2009-WC-00699-COA

**IN THE SUPREME COURT OF MISSISSIPPI**

**BARRY GREGG** **APPELLANT/CLAIMANT**

**V.**

**NATCHEZ TRACE ELECTRIC POWER ASSOCIATION** **APPELLEE/EMPLOYER-CARRIER**

## 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 Court of Appeals may evaluate possible disqualification or recusal.

1. Barry Gregg, Appellant/Claimant
2. Bennie L. Turner, Counsel for Appellant/Claimant
3. Natchez Trace Electric Power Association, Appellee/Employer-Carrier
4. Amy K. Taylor, Counsel for Appellee/Employer-Carrier

Respectfully submitted this the 22nd day of July, 2009.

**BENNIE L. TURNER**
**MISSISSIPPI BAR NO.** [redacted]

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## STATEMENT OF THE ISSUE

Whether Barry Gregg's undisputed proof established, by a preponderance of the evidence, that he suffered a loss of wage earning capacity as a result of a work-related injury. Stated differently, whether or not the record contains substantial evidence in support of the majority decision of the Full Commission, and the Circuit Court of Webster County, Mississippi, which affirmed the ruling of the Administrative Judge that Claimant failed to prove a loss of wage earning capacity.

## STATEMENT OF THE CASE

A hearing on the merits was held in this cause on September 12, 2007, before the Administrative Judge of the Commission in Grenada, Mississippi. *R.* at 1. The issues before the Administrative Judge were the existence, nature and extent of disability attributable to Claimant's work-related injury. *R.* at 3. The parties stipulated that (1.) Claimant sustained an injury to his lower back on July 21, 2004, as alleged in the Petition to Controvert; (2.) the Claimant's average weekly wage at the time of injury was $840.21; (3.) the Claimant returned to his pre-injury position with his employer as a serviceman on December 15, 2005; (4.) Claimant reached maximum improvement on May 2, 2006; and (5.) Claimant's post average weekly wage was $891.22. *Id.* Following a hearing on the merits, the Administrative Judge ruled that Claimant was temporarily and totally disabled from July 21, 2004, to the date designated and stipulated.[1] *R.* at 80. Of particular importance, the Administrative Judge of the Commission also found as follows:

> 2. Both lay and medical testimony indicate that the claimant was ultimately returned to full duty with the singular description and/or restriction of "no climbing" later specified to be "no pole climbing" which could indeed have been a part of serviceman work for the power company. However, lay testimony was replete with references that such "pole climbing" is not required for the discharging of all pertinent duties relative to the claimant's current employment. He is in no danger of losing his job because of this permanent restriction and, further, it has not impact on his wage earning potential. Ergo, all factors considered, the claimant has suffered no lost wage of earning capacity [sic] and none is found.

*R.* at 80.

After receiving the order of the Administrative Judge of the Commission, Claimant then appealed the decision to the Full Commission. *R.* at 82. The Full Commission affirmed the

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[1]Claimant was also found to have a 10% permanent partial medical impairment rating to the body as a whole for the work-related injury to his back. R. at 59.

decision of the Administrative Judge (without a written opinion), with Commissioner Collins dissenting (with a written opinion). *R.* at 84 - 88. Claimant aggrieved by the decision of the Full Commission filed a Notice of Appeal requesting review by the Circuit Court of Webster County, Mississippi. *R.* at 89. The decision of the Full Commission was affirmed on April 14, 2009, by the Circuit Court of Webster, Mississippi, with the Honorable Joseph H. Loper presiding. (*See Record Excerpts of Appellant/Claimant*).

## STATEMENT OF FACTS

### 1. Testimony of Claimant at the Hearing Before the Administrative Judge

Claimant was employed as a serviceman for Natchez Trace Electric Power Association when he injured his back. *R. 5:23.* Claimant's pre-injury job duties were performing service work, such as restoring power, connecting and disconnecting power for customers, and climbing poles and ladders to hook up service. *Id.* Although Claimant had been employed by Natchez Trace Electric Power Association for twenty years, he was never furnished a written job description. *R.* at 7:17 and 13:17. Even though Claimant never received a written job description, he knew that he was expected to climb during certain service job activities. *R.* at 7:20. Claimant was also placed on call as part of his pre-injury job duties. *Id* a t. 7:25. Claimant was "on call" every other week for a seven day period of time, and he was automatically paid two hours overtime for each service call, unless the time required to complete the service call exceeded two (2) hours. *R.* at 8:1 - 8:25. Claimant was also paid a minimum of one hour per day overtime for each day he was "on call." *Id.* Claimant ultimately returned to work with Natchez Trace Electric Power Association following the injury to his back, but he was not able to "pull" any calls. *R.* at 7:27 - 8:4. Because Claimant could not climb, working service calls and receiving overtime compensation for service calls was no longer

available to him. *R.* at 9:14 - 9:18. Claimant does not have an employment contract with his employer, and he testified that he does not know how long Natchez Trace Electric Power Association will allow him to continue his employment as a service man restricted in his ability to climb. *R.* at 10:15. Claimant doubts that he could get another job as a service man for another power company with a climbing restriction. *R.* at 10:27. He also stated that fifty percent (50%) or more of his pre-injury job duties involved climbing poles. *R.* at 17:11.

Claimant takes two Ultram a day for pain, and he testified that he cannot function without taking them. *R.* at 11:15 - 11:29. Helping the construction crew, which requires heavy lifting and setting poles, also causes him pain. *R* at. 15:11 - 15:19. Claimant testified that lifting chain saws and ladders are now problematic. *R.* at 15:16 - 15:19. Claimant stated that he experiences pain in his lower back and left leg on a daily basis and that his work aggravates his pain. *R.* at 13:26. Claimant also testified that he takes Ibuprofen for pain when he runs out of the prescription medication. *R.* at 31:8. He describes the pain as constant. *Id.* at 31:20.

**2. Testimony of Employer/Carrier at the Hearing Before the Administrative Judge**

Kase C. Pullium testified on behalf of Natchez Trace Electric Power Association at the hearing. Mr. Pullium is the branch manager of the Eupora office and he is Claimant's immediate supervisor. *R.* at 32:23. Although he admitted it was "hard to say", Mr. Pullium estimated that approximately twenty-five percent (25%) of Claimant's job consisted of climbing poles. *R.* at 34:29. When asked if Claimant's inability creates any type of hardship or scheduling difficulty, Mr. Pullium responded that the work has to be scheduled differently, but the crew is able to do the climbing that Claimant cannot do. *R.* at 35:24 - 35:29 Mr. Pullium was not aware of any other individuals employed by Natchez Trace Electric Power Association who have or previously had a climbing

restriction. *R* at 47:13 - 47:17.

Lamar Dumas also testified on behalf of the Employer/Carrier. He stated that his crew climbs for Claimant and that they try to work together to make sure "things get done." *R.* at 55:8 - 55:15. Mr. Dumas testified that all of the men on his crew climb poles and that he was aware that Claimant was restricted from climbing poles by his treating physician. *R.* at 57:11 - 57:20

Craig McClusky testified on behalf of the Employer/Carrier, and he, too, was aware of Claimant's climbing restriction. *R.* at 65:5. Although he could not recall a specific number, McClusky recalls assisting Claimant with climbs on various service calls. *R.* at 65:8. Claimant would notify the crew that he needed assistance, and the crew responded to the call. *R.* at 65:20.

**3. Chronology of Medical Treatment and Impairment of Claimant**

Claimant Barry Gregg sustained an admittedly compensable injury to his back on July 21, 2004, while within the course and scope of his employment with Natchez Trace Electric Power Association. *R.* at 1 and 62. Claimant was thirty-nine years old at the time of occurrence, and he reported that he felt a pop in his back while lifting a tool belt. *R.* at 1 and 51. Claimant was initially treated at the Eupora Family Medical Clinic by Dr. David G. Booth, M.D., and ultimately referred to Dr. Thomas McDonald for neurosurgical evaluation. *R.* at 51. Upon presenting to Dr. McDonald for treatment, Claimant reported symptoms of low back pain radiating into the left leg. *Id.* Dr. McDonald's initial impression was lumbosacral sprain. *R.* at 50. After a series of injections and other conservative measures, Claimant was diagnosed as suffering "HNP L4-5, left." *R.* at 46. Dr. McDonald recommended left hemilaminectomy and microdiscectomy L4-5, which were performed on November 30, 2004. *Id.* Claimant returned to Dr. McDonald's office for follow up, as recommended. *R.* at 40. On February 14, 2005, Dr. McDonald was of the opinion that Claimant had

progressed such that he could perform light work. *R.* at 42. Claimant returned to Dr. McDonald's office on March 14, 2005, complaining of left leg pain with numbness in the left calf and left leg weakness. *R.* at 37. The symptoms were aggravated by sitting and standing. *Id.* Claimant was told to continue light work and return for follow up in one month. *R.* at 39. On April 13, 2005, Claimant returned to Dr. McDonald for another follow up visit. *R.* at 34. Claimant again complained of lower back pain radiating into the left leg with constant left calf numbness. *Id.* He was taking Soma for muscle spasms, Vioxx and Lortab for pain, Tranzene, Vicoprofen, Decadron Dose Pack and Xanax. *Id.* A new problem of "numbness" was added to Dr. McDonald's progress notes. *Id.* Claimant was given a return to work slip for medium duty, with a restriction of no climbing. *R.* at 36. Claimant continued to return to Dr. McDonald as recommended with continuing complaints of low back pain and left leg numbness. On May 2, 2006, Claimant was given a ten percent (10%) anatomical disability rating and a permanent climbing restriction. *R.* at 59. On February 2, 2007, and again on March 6, 2007, Claimant went to the Eupora Family Medical Clinic for treatment. *(See Record Excerpts of Appellant/Claimant).* His chief complaint was low back pain on both visits. *Id.* Claimant was prescribed medication for pain. *Id.*

## SUMMARY OF THE ARGUMENT

Claimant suffered an admittedly compensable injury while in the course and scope of his employment as a service man with Natchez Trace Electric Power. More specifically Claimant was lifting a tool belt when he felt a "pop" in his lower back. As a serviceman, Claimant was required to respond to after hour service calls and climb polls as needed. Claimant was initially treated with conservative measures for the injury to his back, which eventually lead to lower back surgery. Claimant was ultimately released to return to work by his treating physician with a ten percent (10%)

anatomical disability rating and permanent climbing restriction.

Before the injury Claimant was capable of climbing and responding to calls. Claimant was paid overtime for being "on call." At the time of the hearing Claimant had returned to work and was earning an average weekly wage of $891.22. Claimant's average weekly wage at the time of the hearing is more than his wage at the time of injury, which was $840.21. Because Claimant is earning more after the injury than he was before the injury, the Administrative Judge, the Full Commission and the Circuit Court of Webster County, Mississippi, have all held that Claimant has not proven a loss of wage earning capacity. In response to the prior rulings in this cause, Claimant submits that it is undisputed that he received wages over and above his base pay for responding to calls, that he has a permanent climbing restriction, which renders him incapable of being placed on the service list to respond to calls and that his ability to earn wages by responding to calls and climbing poles has been lost due to this injury.

## ARGUMENT

### STANDARD OF REVIEW

The findings of the Commission will be affirmed if they are supported by substantial evidence. *Smith v. Rizzo Farms, Inc.*, 870 So.2d 1231, 1237 (Miss. App. 2003). Although the scope of review for workers' compensation cases is restricted by case law and statute, the findings of the Commission will be reversed, if the Administrative Law Judge and the Commission have committed an error of law or their findings are against the overwhelming weight of the evidence. *Id.*

## LOSS OF WAGE EARNING CAPACITY (DEFINED)

Section 71-3-1 of Miss. Code Ann., (1972), requires that compensation be paid for disability for an injury arising out of and in the course of employment. *General Elec. Co. v. McKinnon*, 507 So.2d 363, 365 (Miss. 1987). The degree of disability is determined by actual physical injury and loss of wage earning capacity. *Id.* In determining the loss of wage earning capacity, more is taken into account than a comparison of the pre-injury and post-injury earnings. *Id.*

> ...Post injury earnings equal to or in excess of pre-injury earnings are strong evidence of non-impairment of earning capacity, but that the presumption arising therefrom may be rebutted by evidence on the part of the claimant that the post-injury earnings are unreliable due to: increase in general wage levels since the time of accident, claimant's own maturity and training, longer hours worked by claimant after the accident, payment of wages disproportionate to capacity out of sympathy to claimant, and the temporary and unpredictable character of post-injury earnings.

*Wilcher v. D.D. Ballard Construction Co.*, 187 So.2d 308, 310-311 (Miss.1966) (emphasis added). This list is not exclusive and any factor which causes the actual post- injury earnings to become a less reliable indicator of earning capacity will be considered. *Hall of Mississippi, Inc. v. Green*, 467 So.2d 935 (Miss. 1985). Earning capacity is more than a theoretical concept. *Smith v. Picker Service Company*, 240 So.2d 454, 456 (Miss. 1970). It is a test of capacity, where the Commission must make the best possible estimate of future impairment of earnings on the strength of both actual post-injury earnings and any other evidence of probative value on the issue of earning capacity. *Id.*

In the event a Claimant's functional or medical disability rating varies from the industrial or occupational disability, the Claimant is entitled to the higher of the two ratings. *Union Camp*

*Corporation v. Hall,* 955 So.2d 363, 372 (Miss. Ct. App. 2006). Industrial or occupational disability refers to the manner in which a Claimant's functional or medical disability affects the Claimant's ability to perform the duties of his employment. *Id.*

Most importantly, the Commission is not confined to medical testimony in determining the percentage of loss to be assigned to an injury. *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 167 (Miss. 1991). The extent of Claimant's loss of wage earning capacity should be determined only after considering the evidence as a whole. *Id.*

An employee is not to be denied a finding or some degree of loss when a functional impairment actually prevents him from performing some of the acts and duties incidental to his occupation, and in such cases the continuance of wages at the pre-injury level **must** be credited to the kindness and generosity of his employer. *Vardaman S. Dunn, Mississippi Workers' Compensation Law*, Third Edition, p. 79 (emphasis added). The willingness of the employer to accommodate the Claimant's injury does not provide that the Claimant suffered no post injury loss of wage earning capacity. *University of Mississippi Medical Center v. Smith*, 909 So.2d 1209, 1221 (Miss. Ct. App. 2005). Wages attributable 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. *Id.* The employee has no assurance that he will continue to be the beneficiary of the employer's magnanimity or kindness. *Id.*

In the claim of *Jerry Box v. Aircap Industries and Liberty Mutual Insurance Company*, MWCC No. 05-04558-J-B, loss of wage earning capacity was at issue. The claimant in that instance was given a 10% permanent impairment rating with a permanent restriction of lifting no more than 35 pounds and a 100 pound restriction on pushing and pulling. There was also an alternating sit and

stand restriction for 50% of the time for each. Although Claimant's post-injury earnings and pre-injury earnings were comparable, the Administrative Judge found that a preponderance of the evidence showed the Claimant's overall capacity to earn wages had been impaired by the work-related injury. The Administrative Judge applauded the Employer's efforts to accommodate the injured Claimant, but went on to find that under the current circumstances, it would be difficult for the Claimant to compete in the open labor market.

**LOSS OF WAGE EARNING CAPACITY OF CLAIMANT**

The Employer/Carrier allege that since the Claimant is actually being paid more now than he was prior to the injury, Claimant has not suffered a loss of wage earning capacity. Admittedly, Claimant's post-injury wage is $891.22, and he earned an average weekly wage of $840.21 prior to the injury. The uncontradicted testimony of Claimant, however, establishes that Claimant is not performing all of the substantial duties or acts of his employment. It is undisputed that Claimant has a permanent restriction of "no pole climbing." Because of the restriction of "no pole climbing" Claimant was taken off the service call list. When Claimant was removed from the service call list he lost a minimum of fourteen (14) hours overtime pay per month.[2] A loss of fourteen (14) hours

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[2] Fourteen (14) hours is the minimum amount that Claimant lost after being removed from the service call list. Claimant testified during the hearing that he was "on call" two weeks out of a month and that he received an hour of overtime pay per day regardless of whether he was called out or not. On the days he responded to a "call" he received no less than two hours overtime pay. The amount of compensation Claimant received for responding to a call varied based on the length of time required to make the necessary repair(s). If the repair(s) required four hours of work, Claimant received four hours of overtime pay. If the repair(s) could be completed within two hours or less, Claimant received the standard two hours of overtime pay. Claimant also testified that the amount of service calls received during the span of a week also varied. He estimated receiving an average of six calls during a given week.
R. at 8 - 9.

amounts to a loss of $462.00 per month, when taking into account Claimant's hourly rate of $22.00, and an overtime compensation rate of $33.00. Again, it is undisputed that Claimant was removed from the service call list, and it stands to reason that with the two cost of living increases he has received, he would be earning significantly more than $891.22, if he was still capable of "pulling calls." Based on these figures it is apparent that Claimant would be earning a minimum of $1,006.72 per week, but for the work-related injury and resultant work restriction.[3]

Oddly enough, although Claimant is restricted in his ability to climb, his post-injury wage is higher than his pre-injury wage. Because Claimant is earning more money now, the natural inclination is to conclude that the restriction of "no pole climbing" had no bearing on Claimant's ability to perform his job duties, and thus no bearing on his wage earning capacity.

Most importantly, the employer has undisputedly accommodated Claimant in his inability to climb. While the employer's accommodation of Claimant is admirable, it does not negate the fact that Claimant has a restriction that prevents him from performing a significant portion of the acts and duties incidental to his pre-injury employment.[4] The employer's accommodation of Claimant has been corroborated by every witness called by the Employer/Carrier. Even more, Craig McClusky, who refers to himself as the "baby of the bunch," repeatedly testified that he now does the climbing Claimant was responsible for doing prior to the injury. Contrary to the arguments presented by witnesses called by the Employer/Carrier, climbing was an integral part of the job duties performed

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[3]Judge Loper, in his order, correctly points out that Gregg intended to state $1,006.72 as a weekly wage, instead of $ 1,353.22. (*Judge Loper's Order at P. 5*)

[4]Claimant estimated during the hearing that fifty percent (50%) or more of his pre-injury job duties consisted of climbing. R. at 7; R. at 17. Kase Pulliam, Claimant's immediate supervisor, opined that twenty-five (25%) of Claimant's job duties consisted of climbing. *R.* at 34.

by Claimant. It was so important that Claimant was no longer capable of "pulling calls" and earning the overtime associated with being on the service call list. Claimant testified that he has received two "cost of living" increases since the time of injury. Claimant's immediate supervisor, Kase Pulliam, also testified that since Claimant has returned to work, he has called Claimant out to get some overtime for "special things." *R.* at 45. Based on these facts, it is apparent that Claimant's higher average weekly wage is attributable to the Employer/Carrier's willingness to modify his job by accommodating his permanent restriction, general cost of living increases, and the generosity of the Employer/Carrier, which is exhibited by making certain Claimant receives some overtime work for "special things."

Claimant's testimony, which was corroborated by the testimony of the Employer/Carrier's witnesses, establishes that service men are required to climb or frame poles. Claimant testified that he could no longer climb and that he was in fact restricted by his treating physician from doing so. The uncontradicted testimony of the Claimant further establishes that he climbed poles and worked "on call", prior to the injury and subsequent surgery on his low back. At present, Claimant does not climb poles or lift heavy objects for fear of re-injuring his back. These are activities he frequently performed prior to the injury, and any increased wages he is now receiving must be attributed to cost of living increases and the magnanimity and kindness of the employer. The proof establishes that Claimant cannot perform all of the substantial acts of a service man with Natchez Trace Electric Power Association, and that he does not believe he would be hired as service man for any other power company. Claimant continues to experience low back pain and his symptoms have been documented in the medical records of Eupora Family Medical Clinic and Dr. Thomas McDonald. The Employer/Carrier have not offered any proof to contradict Claimant's continuing

complaints of low back pain and left leg numbness nor the validity of the climbing restriction placed on Claimant by Dr. McDonald.

## CONCLUSION

Claimant asks the Supreme Court of Mississippi Circuit Court to reverse the orders of the Circuit Court of Webster County, Mississippi, the Full Commission and Administrative Judge finding that Claimant has not suffered a loss of wage earning capacity. The facts and testimony establish, without contradiction, that Claimant is certified to climb poles and that he has been restricted from doing so by his treating physician. Claimant's co-workers now perform those duties he cannot perform as a result of the work-related injury. The evidence overwhelmingly shows that Claimant has sustained a loss of wage earning capacity in that he can no longer earn steady overtime pay as he did prior to the injury. He is also in jeopardy of being overlooked as a service man for another employer with his inability to climb. The fact that his pre-injury wages and post-injury wages seem comparable must be attributed to general cost of living increases and the generosity of the employer. Based on the forgoing, Claimant respectfully requests that the this Court reverse the decisions of the Circuit Court of Webster County, Mississippi, the Full Commission and Administrative Judge. Claimant respectfully requests that this Court issue an order determining that Claimant has sustained a loss of earning capacity of fifty percent (50%) and for any and all other relief to which he may be entitled.

Respectfully submitted,

**BARRY GREGG, APPELLANT/CLAIMANT**

**BY:** _____

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## CERTIFICATE OF SERVICE

I, the undersigned attorney for the claimant, do hereby certify that I have this day mailed, by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant/Claimant* to:

Honorable Joseph H. Loper, Jr.
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Amy K. Taylor, Esq.
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This is the 22nd day of July, 2009.

**BENNIE L. TURNER**

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