IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CHRISTINE LANG — **APPELLANT/ CROSS-APPELLEES**

VS. — **NO. 2009-WC-01540-COA**

MISSISSIPPI BAPTIST MEDICAL CENTER AND RECIPROCAL OF AMERICA (MISSISSIPPI INSURANCE GUARANTY ASSOCIATION A/K/A "MIGA") — **APPELLEES/ CROSS APPELLANTS**

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. Christine Lang, Appellant / Cross-Appellee;
2. John Hunter Stevens, Esq., Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant / Cross-Appellee;
3. Mississippi Baptist Medical Center and Reciprocal of America (Mississippi Insurance Guaranty Association a/k/a "MIGA"), Appellees / Cross-Appellants; and,
4. Douglas R. Duke, Shell Buford, PLLC, Counsel for Appellees / Cross-Appellants.

Douglas R. Duke
Attorney of Record for Appellee / Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTE

ORAL ARGUMENT REQUESTED

Given the clear error by the Mississippi Workers' Compensation Commission in failure to follow the case law denying permanent partial benefits when reasonable job efforts are found lacking after maximum medical improvement, oral argument is requested to allow the Employer/Carrier to highlight this Court's need to advise Mississippi trial courts that per this Court's prior decisions in *Walker Mfg Co. v. Cantrell*, 577 So.2d 1243 (Miss. 1991), prejudicial and reversible error results from such error. Additionally, the equally reversible error of finding compensability when there is no substantial medical evidence to support a causal connection with a claimant's condition and any on-the-job injury needs oral argument for the same reason. *Westmoreland v. Landmark Furniture, Inc.*, 752 So.2d 444 (Miss. 1999).

STATEMENT OF THE ISSUES

ISSUE 1: Whether or not the claimant made reasonable attempts at employment following her release at maximum medical improvement?

ISSUE 2: Whether or not the claimant's condition is related to a work injury?

STATEMENT OF THE CASE

This case arose out of an alleged January 31, 2002, low back injury which supposedly occurred at the Mississippi Baptist Medical Center in Jackson, Mississippi. A Hearing on the Merits was held on January 26, 2007, with all parties present. The *Order of the Administrative Judge* was rendered on April 3, 2007, which determined that the claimant had a permanent occupational disability of 50% loss of wage earning capacity and awarded indemnity and medical benefits. From this decision, employer/carrier filed an appeal requesting the Commission to reverse and deny permanent disability benefits due to the Administrative Judge's total disregard for undisputed medical testimony and overwhelming evidence regarding pre-existing conditions, lack of causation and total disregard of evidence of the claimant's failure to make reasonable attempts at employment after being discharged by her doctors to return to work.

The Full Commission entered its order December 21, 2007, reversing the Administrative Judge. Based on the undisputed evidence that claimant failed to reasonably seek or accept employment, the Commission found a 20% permanent loss of wage earning capacity as opposed to the 50% loss of wage earning capacity awarded by the Administrative Judge.

The parties herein appealed and cross-appealed to the Circuit Court for the First Judicial District of Hinds County, Mississippi, which merely affirmed the holding of the Commission. It is from the said Circuit Court's order affirming the Commission's order that both parties have appealed to this Honorable Appellate Court.

SUMMARY OF THE ARGUMENT

The appellant (claimant) has appealed the Full Commission and Circuit Court orders claiming that each erred in reducing the award of the Administrative Judge based on the substantial, overwhelming and undisputed evidence that claimant failed to exert the reasonable effort required by law to return to her employment after reaching maximum medical recovery with some restrictions, for which her employer had made the necessary modification in claimant's job description.

The Appellee (cross-appellant and employer/carrier) appealed the Commission and Circuit Court order based on the Commission's failure to follow the law and deny permanent benefits after correctly finding that claimant had not made the required effort to return to work. Additionally, the Commission failed to follow the overwhelming and undisputed medical evidence that claimant's condition and related medical expenses are a result of her pre-existing back condition which required surgery-not a result of the injury which claimant purported to have occurred on January 31, 2002. The Circuit Court of Hinds County consequently erred in affirming the Commission's reduced award and allowing any award of indemnity or medical expenses, whatsoever.

As an appellate court in appeals from the Mississippi Workers' Compensation Commission the Supreme Court properly reverses the order of said Commission if the basis of the lower tribunal's order regarding compensability is not supported by substantial evidence. *Harpole Bros. Construction Co. v. Parker*, 253 So.2d 820 (Miss.1971). Additionally, if the Commission does not follow the law applicable to a correct finding of fact, then the Circuit

Court, which is charged by statute with the duty of reviewing all questions of law and fact, should have reversed the Commission Order, § 71-3-51, Miss. Code Ann. 1972.

This power and duty of reversal of the Commission findings are limited, "but where there was no substantial contradiction in evidence as to material facts, and case rested upon presumption and inference from the undisputed facts, Circuit Court was justified in disturbing findings." *Winters Hardwood Dimension Co. v. Harris' Dependents*, 112 So.2d 227 (Miss. 1959). As herein below set forth such a presumption of no permanent loss of wage earning capacity exists when claimant fails or refuses to make reasonable efforts to seek or accept employment at the same wage within her restrictions. Also, there is no substantial medical evidence that claimant's condition and need for medical treatment are due to anything other than her pre-existing back condition. Dr. John Neill's testimony is undisputed that he would not relate claimant's condition to the alleged January, 2002 injury. Dr. Vohra has no opinion on the issue as pointed out herein below and from the actual record in this case.

ARGUMENT

A. FACTS

At the time of her alleged injury on January 31, 2002, the claimant was an LPN for the Mississippi Baptist Medical Center in Jackson, Mississippi. **Before the date of alleged injury,** on June 19, 2001, the claimant had undergone non-job related back surgery and returned to her regular job with continuing discomfort in her back and both lower extremities after standing all day. (RE1: R. "Exhibits", Gen. 1, p. 9, line 4 - Dr. Neill deposition). The Administrative Judge in her April 03, 2007 decision evidenced her complete misunderstanding of the undisputed evidence in this claim where she begins her decision as follows:

1. "The claimant suffered a compensable work related injury on or about the date alleged in the Petition to Controvert namely, January 31, 2002. As a result of this injury, the claimant underwent surgery by the esteemed neurosurgeon, John Chalmers Neill."

It is undisputed from the record that the only back surgery this claimant ever had was for her pre-existing condition . Said surgery was performed on June 19, 2001, more than seven (7) months **before** the alleged on-the-job injury.

The Administrative Judge also misrepresents the record when she stated claimant was free of pain by September 21, 2001 because from medical records it is undisputed that on the 21st of September, 2001, she had "continuing discomfort in her back and lower extremities after standing all day." (RE1: R. "Exhibits", Gen. 1, p. 9, line 4).

Following her June 19, 2001 surgery and follow-up visits for disc herniation, claimant returned to Dr. Neill on May 1, 2002 with no history given of a January 2002 injury. Instead, she

reported to Dr. Neill the same original pre-existing complaints of low back pain with radicular right-sided symptoms. The back problems claimant reported in May 2002 did not surface until a **"couple"** of months prior to the May 1st visit (*i.e.*, March – NOT JANUARY). (RE1: R. "Exhibits", Gen. 1, p. 10, line 7).

As an afterthought, claimant called Dr. Neill a week after her May 1, 2002 visit and asked that her chart be changed to reflect that her problems began with a January 31, 2002 on-the-job injury as opposed to the original history she provided at the time of her visit on May 1st (*i.e.*, her problems began a couple of months prior to her May 1, 2002 visit). (RE1: R. "Exhibits", Gen. 1, p. 9, line 25 and p. 12, line 12).

Dr. Neill testified on page 21 regarding causation as follows:

> May 8th I have a note, Ms. Lang called and wanted to be sure it was in her chart that her problems began when she lifted a patient on 1/31/02. That's a month before her back pain started. If in fact you can establish that, to me---**I wouldn't relate her back pain to that injury of January 31st, but people also will say a 'couple of months' when they mean three months. . . .**

(RE1: R. "Exhibits", Gen. 1, p. 21, line 4). This opinion was ignored and not mentioned in the opinion or decision of the Administrative Judge or Commission. Claimant's own testimony verifies Dr. Neill's lack of causation testimony, as hereinbelow set forth.

More than once under oath in this case Claimant clearly testified that "a couple" always meant "two (2)" to her. (RE2: R. Volume 3 of 3, p.28, line 12 and RE6: R. "Exhibits", Gen. 15, pp. 19 and 20). If the Administrative Judge found Dr. Neill to be so esteemed as stated in item one (1) of her DECISION, she had no basis not to accept the good doctor's opinion as hereinabove quoted which establishes a lack of causal connection between claimant's back pain and the alleged January 31, 2002 accident.

After Dr. Neill's testimony as hereinabove set forth, the employer and carrier amended their answer to deny the accident and its causal connection to any job related incident, and the Full Commission's order recognized the issue but erroneously decided in Claimant's favor in spite of undisputed medical evidence to the contrary. (RE2: R. Volume 3 of 3, p. 3, line 10; RE7: R. Volume 2 of 3, pp. 36-39)

Dr. Rahul Vohra did not see claimant until about eight (8) months after the alleged January, 2002 incident and consequently had no causation opinion. Vohra concluded her condition was just as likely due to "a progression of her back pain which she had previously, or it could have been secondary to the injury she reported." (RE3: R. "Exhibits", Gen. 2, pp. 5 and 20). This leaves no substantial medical evidence to support the causal connection required to award benefits for this claim. This medical opinion testimony of Dr. Vohra which was also ignored and not mentioned in the opinion or decision of the Administrative Judge or Commission, said page 20, is quoted as follows:

> **Q.** As I understood your original testimony as far as relating the need for this treatment, you, as to causation, had no opinion as to whether or not it's related to the natural degeneration of spondylosis, subsequent - - or prior, rather, surgery, or some other cause?
> **A.** I think what I had said was that I have no independent knowledge of how this back pain came along. It certainly could have been a part of the – you know, a progression of her back pain which she had previously, or it could have been secondary to the injury that she reported. I have no independent way of verifying one or the other.
> **Q.** Just as likely one as the other?
> **A.** Could be.

It is stipulated and undisputed that MMI was reached on July 28, 2003 and claimant could return to work with FCE restrictions.

Dr. Vohra testified that if her job duties were modified to meet her FCE restrictions then claimant could have continued in her LPN employment at MBMC (RE3: R. "Exhibits", Gen. 2, pp. 12-13), to-wit: ". . . **A.** . . . If the job could be modified to fit the restrictions, I think she could do it." (RE3: R. Exhibits", Gen. 2, p. 13, line 3).

Undisputed testimony from claimant's supervisor, Libby Lampley, at the Baptist Hospital establishes that the said employer offered claimant work with the FCE modification at the same wage, but claimant came in and falsely represented to Ms. Lampley that she, contrary to the FCE, could do nothing within the FCE restrictions. (RE2: R. Volume 3 of 3, pp. 31-32 and pp. 54-56). Claimant admitted the foregoing in her testimony as follows:

> **Q.** You were released by Dr. Vohra on July 28th, 2003 to light duty; is that correct?
> **A.** Right.
> **Q.** And then when was it that you went to see Mrs. Lampley to see about a job at Baptist after that?
> **A.** Right after I found out I was released.
> **Q.** And when you went in there to see Mrs. Lampley, you could hardly sit in that chair, at all, could you?
> **A.** That's right.
> **Q.** For any length of time?
> **A.** Not much. That's correct.
> **Q.** And you could hardly walk up and down the hall for Mrs. Lampley?
> **A.** My pain was not in control, that's correct.
> **Q.** And when someone can't walk or sit at all, they're not going to get a job as an LPN, are they?
> **A.** Well, that's the condition that I was in when I was released, so I did go back and I did interview with Mrs. Lampley.
> **Q.** But your restrictions said on your FCE you could, at least, sit for 30 minutes at a time and stand for 30 minutes at a time?
> **A.** Yes, sir. That's what my restrictions said, but I was unable to then . . . .

(RE2: R. Volume 3 of 3, pp. 31-32). The hereinabove set forth admission of claimant was ignored and not mentioned in the opinion or decision of the Administrative Judge. Mrs. Lampley also testified as follows:

> **Q.** And did you have an occasion to interview her for any modified work around August of '03?
> **A.** Yes, I did.
> **Q.** What was your position with Baptist at that time?
> **A.** At that point, I was clinical director over several areas, one included the continence clinic where Christine was employed.
> **Q.** And what was the occasion for her coming to see you in the summer of '03?
> **A.** In the summer of '03, from my recollection, she had an excuse to return to work at that point in time and it listed modified duties for her with some restrictions from weight bearing and things of that nature.
> **Q.** Did you review those restrictions with regard to sitting, standing, bending and all of that?
> **A.** Yes.
> **Q.** And were you in a position to offer her modified duty at that time?
> **A.** Absolutely.
> **Q.** And then what happened?
> **A.** At that point in time when Christine sat in my office and we discussed this **and I offered her**, you know, the option of going back in the Continence Clinic and certainly abiding by those restrictions as defined and told her we would be glad to work with her in any way we could at that point in time allowing her however often she needed to sit down. In fact, there were some task[s] that we could do which, you know, would allow her more time to be seated and, obviously, no lifting and things of that nature. At that point in time from my discussion with Christine, **she stated to me that she could not sit comfortably for any length of time and she could not stand comfortably any length of time.**
> **Q.** And did you observe her with the difficulty sitting?
> **A.** Yeah. At that point in time in my office her physical appearance did appear that she was uncomfortable sitting at the table.
> **Q.** Did you observe her walking away from you after the interview?
> **A.** Yeah, I did. I walked with her through the door of my office and observed her as she was walking onto the elevator and she did

appear to be walking in a matter that would indicate that she was uncomfortable.

Q. With regard to the modified duty job that you were willing to offer her, would it have been at her same wage, at approximately, $16.00 an hour?

A. Yes.

Q. And what types of positions were available at Baptist at that time that you could have put her in within her restrictions?

A. Basically, I think what we could have done, at that point in time, was put Christine back in the Continence Clinic where she was employed. I mean, there were a lot of duties that we could do that didn't require any continuos (sic) standing. We could have gone with things, such as, follow up phone call interviews with patients and things of that nature. Even limited assisting with procedures should have been, in my opinion, within what the restrictions were defined as.

Q. You ever done any fishing?

A. I grew up fishing in the later years.

Q. If she could do fishing and shopping with the carts and bags and so forth –

BY MR. STEVENS: I object to that line of question, Judge, that's way out there.

BY ADMINISTRATIVE JUDGE MOUNGER: I'd have to sustain that.

BY MR. DUKE: (Continuing)

Q. Did you have a chance to observe any photographs of her shopping?

A. Yesterday in my office, yes, with you.

Q. Would the jobs you had for her be consistent with what you observed she was able to do in that picture?

A. From my observation, yes.

(RE 2: R. Volume 3 of 3, pp. 54-56). This evidence was also ignored and not mentioned in the opinion or decision of the Administrative Judge, but was accepted by the Commission as substantial evidence. (RE7: R. Volume 2 of 3, p. 36-39)

After MMI on July 28, 2003, claimant waited for approximately six (6) months to purportedly seek any other employment in January of 2004. (RE2: R. Volume 3 of 3, p. 36). This undisputed point was ignored and not mentioned in the opinion or decision of the

Administrative Judge. Her visit to MBMC to discuss returning to work after being she released by Dr. Vohra was a farce because she feigned not being able to do the modified duties she was offered at the same salary and misrepresented her FCE restrictions to the extent of not being able to stand or sit for any length of time. She also told her employer that she was sedated. In effect, that behavior begs not to be hired by anyone. (RE2: R. Volume 3 of 3, pp. 31, 32 and 38).

Nevertheless, the Administrative Judge ignored a third undisputed expert opinion that claimant had not made reasonable efforts to obtain employment and consequently had no loss of wage earning capacity. (RE2: R. Volume 3 of 3, pp. 67-68). This was the testimony of Jennifer Oubre, a vocational rehabilitation expert, as follows:

> **Q.** So based upon that and your expertise and your listening to the evidence today, do you have an opinion whether or not she made reasonable efforts to gain employment?
>
> **BY MR. STEVENS:** Object to speculation.
>
> **BY ADMINISTRATIVE JUDGE MOUNGER:** Overruled. She can answer.
>
> **A. I do not believe that, in my opinion, that she made 3a (sic) reasonable effort to seek employment within her restrictions.**
>
> **BY MR. DUKE:** (Continuing)
>
> **Q.** And based on the testimony of Mrs. Lampley that was willing to modify her LPN job at the same wage, do you have an opinion whether she had any loss of wage earning capacity?
>
> **A.** No, there was - -
>
> **BY MR. STEVENS:** Same objection.
>
> **BY ADMINISTRATIVE JUDGE MOUNGER:** Overruled.
>
> **BY MR. DUKE:** (Continuing)
>
> **Q.** Do you have a position?
>
> **A. No - - I'm sorry. She would not have a loss of wage.**

The Commission accepted the above as undisputed substantial evidence but failed to deny benefits in accordance with the herein below cited case law.

B. LAW AND AUTHORITIES

ISSUE 1: Whether or not the claimant made reasonable attempts at employment following her release at maximum medical improvement?

In the present case, the Full Commission correctly found as the ultimate fact-finder that claimant failed to make reasonable attempts to find employment after MMI, but then failed to follow the law defining denial of benefits for permanent partial loss of wage earning capacity.

The case law seems very clear that it is the claimant's duty to reasonably seek other employment after being discharged for work. *Pontotoc Wire v. Ferguson*, 384 So. 2d 601 (Miss. 1980); *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638 (Miss. 1978); *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826 (Miss. 1979); *Pike County Board of Supervisors v. Varnado*, 912 So. 2d 477 (Miss. App. 2005).

In this case it is undisputed that the employer had modified duties to offer claimant pursuant to the FCE restrictions at the same wages. Of course, when claimant came to her interview after MMI and return to light duties, she portrayed fictitious restrictions (*i.*e., no sitting, no walking and sedation (RE2: R. Volume 3 of 3, pp. 31, 32, and 38)) making it impossible to hire her. Both claimant and Ms. Lampley, the Baptist Hospital interviewer, confirmed this set of undisputed facts. It is also undisputed that claimant never came back to Baptist even after later Social Security Capacity Assessment in December '03 found her able to sit for up to six (6) hours (vs.30 minute sitting limitation on June 03 FCE) (RE5: R. "Exhibits", EC. 13 (Soc. Sec. Ex. F, p. 2) and RE6: R. "Exhibits", Gen. 15, p. 17). The Claimant certainly can fish and sit for over six (6) hours as reflected on the November '06 videotape, a fishing trip claimant denied in her second deposition. (RE6: R. "Exhibits", Gen. 15, pp. 11 and 23).

Claimant's portraying to interviewers false restrictions making it impossible to hire her, amounts to no effort at all, much less reasonable effort.

It is respectfully submitted that the Commission on review "is basically the original fact-finding agency and while its consideration is usually upon the record as made before the administrative judge, it reviews the evidence as well as the law" and therefore ruled Claimant had not met the requirements of a reasonableness in her alleged efforts to return to work. *Walker Mfg Co.v. Cantrell*, 577 So. 2d 1243, 1246 (Miss. 1991); *Hale v. Ruleville Health Care Center*, 687 So. 2d 1221 (Miss. 1997). The Commission's error in the case at bar was one of failing to follow the law applicable to such a finding of fact.

In *Walker*, as in this case, the claimant was offered the opportunity to return to work in a different position but with no change of pay after an injury to his hand. The Commission in its review found, among other things, "that Cantrell . . . had not returned to work in spite of Walker Manufacturing's offer." Moreover, the Commission found that Cantrell had failed to prove an occupational disability attributable to his hand injury in excess of the scheduled number medical impairment that was documented by his doctor. In the present case the disability rating by Dr. Vohra is 5% to the body as a whole. See page 11 of Dr. Vohra's deposition. Moreover, Dr. Vohra and Neill do not causally connect any impairment or medical expense to the alleged January, 2002 accident. The Commission explained that Cantrell failed to "provide any witnesses to corroborate his statements of inability to work . . ., nor did he provide any proof that he was refused employment based upon the disability to his hand." *Id.* at 1245. Likewise, in this case there is no proof that claimant supplied witnesses to corroborate her statements of inability to work or that the claimant was denied employment based on her alleged disability.

In *Hale v. Ruleville Health Care Center*, the Commission found that the claimant's efforts to secure employment were less than diligent based upon the fact that she worked following the accident from which the case arose. The defendant's testimony also revealed that the Health Center offered her with work within the specified limitations set by her physician, but the claimant responded that she would be unable to accept the work offered because she could not "bend over," a restriction that was not included in the doctors return-to-work slip. The Commission found that the claimant "did not establish a prima facie presumption that she had suffered disability through her rather limited efforts to regain employment at the Health Center . . . ." 687 So. 2d at 1227-28. In the present case, the claimant stated that she continued to work following the accident from which this case arose because she was not hurting. In fact, she stated that she "had no injury at all." (RE2: R. Volume 3 of 3, pp. 16-17). Undisputed testimony from claimant's supervisor, Libby Lampley, establishes that the claimant's employer offered claimant work within the FCE modification **at the same wage,** but claimant refused said work based upon restrictions that were not included in the FCE restrictions indicated by her physician. (RE2: R. Volume 3 of 3, pp. 22-32 and pp. 54-58).

It is respectfully submitted that six months (July '03 to January '04) and then eighteen (18) months delays, including the entire year of 2005, in searching for a job were not reasonable since doctors had released the claimant for light duty during these periods. (RE2: R. Volume 3 of 3, p. 42). The Administrative Judge's reference to an "exhaustive" search is clearly erroneous because the record demonstrates that she allegedly looked for a job only twenty-two (22) days out of a possible 1277 days. (RE7: R. Volume 2 of 3, p. 36-39). In the present case, the Full Commission found correctly that claimant's efforts were not diligent. It is undisputed that she

went to purported prospective employers only when her lawyer told her to go. (RE2: R. Volume 3 of 3, p. 43).

Havard v. Titan Tire Corporation of Natchez, 919 So.2d 995 (MS. 2005) held that the claimant was not entitled to additional indemnity benefits beyond the stipulated date of maximum medical improvement for permanent total disability. In so holding, this Court affirmed the Court of Appeals holding further as follows:

> "To establish that workers' compensation claimant was entitled to permanent partial disability benefits, claimant had to show that he had sought work, but been unable to obtain the same or similar type of employment, and upon reaching maximum medical recovery, claimant also had to show that he reported back to employer and employer refused to reinstate or hire him...."

In the present case the Full Commission found as the ultimate fact-finder that claimant's efforts to return to work, i.e. to her employer or other available employment, were not reasonable and a sham because she undisputedly exaggerated the symptoms that were documented in her functional capacity evaluation. Having so found factually that the claimant's efforts were not sufficient, the Commission then only reduced the claimant's award in spite of the long standing rule of law that if claimant does not prove a "reasonable" effort to re-obtain employment, then claimant has not met the burden of proof for any indemnity benefits beyond the stipulated date of maximum medical improvement.

Not just any effort to obtain employment is sufficient for claimant to meet her burden in the present case. The case law consistently has held in this state that such efforts must be reasonable.

In *Chestnut v. Dairy Fresh Corporation*, 966 So.2d 868 (MS – 2007) this Court affirmed the Court of Appeals ruling and holding that, "workers' compensation claimants reaching

maximum medical improvement, and his failure to make a reasonable effort to find employment following release from his physicians, constituted **a bar** as to his ability to present a *prima facie* case of permanent partial disability."

It is respectfully submitted that this Court should find that the record supports the Workers' Compensation Commission's decision that Claimant did not make reasonable efforts to obtain gainful employment for purposes of any permanent partial disability benefits as in *Ford v. Emhart, Inc.*, 755 So.2d 1262 (MS – 2000). However, as the ultimate fact-finder, the Commission having made such a correct finding of fact, was bound to follow the law and deny Claimant's award for permanent partial benefits on the grounds that she, therefore, did not meet the burden of proof to entitle her to same. When the Full Commission is found by this Court to have made the proper finding that Claimant failed to sustain burden of proof of loss of wage earning capacity because Claimant did not provide sufficient evidence that Claimant made reasonable efforts to find employment, then indemnity benefits must be denied. The Full Commission in the case *sub judice* having made the correct factual finding is bound to follow the law as stated in *Owens v. Washington Furniture Company*, 780 So.2d 643 (MS – 2000) and rule no loss of wage earning capacity.

The case law also makes it irrelevant that the claimant can no longer do all the duties in the standard job description for an LPN (because of her pre-existing degenerative and non-accident conditions) which job description Ms. Lampley stated was overridden by Hospital policy for employees returning for modified duty with their restrictions. The loss of the same job argument may be sufficient under certain insurance disability policies, but in Worker Compensation cases the claimant is required to take "other" employment available to her.

Walker Mfg Co.v. Cantrell, 577 So. 2d 1243 (Miss. 1991). Ms. Lampley was revising Ms. Lang's job duties so that she could make the same wages with different responsibilities. Ms. Lang produced no witnesses to corroborate her statements of inability to work or perform according to the FCE restrictions. Lang's case stands or falls on her own unsubstantiated testimony with regard to this fact. Therefore, under the undisputed facts in this claim, there should be no award for loss of wage earning capacity, since claimant pretended not to be able to sit or stand at all (RE2: R. Volume 3 of 3, p. 55). This was at a time she was offered the same wage to return to work within her time restrictions.

Finally, on Issue 1, Appellees and Cross-Appellants request this Court affirm the factual finding of the Commission that reasonable efforts were not made, but reverse and deny any award for permanent partial disability in accordance with the law applicable to said fact-finding.

ISSUE 2: Whether claimant's condition is related to a job related injury?

The totality of medical evidence in this case fails, without any contradiction, to causally connect a work related injury to Claimant's condition. The issue of failure to reasonably seek re-employment obviously becomes moot if this Court accepts the undisputed testimony of Dr. Neill that causation from a work-related injury is not likely based on the history given to Dr. Neill by claimant. Claimant failed to report any injury upon her first visit to Dr. Neill in May of 2002 when she stated her problems began "a couple of months earlier." Problems should not begin in March for a January accident. Dr. Neill testified as follows:

"I wouldn't relate her back pain to that injury of January 31st, but people also will say a couple of months when they mean three months or a 'few months' when they mean four months." (RE1: R. "Exhibits", Gen 1, p. 20 - Neill deposition).

Ms. Lang in her deposition and at the hearing plainly testified that "a couple" meant "two" to her. (RE2: R. Volume 3 of 3, p. 29, line 11-12 ; RE6: R. "Exhibits", Gen. 15, pp.19-20.)

Moreover, in the Order for Ms. Lang's Social Security Award her entire list of disability conditions did not include any alleged injury of January 31, 2002, **but only the numerous conditions unrelated to said alleged injury.** (RE2: R. Volume 3 of 3, p. 33; RE4: R. "Exhibits", CL. 8 and RE5: R. "Exhibits" EC. 13). It is also undisputed from the record that claimant was first denied Social Security benefits until she supplemented her claim with the **conditions she had which were unrelated to any job injury**, to wit: hands, wrists, shoulders, hyperthyroidism, diabetes, and hypertension. (RE2: R. Volume 3 of 3, pp. 33-34 and RE6: R. "Exhibits", Gen. 15, pp. 13-15; RE4: R. "Exhibits" CL. 8). She also admitted that the pain medications she is taking serve to relieve this unrelated pain. (RE2: R. Volume 3 of 3, p. 45). Therefore, this employer and carrier should not have to pay for said pain medication unrelated to any alleged work injury. This undisputed evidence was also ignored and not mentioned in the opinion or decision of the Administrative Judge, the Full Commission or the Circuit Court.

Dr. Vohra testified (RE3: R. "Exhibits", Gen. 2, p. 20 - Vohra deposition) on the issue of whether claimant's back condition arose out of an on-the-job injury that **Ms. Lang's condition was just as likely due to the diagnosis of Dr. Neill (pre-existing degenerative disc disease due to wear and tear- (RE1: R. "Exhibits", Gen. 1, p. 14)) as to any alleged January 31, 2002 aggravation**. This does not carry the burden of proof or the issue of causation under MS Workers Compensation case law *Westmoreland v. Landmark Furniture, Inc.*, 752 So. 2d 444 (Miss. 1999), wherein benefits were denied because "physicians could not attribute claimant's condition to work related incident any more than they could attribute his condition to incident

Respectfully submitted,

MISSISSIPPI BAPTIST MEDICAL CENTER,
RECIPRICAL OF AMERICA AND MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION

BY: Douglas R. Duke
Douglas R. Duke

DOUGLAS R. DUKE, MBN [redacted]
SHELL BUFORD, PLLC
POST OFFICE BOX 157
JACKSON MS 39205-0157
Telephone: (601) 932-4118
Facsimile: (601) 932-4860
lawyerduke@aol.com

ATTORNEYS FOR APPELLEE / CROSS-APPELLANT

CERTIFICATE OF SERVICE

I, Douglas R. Duke, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above and foregoing document to:

John Hunter Stevens
GRENFELL, SLEDGE & STEVENS
1659 Lelia Drive, Jackson, MS 39216
Post Office Box 16570
Jackson, Mississippi 39236-6570

Honorable William F. Coleman
Hinds County Circuit Court Judge
Post Office Box 27
Raymond, MS 39154

This the 25th day of February, 2010.

Douglas R. Duke