. at 30).

Claimant called no other witnesses to testify on his behalf in corroboration.

Employer and Carrier called Mr. Kase C. Pulliam, branch manager for Natchez Trace Electric Power Association in Eupora. (R. at 32). Mr. Pulliam has worked for the employer for a total of thirty-one (31) years. (R. at 32). He has been the branch manager over the Eupora office for a thirteen (13) year period of time. (R. at 32). Mr. Pulliam testified that the Eupora office was a pretty small office with approximately seven (7) to nine (9) employees. (R. at 33, 42). He testified that the claimant was one of those few employees, and that he is the direct supervisor

of the claimant. (R. at 33, 42).

Mr. Pulliam testified that he was aware that the claimant returned to work under permanent restrictions from Dr. Thomas McDonald of no pole climbing. (R. at 33). Mr. Pulliam testified that, since that time in May, 2006, the claimant has continued to work as a service man with the employer accommodating the restriction. (R. at 33). Mr. Pulliam testified that was the same position that the claimant held prior to his injury. (R. at 33). Mr. Pulliam testified that he did not hesitate to accommodate that restriction for the claimant. (R. at 33). Mr. Pulliam testified that the company supports him with accommodating the claimant's restriction. (R. at 47). Mr. Pulliam testified that any employee that is permanently restricted is always accommodated by the employer. (R. at 34).

Mr. Pulliam testified that, although the claimant is not on a specific call schedule, there are certain occurrences and emergencies where the claimant is called out for which he receives overtime pay. (R. at 45).

Mr. Pulliam testified that he was not aware of any complaints of back pain that the claimant had made since his return to work in May, 2006. (R. at 34). Mr. Pulliam has not observed the claimant having any difficulty performing the non-accommodated portion of his job. (R. at 34). Mr. Pulliam testified that the claimant has never come to him and stated that he could not do the service man job because of back pain. (R. at 34).

Mr. Pulliam testified that it is difficult to pinpoint how much pole climbing was involved with the service man position because the job calls for the service man to only climb poles at times, and sometimes there is no pole climbing involved. (R. at 35). Mr. Pulliam stated that most of the claimant's duties as a service man include pulling and setting meters, maintaining

yard lights, and checking any service reports that are received concerning maintenance or bad voltage. (R. at 35). Mr. Pulliam testified that a service man has a lot of duties that he performs; the only tasks the "no climbing" restriction prevents the claimant from performing are repairing yard lights or repairing a bad connection on a pole. (R. at 35). Mr. Pulliam stated that his construction crew does that work for the claimant. (R. at 36). Mr. Pulliam testified that the claimant is currently able to perform the substantial acts of his job as a service man. (R. at 41). Mr. Pulliam testified that the claimant is a good worker, does what is expected of him, and gets his job done. (R. at 36).

Mr. Pulliam testified that the claimant reports directly to him, and he keeps up with the time the claimant is off of work. (R. at 36). Mr. Pulliam reviewed the claimant's sick leave documents that he keeps in the regular course of business. (R. at 36). Mr. Pulliam testified that the documents that he reviewed consisted of all of the claimant's sick leave records from August 4, 2006 through September 12, 2007. (R. at 37, 38). Mr. Pulliam testified that during that period of time the claimant missed only a few sick days. (R. at 38). He testified that the claimant missed one (1) day on August 8, 2006, three (3) hours on November 7, 2006, one (1) day on December 21, 2006, one (1) day on February 13, 2007, and four (4) hours on April 25, 2007. (R. at 36 - 38). Mr. Pulliam further testified that the last date the claimant missed any sick time from work prior to the hearing was July 30, 2007, when he missed two (2) hours of work. (R. at 37)(See also RE at 20-25; Employer and Carrier Exhibit 3). Mr. Pulliam testified that the claimant typically knows ahead of time when he is going to be out of work for sick leave. (R. at 39). Mr. Pulliam testified that the claimant has never called him the morning of a work day and stated that he simply could not report to work that day. (R. at 39).

Mr. Pulliam testified that he has been employed with the employer for thirty-one (31) years and been a manager for the company for the past thirteen (13) years. (R. at 32, 40). He testified that, in his opinion, the company is very fair in dealing with its employees. (R. at 40). He testified that company policy concerning job injury and indemnity benefits dictates that the company supplement the employee's indemnity check received from workers' compensation for a twelve (12) week period of time. (R. at 40). He testified that for a twelve (12) week period of time injured workers receive their full pay. (R. at 40). Additionally, Mr. Pulliam testified that he has been in meetings where Ms. Norma Kilgore, General Manager, emphasized her "open-door" policy to the employees, urging them to come to her with any concerns. (R. at 41). Mr. Pulliam never had any questions in his mind that her policy was legitimate. (R. at 41).

Mr. Pulliam testified that the claimant never requested to go see Ms. Kilgore, nor did he mention anything to him concerning a possible return to the doctor following his return to work in May, 2006. (R. at 41). Mr. Pulliam stated that he is not aware of any plan to indicate that the claimant's accommodation with the employer is temporary. (R. at 41). Mr. Pulliam testified that the claimant had a job as long as he performed the non-accommodated portion of his job. (R. at 46).

Mr. Pulliam agreed that the accommodation being provided by the employer was not specifically related to the claimant but something that the employer would do for all of its employees. (R. at 42). Mr. Pulliam testified that the service man at the Houston branch for the employer does not climb poles. (R. at 42). Mr. Pulliam testified that he himself had a personal situation where he had to be accommodated, and he was not surprised with the employer's willingness to work with him. (R. at 48). Mr. Pulliam testified that he is also aware of other

situations where people had to be accommodated in his office, and he was not surprised that the employer accommodated them, either. (R. at 48). Mr. Pulliam testified that, based upon that history, he was not surprised when the employer accommodated the claimant. (R. at 49).

Employer and Carrier then called Mr. Melvin Lamar Dumas as a witness. Mr. Dumas has worked for the employer for twenty-eight (28) years. (R. at 50). Mr. Dumas is the foreman of the construction crew. (R. at 50). Claimant does not work on his crew, but is a service man. (R. at 51). Mr. Dumas testified that the claimant assists his crew during times of emergencies, and he has been able to observe his work during those times. (R. at 51).

Mr. Dumas testified that he and the claimant both worked on a job in August, 2007, after a motor vehicle struck a utility pole in Eupora. (R. at 51). Mr. Dumas testified that he did not see the claimant having any difficulty pulling his weight on that job. (R. at 51). Mr. Dumas testified that the claimant was very intelligent concerning electrical distribution, and that he was one that he would depend on knowing how the lines are fed. (R. at 51). Mr. Dumas testified that the claimant's knowledge is something that is of great benefit to his crew, even though the claimant cannot climb a pole. (R. at 52). Mr. Dumas testified that, if there is an outage or interruption in the lines, the claimant is the one with whom he would consult concerning the problem. (R. at 52). Mr. Dumas testified that on a job site he designates jobs according to ability. (R. at 53). He testified that the fact that the claimant cannot climb poles causes him no difficulty in that regard. (R. at 53).

Mr. Dumas testified that his construction crew performs any climbing work that the claimant might have on a job. (R. at 55). Mr. Dumas testified that it does not create any hardship for his crew to cover the claimant's climbing responsibilities. (R. at 55). Mr. Dumas

testified that he has personal knowledge of accommodations made for employees other than the claimant. (R. at 54). Mr. Dumas testified that in the past he had someone on the construction crew with a climbing restriction who simply operated a bucket truck instead of climbing. (R. at 57 -58).

Mr. Dumas testified that, to his knowledge, the service men at the other offices for the employer seldom, if ever, climb poles. (R. at 52). Mr. Dumas testified that, in this date and age, it is not very often that service men climb poles while working for the employer. (R. at 53).

Employer and Carrier also called Mr. Craig McClusky as a witness. Mr. McClusky is a lineman for the employer and has worked there for approximately eight (8) years. (R. at 60). Mr. McClusky testified that he is the "baby of the bunch" since most of the people he works with have been there at least fifteen (15) years. (R. at 60-61). Mr. McClusky is pretty good friends with the claimant, although the claimant does not work on his crew. (R. at 61). Mr. McClusky testified that since the claimant returned to work in May, 2006, he had only heard him complain of back pain a few times. (R. at 62).

Mr. McClusky testified that he is on the construction crew that does the climbing. (R. at 62). Since he is considered the "baby of the bunch", Mr. McClusky testified that he takes on the majority of all climbing tasks that the construction crew performs. (R. at 61, 62). Mr. McClusky testified that he does not mind doing the climbing for the claimant, also. (R. at 64).

Mr. McClusky testified that he also worked the job in August, 2007, when the automobile hit the light pole. (R. at 63). He testified that the claimant was working that job, and that the claimant pulled his weight on that job. (R. at 63). Mr. McClusky testified that he has never noticed the claimant not pulling his weight on a job. (R. at 63).

Medical records of Dr. Thomas J. McDonald were entered as General Exhibit 2. Dr. McDonald performed a left hemilaminectomy and microdiscectomy on the claimant for a herniated disc at L4-5 on November 30, 2004. (RE at 27, 30; General Exhibit 2 at 36, 39). On May 2, 2006, Dr. McDonald released the claimant at maximum medical improvement (MMI). (RE at 33; General Exhibit 2 at 74). Dr. McDonald provided the claimant with a permanent restriction of no pole climbing, and a ten percent (10%) permanent partial impairment rating to the body as a whole. (RE at 33; General Exhibit 2 at 74). On May 2, 2006, Dr. McDonald stated that the claimant could return to his office on an "as needed" basis, and discharged him to his general practitioner. (RE at 34, 35; General Exhibit 2 at 75, 77).

Medical records from the Eupora Family Medical Clinic were admitted as General Exhibit 1. The first visit the claimant had with the Eupora Family Medical Clinic after his release from Dr. McDonald in May, 2006, occurred on February 2, 2007. (RE at 37-40; General Exhibit 1 at 11-14). On that date the claimant presented with a complaint of low back pain and numbness in his hands. (RE at 37; General Exhibit 1 at 11). The assessment on that visit consisted of carpal tunnel syndrome on the right side and pain in the joints, multiple sites. (RE at 40; General Exhibit 1 at 14). A rheumatory panel was ordered for the claimant's on and off specific joint pain. (RE at 40; General Exhibit 1 at 14).

The only other medical record from Eupora Family Medical Clinic is from an office visit on March 6, 2007, when the claimant presented with a chief complaint of pain in his low back and right wrist. (RE at 41-44; General Exhibit 1 at 16). Due to the claimant's complaints of morning stiffness and joint pain that temporarily improved with steroid treatment, he was referred to a rheumatologist. (RE at 44; General Exhibit 1 at 19).

ARGUMENT

WHETHER THE COMMISSION'S DECISION THAT CLAIMANT HAS NOT SUSTAINED ANY PERMANENCY OR ATTENDANT LOSS OF WAGE EARNING CAPACITY AS A RESULT OF THIS INJURY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is well settled under Mississippi law that a decision of the Mississippi Workers' Compensation Commission will be upheld on appeal if same is "based upon substantial evidence." Dulaney v. National Pizza Co., 733 So. 2d 301, 304 (Miss. 1998); Metal Trims Industries, Inc. v. Stovall, 562 So. 2d 1293, 1296-97 (Miss. 1990). The Mississippi Workers' Compensation Commission is the trier and finder of facts in all cases before it and has determined prior to appeal which evidence has weight and is credible. Inman v. Coca-Cola/Dr. Pepper Bottling, 678 So. 2d 992, 993 (Miss. 1996); Stovall, 562 So. 2d at 1297. Further, the Mississippi Supreme Court has clearly stated that an order of the Mississippi Workers' Compensation Commission will be reversed on appeal only if said order is found to be "clearly erroneous and contrary to the overwhelming weight of the evidence." McGowan v. Orleans Furniture, Inc., 586 So. 2d 163, 165 (Miss. 1991).

In the current case, the Full Commission correctly determined that the claimant failed to meet his burden of proof that he is entitled to any permanent disability benefits as a result of his work-related accident of July 21, 2004. Substantial evidence exists to support that decision.

"Disability" is defined in the Mississippi Workers' Compensation Act as the

> incapacity because of injury to earn the wages which the employee was receiving at the time of injury from same or other employment, which incapacity and the extent thereof must be supported by medical findings.

Miss. Code Ann. § 71-3-3(i) (Rev. 1995). In order to establish industrial disability a claimant

must prove not only that a medical impairment existed, but that the medical impairment resulted in a loss of wage earning capacity. Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308, 312 (Miss. 1997); Robinson v. Packard Elec. Div. G.M.C., 523 So. 2d 329, 331 (Miss. 1988).

It is well settled in workers' compensation law that, when an employee returns to work for the same employer following a work-related injury and receives the same or greater earnings as prior to his injury, there is a presumption that the claimant has suffered no loss of wage earning capacity. Guardian Fiberglass, Inc. v. LeSueur, 751 So. 2d 1201, 1205 (Miss. App. 1999); See also General Electric Company v. McKinnon, 507 So. 2d 363, 365 (Miss. 1987) (holding that presumption of no loss of wage earning capacity arises following injury when claimant returns to position with wages equal to or in excess of his pre-injury wages). That presumption can only be rebutted by the claimant with evidence that the post-injury wages are not a reliable indicator of the claimant's true earning capacity. LeSueur, 751 So. 2d at 1205.

The Mississippi Supreme Court has determined that factors to be considered in an effort to rebut that presumption include "an increase in general wage levels since the time of accident, Claimant's own greater maturity and training, longer hours worked by the claimant after the accident, payment of wages disproportionate to capacity out of sympathy to Claimant, and the temporary and unpredictable characteristics of post injury earnings." Spann, 700 So. 2d at 313; Winters v. Choctaw Maid Farms, Inc., 782 So. 2d 155, 160 (Miss. App. 2000). Additionally, the Court has repeatedly held that all evidence should be considered in a determination concerning loss of wage earning and hence "permanent disability". DeLaughter v. South Cent. Tractor Parts, 642 So. 2d 375, 379 (Miss. 1994); Winters, 782 So. 2d at 160. Finally the Court has held that, absent a showing of surrounding facts and circumstances that the worker's post-injury wages

alone are not necessarily conclusive, the presumption stands. International Paper Co. v. Kelley, 562 So. 2d 1298, 1303 (Miss. 1990); Agee v. Bay Springs Forest Products, Inc., 419 So. 2d 188, 189 (Miss. 1982).

In the instant case it was stipulated by the parties that the claimant returned to work for the employer on December 15, 2005. At that time the claimant returned to his pre-injury position of service man with certain light duty restrictions. Thereafter on May 2, 2006, Dr. Thomas McDonald released the claimant at maximum medical improvement (MMI) and provided him a permanent restriction of no pole climbing. Claimant continued to work in his position as a service man following that permanent release. The parties stipulated that the claimant's pre-injury average weekly wage was $840.21. It was also stipulated by the parties at the time of the hearing that the claimant's post-injury average weekly wage was $891.22.

Based upon the applicable case law, therefore, since the claimant returned to work for the employer at the same or greater wages than he was earning at the time of his injury, a presumption was created that the claimant sustained no loss of wage earning capacity. During the hearing in this matter the claimant failed to present evidence under prevailing case law sufficient to rebut that presumption or prove that his post-injury earnings were an unreliable indicator of his true earning potential.

Claimant attempted to support his rebuttal with the fact that he no longer "pulls call" as often as he did prior to the injury. There was testimony presented by the employer, however, that the claimant was not ever required to "pull call" but did so on a voluntary basis. Additionally there was testimony presented by the claimant during cross-examination that there is actually a supervisor and a worker on call at all times during the "on call" periods. Further, testimony

established that this claimant possesses excellent knowledge concerning electrical distribution. Nevertheless, the claimant never inquired as to whether he could "pull call" in a supervisory capacity which would not require him to go into the field but would allow for him to have the benefit of "on call" wages.

The claimant's immediate supervisor, Mr. Kase C. Pulliam testified that, although the claimant is not currently pulling calls on a regular basis, there are times of emergencies when he calls the claimant out, during which time the claimant does receive overtime pay. Furthermore the employer would point out that the claimant's post-injury earnings are still greater than his pre-injury earnings despite the fact that he is not pulling regular call at the current time. That being the case it cannot be argued that those facts create a loss of wage earning capacity.

Claimant also testified that he continues to have problems with his back and has been in constant pain since being released from Dr. Thomas McDonald in May, 2006. Claimant further testified that he takes Ultram, two (2) tablets twice a day, every day, because he cannot function in the great amount of pain that he is experiencing. The only medical records that the claimant presented concerning any medical treatment after he was released by Dr. McDonald in May, 2006, were from Eupora Family Medical Clinic. Those records reflect that the first time the claimant returned to that clinic following his release from Dr. McDonald in May, 2006, was February, 2007.

At that point the claimant was actually presenting with complaints of numbness in his hand and low back pain. The actual assessment that day was carpal tunnel syndrome and pain in the joints at multiple sites. There was enough concern following the physical examination on that date for the claimant to be referred for a rheumatology consult.

Although it is unclear from the claimant's testimony, it appears that the rheumatologist, Dr. Huffman, initially prescribed the Ultram for the claimant that he currently insists that he takes every day. As noted, the claimant was not even referred to Dr. Huffman until February, 2007. That being the case, the employer and carrier would question the validity of the claimant's complaints of "constant pain" as related to his accident of July 21, 2004, as there is no medical documentation that he received any type of medical treatment or pain medication from May, 2006, until February, 2007. Further, there is no medical documentation that the claimant received any medical treatment at all after March, 2007.

Additionally the claimant contends that there were many days that he had to miss work due to constant pain, and that there were days when he would wake up in the morning and be unable to get out of bed. On those days the claimant testified that he called in sick because he simply could not come to work due to the pain. Mr. Kase Pulliam, the claimant's immediate supervisor, testified as to the claimant's sick days from August, 2006 until the date of the hearing, September 12, 2007, a period of time that is just over one (1) year. During that period of time Mr. Pulliam testified that there were only three (3) days that the claimant missed the entire day from work for being sick. There were a few other times that he missed, being absent for two (2), three (3) and four (4) hours at a time, respectively.

Mr. Pulliam testified that the last time the claimant missed any work for being sick prior to the hearing was July 31, 2007. That date is some six (6) weeks prior to the hearing in this matter. Mr. Pulliam testified that the claimant always let him know ahead of time that he was going to be out on sick leave. That fact leads one to the conclusion that the majority of the claimant's missed sick days from work were actually for doctor appointments, presumably for

matters other than his work-related injury since there are no medical records filed to support those dates. It would be difficult to believe that the claimant would be able to tell the employer ahead of time that he would "be unable to get out of bed" the following morning.

Additionally while the claimant testified that he was in constant pain and having difficulty performing the non-accommodated portion of his job, his co-employees testified that, at most, they heard the claimant only complaining of pain on an occasional basis. In fact, Mr. Craig McClusky, who testified that he is a good friend of the claimant, stated that the claimant only mentioned his back hurting "on occasion." Further, Mr. McClusky testified that he has never noticed the claimant not "pulling his weight" on a job. Being a personal friend of the claimant one can assume that if the claimant was mentioning over and over on a regular basis any complaints of back pain, Mr. McClusky would recall. Also, having worked together on several jobs, Mr. McClusky would be able to testify if the claimant was having any difficulty performing the non-accommodated portions of his job because of alleged back pain.

The only restriction that the claimant received was no pole climbing which, according to Mr. Kase Pulliam, would allow him to perform the substantial acts of his employment. Claimant himself testified that his job consisted of desk work approximately one (1) hour every day, and during the other times of his day he is filling service orders, checking lines, reading meters, connecting or disconnecting power. Mr. Pulliam specifically stated that the claimant's job entailed many tasks to be completed. The only thing that he is not allowed to do is repair a bad connection on a pole or repair a yard light.

In fact, Mr. Dumas, a twenty-eight (28) year employee of the employer, testified that in this day and age service men rarely ever climb poles. It was testified by the claimant's

immediate supervisor, Mr. Kase Pulliam, that, while the scheduling had to be arranged differently, that accommodation was not a problem for the employer. It was also acknowledged by the claimant's co-employee, Mr. Craig McClusky, that he is the gentleman who does the majority of the climbing for the entire Eupora office because he is the "baby of the bunch". Mr. McClusky stated that he did not mind having to do the claimant's climbing as well, because he was basically the one who did most of the climbing for the employer at that branch anyway.

Through his brief the claimant alleged that helping the construction crew required heavy lifting and setting poles that also caused him pain. There was nothing to corroborate that allegation, however, from the two (2) members of the construction crew that testified at the hearing, Mr. Lamar Dumas and Mr. Craig McClusky. Both of them testified that they seldom, if ever, heard the claimant complain of back pain, and that he always pulled his weight on a job. Claimant also alleges in his brief that lifting chain saws and ladders was problematic. Claimant continues to argue that his co-workers assisted him in lifting heavy objects which is simply not supported by the testimony that was provided at the hearing on the merits. Claimant himself testified that Dr. McDonald did not put a restriction on him with regard to his lifting capacity.

Through his brief the claimant argues that the employer and carrier have not offered any proof to contradict the claimant's continuing complaints of low back pain and left leg numbness or the validity of the climbing restriction placed on the claimant by Dr. McDonald. Employer and Carrier submit that they do not have the burden of proof in that regard. Employer and Carrier submit that, since the claimant returned to the employer in the same position at a wage higher than his pre-injury average weekly wage, a presumption arose that there is no loss of wage earning capacity. At that point the burden shifted to the claimant to show that his current wages

are not a reliable indicator of his true wage earning capacity. Claimant simply has not rebutted that presumption. To argue through his brief that the employer and carrier had the burden to contradict his continuing complaints of pain or the validity of his restriction is not accurate. That is simply not the standard utilized by the Mississippi Workers' Compensation Commission.

Additionally, the claimant tries to state that the fact that his post-injury wages are greater than his pre-injury wages must be attributed to the generosity of the employer, but again there is no evidence to support that assertion. There was repeated testimony at the hearing that any employee who received a permanent restriction, under workers' compensation or otherwise, is always accommodated by this employer. Mr. Kase Pulliam testified that he himself has been the benefit of an accommodation provided by this employer. He was not at all surprised that the employer accommodated him or that the employer accommodated the claimant in the instant case. It is not simply generosity of the employer with regard to this single claimant that he was accommodated when he returned with permanent restrictions. It is a policy that this employer prides itself on and continues on a regular basis with all of its employees in all three (3) of its district offices.

Further, to argue that the claimant is being provided wages out of generosity, Spann dictates that the claimant/appellant must show "payment of wages disproportionate to capacity out of sympathy for the claimant." Spann, 700 So. 2d at 313. The testimony in this case was that the claimant performs many tasks in his role as service man. Claimant's own testimony solidified that fact. His fellow employees testified that he always "pulled his weight" on the jobs. Based on that testimony, the employer and carrier submit that the wages paid to this claimant were not "disproportionate to capacity out of sympathy"; rather, they were wages earned by this

claimant as a hard working employee in his job as a service man.

In his brief the claimant attempts to utilize authority from Union Camp Corporation v Hall to state that his functional disability is greater than his industrial disability. While the employer and carrier would agree that the claimant received a ten percent (10%) permanent partial impairment rating to the body as a whole, the employer and carrier submit that the case referenced by the claimant in support of his position is not relevant to the instant fact situation. The Hall case dealt strictly with a scheduled member where there is, at times, a decision to be made between a functional or occupational and medical disability rating. That case is not applicable to the current situation as this is a body as a whole case and deals solely with loss of wage earning capacity.

Additionally, the claimant attempts to support his position with a 2005 case from the Mississippi Court of Appeals. Claimant cites University of Mississippi Medical Center v Smith, 909 So. 2d 1209 (Miss. App. 2005) as holding that wages attributed to the kindness and generosity of the employer are not indicative of the employee's actual capacity to command a certain wage on the open labor market. Employer and Carrier would submit that the Smith case can be distinguished from the instant case in that the claimant in that case was not still employed with the employer at the time of the hearing on the merits.

What the Smith Court held was the fact that a claimant returned to work after his accident is not a reliable indicator of his post-injury occupational disability when the claimant is not able to continue in that post-injury work because the claimant's work-related physical disability continues to deteriorate to the point where he is no longer able to perform that work. In Smith the Court found that the claimant's physical disability had not fully manifested itself when he

returned to work, and as such his return to work for a brief period of time did not stop his entitlement to any permanent disability benefits. Additionally, in the Smith case the Court found it important that the claimant was still receiving regular medical treatment for his work-related headaches at the time of the hearing on the merits.

That case is quite different from the facts at hand in that the claimant in the instant case returned to work for this employer in December, 2005, and has continued to work there on a regular basis, to date. Likewise, no medical reports were introduced to show that the claimant was receiving regular medical treatment. The lack of ongoing medical treatment by this claimant further distinguishes the current fact scenario from the Smith case.

Additionally and as previously stated, the claimant cannot just assume that the accommodations made by the employer are simply out of generosity towards this claimant since this employer has a history of accommodating all of its employees. This employer is a very fair employer with its employees. The employer would submit that, if that was not the case, it would not have employees with thirty-one (31), twenty-eight (28), twenty (20) or fifteen (15) years of tenure.

Since the claimant returned to the employer in the same position at a wage higher than his pre-injury average weekly wage, a presumption arose that there is no loss of wage earning capacity. At that point the burden shifted to the claimant to show that his current wages are not a reliable indicator of his true wage earning capacity. Claimant simply has not rebutted that presumption.

While the employer and carrier are aware that the evidence as a whole must be reviewed in determining whether the claimant adequately rebutted the presumption of no loss of wage

earning capacity, the prevailing case law is very clear as to the factors a claimant must show when attempting to rebut the presumption when he returned to work for the same employer at the same or greater wages.

In light of prevailing case law, since the claimant failed to rebut the presumption of no loss of wage earning capacity, the presumption stands. That being the case the employer and carrier submit that substantial evidence existed to support the Full Commission determination that the claimant did not sustain a loss of wage earning capacity as a result of his work-related injury.

Assuming for the sake of argument that this Court determines that substantial evidence did not exist to support the Commission's determination that the claimant failed to rebut the presumption of no loss of wage earning capacity, there is absolutely nothing in the record concerning Claimant's education or job history to determine what his employability would be in the open labor market. In determining loss of wage earning capacity, many factors must be considered. McGown, 586 So. 2d at 167. Those factors include "the amount of education and training which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain and any other related circumstances." Id.

The record is completely void of any testimony regarding the claimant's education and training or his failure to be hired elsewhere. There is no regular medical treatment for this claimant that has taken place after he was released from Dr. Thomas McDonald on May 2, 2006, with the exception of two (2) office visits to a family medical clinic in Eupora, Mississippi. The first of those visits did not even occur until some nine (9) months after his release from Dr. McDonald. Claimant alleges he has been in constant pain since the date of his accident, and had

to take pain medication daily. He has presented no information, however, to support who prescribed that medication or what type of medication he has been taking.

Additionally, to the knowledge of the employer and carrier, the claimant has sought no additional medical treatment for his work-related injury since March, 2007. He was referred to a rheumatologist in Tupelo, Mississippi, for an unrelated arthritis problem with whom the claimant testified that he is still treating. There has been no demand made for payment in that regard and no records submitted concerning same.

As such, the only medical information that the claimant has submitted that he even remotely received medical treatment since May 2, 2006, for his work-related injury were two (2) office visits that occurred some nine (9) and ten (10) months after his release from Dr. McDonald. Claimant simply has failed to submit any evidence to support his allegation of this constant and continuous pain in his back since the date of his accident to the point where he cannot function and requiring him to take pain medication on a daily basis.

Finally, the claimant has failed to set forth any evidence concerning an inability to work as referenced by McGowan. His supervisor testified that he had only missed three (3) full days of work in the year prior to the hearing, and that request for that leave was always submitted ahead of time. Those facts also contradict claimant's testimony that some days he is unable to work due to pain.

Additionally, through his brief the claimant attempts to calculate what he perceives to be his loss of wage earning capacity. There was no wage statement admitted into evidence at the hearing in this matter, as both the claimant's pre-injury average weekly wage and post-injury average weekly wage were stipulated by the claimant and employer and carrier. The claimant,

through his brief, now takes the position that the increase of wages is due to two (2) cost of living increases provided by the employer. The claimant is attempting to utilize facts not present in the record in this matter.

The claimant has submitted a figure which he believes represents his weekly loss of a certain amount of dollars. There has been no evidence whatsoever, however, to support that calculation. No evidence was presented as to how many hours this claimant worked every single week, as one can assume the utility industry is subject to overtime hours on a regular basis. Additionally, there has been absolutely no evidence presented as to how often the claimant is called out for storm duty or emergency situations, as referenced by Mr. Kase Pulliam. As previously stated, no wage statement concerning this claimant's wages was ever placed in evidence at the hearing on the merits. The claimant cannot simply assume facts not in evidence in an attempt to strengthen his position.

Based on the foregoing argument and the previously discussed case law, it is clear that substantial evidence exists to support the determination of the Mississippi Workers' Compensation Commission and the Circuit Court of Webster County, Mississippi, that the claimant failed to meet his burden of proof that he sustained any permanent disability as a result of his injury. As such, the decision of the Mississippi Workers' Compensation Commission and the Circuit Court of Webster County, Mississippi should be affirmed.

CONCLUSION

Claimant in the instant case suffered a compensable work-related injury on July, 21, 2004, while working as a service man for the employer. Following a period of medical treatment, the claimant returned to work for the employer on December 15, 2005. Claimant returned in his same position as a service man at that time. In May, 2006, he was permanently released from Dr. McDonald's care and provided a permanent restriction of no pole climbing. Since only a small portion of the claimant's pre-injury duties consisted of pole climbing, the employer was able to easily accommodate his job description to match the permanent restriction provided.

Claimant has attempted to state that the accommodation was nothing more than generosity on the part of the employer toward this claimant, and that there is no indication that the accommodation will continue in the future. There was substantial evidence at the hearing that accommodations are always made for the employees of this employer, and this was not an exception made for this claimant. Additionally there was testimony at the hearing that, so long as the claimant continues to perform the non-accommodated portion of his job, he will have a job. The fact that the claimant had been back at work in his job as a service man for a year and a half prior to the hearing on the merits in September, 2007, is compelling evidence in and of itself.

Claimant's post-injury average weekly wage of $891.22 was greater than his pre-injury average weekly wage of $840.21. Based upon the applicable case law and the facts set forth above, therefore, a presumption was created that the claimant sustained no loss of wage earning capacity as a result of his injury since he returned to work for the employer at the same or greater wages.

The Mississippi Supreme Court previously determined factors to be considered in determining if a claimant has rebutted the presumption created under these facts and circumstances. Claimant failed to present testimony at the hearing to adequately meet the factors to rebut the presumption of no loss of wage earning capacity. Absent a showing that a worker's post-injury wages are not a reliable indicator of his earning capacity, the presumption stands. The Mississippi Workers' Compensation Commission correctly ruled that the claimant sustained no permanent disability as a result of his work-related accident of July 21, 2004. Substantial evidence was presented at the hearing on the merits to support the decision of the Mississippi Workers' Compensation Commission and the Circuit Court of Webster County, Mississippi, and that decision should be affirmed.

Respectfully submitted this the 23rd day of September, 2009.

Natchez Trace Electric Power Association and
Electric Power Associations of Mississippi
Workers' Compensation Group, Inc.

BY: Amy K. Taylor
Amy K. Taylor (MSB#[redacted])

CERTIFICATE OF SERVICE

I hereby certify that I have, this date, served a copy of the above and foregoing Brief of Employer/Appellee in Response to Appellant's Appeal to the Mississippi Supreme Court to the Honorable Bennie L. Turner, Esquire, counsel of record for Claimant/Appellant, by placing a copy of same in the United States Mail, postage prepaid, to his regular business mailing address which is Post Office Box Drawer 1500, West Point, MS 39773.

This the 23rd day of September, 2009.

Amy K. Taylor

Amy K. Taylor (MSB# [redacted]
Attorney at Law