

**IN THE COURT OF APPEALS OF MISSISSIPPI**

**COPY**

**REBECCA GILL**

**APPELLANT**

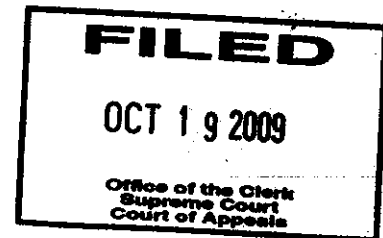
**V.**

**DOCKET NO: 2009-WC-01119-COA**

**HARRAH'S ENTERTAINMENT  
A SELF-INSURED**

**APPELLEE**

**APPELLANT'S BRIEF**



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## **I. CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellant certifies that the following persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Rebecca Gill, Sarids, Ms.
2. David L. Walker, Batesville, Ms.
3. Harrah's Entertainment, Inc. Robinsonville, Ms
4. George Dent, Tupelo, Ms..

Respectfully submitted,

This the 19th of October 2009.

  
David L. Walker MBP   
Counsel of Appellant

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#### **IV. STATEMENT OF ISSUE**

**WHETHER THE TRIAL COURT ERRED IN AFFIRMING THE  
DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION  
COMMISSION IN FINDING THAT APPELLANT/CLAIMANT  
SUSTAINED ONLY A TEN PERCENT LOSS OF WAGE EARNING  
CAPACITY.**

## **V. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

A hearing was conducted in this claim on January 24<sup>th</sup>, 2008. R. at 4. The claim before the administrative judge involved a back injury that occurred on July 2, 2003. R. at 5. The self-insured employer stipulated that the Appellant/Claimant sustained a work related injury to her back on that day. Id. It also stipulated that her average weekly wage was \$379.52 and that she had been paid temporary total disability benefits to which she had been entitled. Id. Additionally, the Appellee/Employer stipulated that she reached maximum medical improvement on August 17<sup>th</sup>, 2004 and that medical services had been provided to her. Id.

The issue submitted for adjudication by the administrative judge (Hon. Mark Henry) was the existence and extent of permanent disability attributable to the aforesaid work injury. Id. The administrative judge awarded the Appellant/Claimant a twenty percent loss of wage earning capacity and permanent partial disability of twenty percent a result of the aforesaid back injury. He awarded permanent partial disability benefits of \$50.60 beginning on August 18<sup>th</sup>, 2004 and continuing for 450 weeks plus penalties and interest. Order of Administrative Judge.

The Appellee/Employer filed a petition for review of the order of the

Administrative judge and the Appellant/Claimant filed a cross petition for review. Full Commission Order at 1. The Full Commission entered a Full Commission Order dated January 23, 2008. It found that pursuant to a review of the record of the proceedings, arguments of the parties and the applicable law that the order of the administrative judge should be amended. Full Commission Order at 1. It found that based upon the Appellant/Claimant's age, education, work experience and the ten percent impairment rating assigned by Dr. Laverne Lovell that she sustained only a ten percent loss of wage earning capacity as a result of the work injury. *Id.* It found that as has been previously noted, a determination of this type, based upon the evidence as a whole, leaves much "to the uncertainty of a factual estimate which is necessarily lacking in mathematical accuracy." **Dunn, Mississippi Workers' Compensation** section 67 (3<sup>rd</sup> ed. 1982). It affirmed all other respects of the Administrative Judge's Order. **Full Commission Order** at 1-2. The decision of The Mississippi Workers' Compensation Commission was appealed to the Circuit Court of Tunica County, Ms. which entered an order affirming decision of the Mississippi Workers' Compensation Commission on June 22, 2009 (same being filed on June 23, 2009). The Appellant/Claimant then filed a notice of appeal of the circuit Court's order on July 8, 2009. The record does not reflect any cross-appeal filed on behalf of the Appellee/Employer.

## **B. APPELLANT/CLAIMANT'S TESTIMONY**

The Appellant/Claimant testified on her own behalf and testified that she was born on June 19<sup>th</sup>, 1963. R. at 8. She graduated from high school in 1981. She attended community college for EMT. Id. She started working in the casino industry in 1994 as a security EMT. She had also worked as a salesperson for a manufactured home business, as a deli manager and office worker/bookkeeper. R. at 9-10.

The Appellant/Claimant was hired by the Appellee/Employer in November 2001 to work as a security officer. R. at 11. On some work days she would be on her feet for 12 hours per shift. At times, she would be assigned to tasks that involved sitting down activities. R. at 12. She did not utilize her EMT skills. Id. In less than six months she promoted to security lead officer and received a pay raise. R. at 13. The Appellee/employer seemed happy with her services. Id.

The Appellant/Claimant was injured when she went to fill up a five gallon gas container and injured her back when she was lifting the filled up gas container. R. at 14. She heard a pop-like sound in her back. Id. She reported the injury to her supervisor and later sought medical treatment from a general practice physician. Id. He treated her and referred to Dr. Laverne Lovell, a neurosurgeon in Memphis, Tn. Id. Dr. Lovell treated her conservatively for a brief period of time and then performed back surgery on her in November 2003. Id. He released her to return to work on August 17<sup>th</sup>, 2004. Id. She returned to work as a security lead. Id. She had previously returned to work in



February. R. at 15. However, she was not at her regular job. Id. She may have received a yearly pay increase. Id. She was terminated by her employer. Id. She was called into the security manager and risk management's office on September 9<sup>th</sup> or September 10<sup>th</sup>, 2004 and told that due to the fact that the Appellee/employer could not ensure her safety that she was going to be let go. She had worked a couple of hours on the day that she was terminated. R. at 16. She liked her job with the casino. This had been the best job that she had ever had from a financial standpoint. Id.

After the Appellant/Claimant's termination she went through a period of unemployment. Id. She was unemployed for six to eight months. She did a job search and had a few interviews. When she told prospective employers what happened at Harrah's no one wanted to talk to her after that. R. at 17. She sought employment at other casinos, such as Hollywood Casino and Sam's Town Casino. Id. She was not hired by either casino. Id. She later secured employment with Fred Baker & Son Electric, Inc. as a secretary/bookkeeper at \$6.25 per hour. R. at 18. She would sit or stand at her option to attempt to control her back pain. Id. Mr. Baker retired and helped her find employment with Memphis Auto Center as an office worker and bookkeeper at \$6.25 per hour. R. at 19. She sought employment at the businesses given her by Pet Mills and was not offered a job.

There is not a time that she does not have some degree of back pain. The amount of pain that she has is related to her activity level, such as being on her feet eight hours per

day. R. at 19-20. She attempts to control her back pain with medication and treatment by Dr. Steven Ritchie, a pain management specialist. R. at 20-21. She was referred to him by Dr. Lovell. R. at 21.

The Appellant/Claimant cannot do a lot of bending and stooping because of her back injury. R. at 22. There is always a degree of pain with standing. Id. If she could return to her job with the employer as a security guard, she could not be as mobile and as quick as she could in the past. Id. She would have to walk whereas she could have run in certain situations. Id.

On cross examination the Appellant/Claimant testified that she could not perform the physical part of EMT work because of her back surgery. R. at 23.

She is no longer a nationally registered EMT because she could not perform the physical part of an EMT because of her back injury. Id. She worked at Outboard Marine Corporation for approximately seven years after she graduated from high school. R. at 23-24. She worked in a Hallmark shop for approximately one year and then as a salesperson for a medical supplies. R. at 24. She also worked as a tool room clerk. She did not believe that she would be rehired at her prior job at Hollywood Casino because of her back injury and limitations. R. at 25-27. These limitations were a thirty pound lifting restrictions and bending and stooping limitations. Id. She has continued to seek employment from the time of her termination by the employer until a week before the hearing. R. at 28. She felt that she could do the job as a mobile home salesperson,

but noted that the business was no longer at the location at which she had worked.

R. at 32. She did not feel that she could perform a job that required driving eight hours per day.

The Appellant/Claimant rested her case in chief and the Appellee/Employer called Ty Pennington as a witness in lieu of Pete Mills. R. at 34. He works as a rehab counselor with Rehabilitation Incorporated for Pete Mills. R. at 35. He characterized the Appellant Claimant as an above minimum wage type person. He was of the opinion that she could perform entry level management work. R. at 36. He classified her as having transferable skills and as an average employee. R. at 39. He was of the opinion that she could obtain a job in the pay range of \$8.00 to \$9.00 per hour with a high end of \$10.00 per hour.

On cross examination Mr. Pennington testified that he attempted to locate a job for the Appellant/Claimant with Hollywood Casino and Sam's Town Casino. R. at 40. An effort was not made to secure the Appellant/Claimant reemployment with Harrah's. Id. The average minimum wage in Mississippi is \$5.85 per hour. Id. The unemployment rate for Panola County, Ms. was probably six percent or above. Id. Panola County, Ms. is a rural county. R. at 41. Employers are split approximately fifty-fifty with respect to hiring injured workers. Id.

If an employer had an option between a 44-year-old female with the Appellant/Claimant's education et. cetera and the same person with the same demographics, one having back surgery and one having not had back surgery,

Mr. Pennington was of the opinion that the employer would probably hire the worker without the back surgery. R. at 41.

**ROBERT EUGENE CHISM, JR.**

The Appellee/Employer next called Robert Eugene Chism, Jr. as its next witness. R. at 43. He is the regional risk manager for Horseshoe, Sheraton, Grand Casino and Harrah's properties. R. at 43. At the time the Appellant/Claimant was terminated, he was property manager for Harrah's. Id. She was terminated because Harrah's did not have a light-duty position that could be offered to the Appellant/Claimant in a full-time capacity. R. at 44. No alternative job was offered to her at the time she was terminated. on cross examination, Mr. Chism testified that to his knowledge the Appellant/Claimant never returned to regular duty. Id.

**DR. LAVERE LOVELL**

Dr. Laverre Lovell treated the Appellant/Claimant for her on the job injury. Deposition of Dr. Lovell at 12. He ordered an MRI scan on her. Based upon this test he performed an L-5/S-1 posterior interbody lumbar fusion with pedicle screw stabilization on her on November 26<sup>th</sup>, 2003. D. at 25. She had fused at L-5/S1. D. at 33. He referred her to a pain management physician. D. at 36. Pain management was not within his practice. D. at 37. He ordered a functional capacity examination for the Appellant/Claimant and based upon this he placed her in a light medium work category (lifting 25-35 pounds occasionally and no work that required repetitive lifting or stooping and bending). He assigned her a maximum improvement date

of August 17<sup>th</sup>, 2004. D. at 40.

Dr. Lovell assigned the Appellant/Claimant a ten percent permanent impairment rating based upon page 404 table 15-7 section II of the AMA Guidelines, Fifth Edition.

He took her off of work from November 26<sup>th</sup>, 2003 until February 27<sup>th</sup>, 2004. D. at 43-

45. He attributed the incident that she described of picking up the five gallon gas can as causing a bulge of the L-5/S-1 disk which resulted in her need for surgery. D. at 46.

## **VI. SUMMARY OF ARGUMENT**

The Full Commission decision to award the Appellant/Claimant permanent partial disability benefits for permanent partial impairment of \$25.30 per week for 450 weeks when the Appellant/Claimant post-injury wages were \$129.52 per week less than her wages at the time of this work injury was not based upon substantial evidence and the circuit court of Tunica County, Ms. erred in affirming this award.

## VII. ARGUMENT

The circuit court erred in affirming the decision of the Mississippi Workers' Compensation Commission. A Full Commission order may be overturned by a circuit court sitting as a reviewing court for errors of law or fact findings unsupported by the evidence. **Lankford v. Rent-A-Center, Inc.**, 961 So. 2d 774, 777 (Miss. App.

2007.) The Full Commission award of ten percent loss of wage earning capacity as a result of the work injury that she sustained herein is unsupported by the evidence. The Full Commission cited the Appellant/Claimant's age, (44 years old at the time of the hearing), education (high school with community college training for EMT) and work experience (casino security officer, officer worker/bookkeeper, salesperson, clerk) and the ten percent medical impairment rating as the basis for its decision to amend the administrative judge's order of twenty percent loss of wage earning capacity.

The Appellant/Claimant made \$6.25 per hour for Mr. Baker compared to the \$379.52 per week that she made at the time of her work injury. Her next job also paid \$6.25 per hour. She was unemployed for six to eight months after her termination by the Appellee/Employer, which never permitted her to return to her prior position. She clearly had a Loss of wage earning capacity if one compares her post-injury wages of \$250 per week (40 hours per week x \$6.25) to her wages at the time of her injury (\$379.52). She made \$129.52 per week less. Yet the Full Commission awarded her only \$25.30 in permanent partial disability benefits for loss of wage earning capacity.

The Appellant/Claimant met her burden of proof of showing an accidental injury

occurred arising out of and in the course of her employment and causal connection by competent medical proof and based upon a reasonable degree of medical probability.

**Harrell v. Time Warner/Capitol Cablevision**, 856 So. 2d 503, 511 (Miss. Ct. App. 2003).

The Appellant/Claimant acknowledges that the Mississippi Workers' Compensation Commission, not the administrative judge, is the ultimate fact-finder in the administrative proceeding involved in this case. **Goodlow v. Marietta-American** 919 So. 2d 149, 151-152 (Miss. App. 2005). Facts as found by the Mississippi Workers' Compensation Commission that are supported by substantial evidence should be affirmed by the circuit court. **Strickland v. M.H. McMath Gin, Inc.**, 457 So. 2d 925, 928 (Miss. 1984). However, an order of the Mississippi Workers' Compensation Commission may be reversed when the circuit court finds that it is clearly erroneous and contrary to the weight of the credible evidence. **Mitchell Buick, Pontiac & Equipment v. Cash**, 592 So. 2d 978, 980 (Miss. 1991). The weight of the credible evidence, that is, a comparison between the Appellant/Claimant's post-injury wages with her wages at the time of her work injury, indicates a clearly erroneous decision by the Tunica County Circuit Court in affirming the decision of the Full Commission.

The workers' compensation act should be liberally constructed to carry out its beneficent remedial purpose. **Stuard v. Brown**, 543 So. 2d 652 (Miss. 1989) The full commission order does not mention this important general rule of workers' compensation law and does not mention the substantial decrease in the Appellant/Claimant's post-injury wages as compared to her wages at the time of her injury.



The Mississippi Workers' Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment. Miss. Code. Ann. Section 71-3-3 (i) (2004). The substantial evidence on disability as noted herein was ignored by the Full Commission.

Procedurally, this appeal is from the circuit court's review of the Full Commission's decision as a final judgment of the circuit court. **Delta CMI v. Speck** 586 So. 2d 768, 772-73 (Miss. 1991). However, the review of the Court of Appeals for all practical purposes is a review of the Commission's order, not that of the circuit Court. *Id.* at 773. The task before the Court of Appeals is to review the Commission's decision for validity, even though the appeal is technically from the circuit court.

**Posey v. United Methodist Senior Servs.** 773 So. 2d 976, 978 (Miss. Ct. App. 2000).

The Court of Appeals owes no deference to the decision of the circuit court. John R. Bradley and Linda R. Thompson, Mississippi Workers' Compensation section 8:6 (Thompson-West 2006). The decision of the Full Commission was arbitrary and capricious and should not be permitted to stand.

Finally, there is a well-established presumption in Mississippi workers' compensation jurisprudence: The actual post-injury earnings will create a presumption of earning capacity commensurate therewith. Applying this rule to the decision of the Full Commission, that decision is not supported by substantial evidence and is arbitrary and capricious. **General Electric Co. v. McKinnon**, 507 So. 2d 363, 365 Miss. 1987).

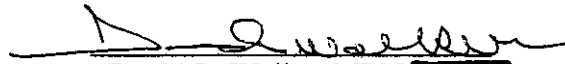
### VIII CONCLUSION

Thus, the Court of Appeals should reverse the decision of the Circuit Court

of Tunica County, Mississippi as not supported by substantial evidence and to remand this case to the Mississippi Workers' Compensation Commission for further proceedings.

Respectfully submitted,

This the 19<sup>th</sup> day of October 2009.

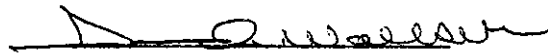


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#### **IX. CERTIFICATE OF SERVICE**

I, David L. Walker, counsel for the Appellant, hereby certify that I have this day mailed a  
A copy of the Appellant's Brief to Hon. Albert Smith, III, circuit court judge and George  
Dent, Esq., opposing counsel, postage prepaid, at their usual mailing addresses.

This the 19<sup>th</sup> day of October 2009.



David L. Walker