IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

CHRISTINE LANG — APPELLANT

V. — NO. 2009-WC-01540-COA

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

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF HINDS COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CHRISTINE LANG **APPELLANT**

VS. **NO. 2009-WC-01540-COA**

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant/Cross-Appellee, Christine Lang, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

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

THIS the 27th day of January, 2010.

JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. Whether or not the Full Commission Order dated December 21, 2007, is contrary to law and against the overwhelming weight of the evidence;

2. Whether or not the Full Commission erred in failing to award disability benefits and in failing to affirm the Order of the Administrative Judge dated April 3, 2007;

3. Whether or not the Full Commission Order dated December 21, 2007, is against the intent and purpose of the Workers' Compensation Act inasmuch as it ignores the liberal construction in favor of compensation.

STATEMENT OF THE CASE

On April 3, 2007, the Administrative Law Judge (ALJ), Virginia Wilson Mounger, entered her Opinion ruling in favor of Christine Lang and ordered $322.90 in temporary total disability benefits from January 31, 2002 through July 28, 2003 and $213.68 in permanent partial disability benefits for 450 weeks beginning July 29, 2003 (Ex.2, Record Appellant Excerpts; P. 30). On April 16, 2007, the employer filed their Notice of Appeal to the full Mississippi Worker's Compensation Commission. (T. 32) On September 24, 2007, the Full Commission of the Mississippi Worker's Compensation Board affirmed the findings of the ALJ but changed the amount of Ms. Lang's diminished earning capacity lowering it from 50% to 20% despite the testimony of numerous experts. (T. 39) On December 27, 2007, the Claimant has appealed this decision to the Circuit Court of Hinds County, Mississippi. (T. 40)

STATEMENT OF FACTS

Stipulated Facts: The average weekly wage of the claimant is $641.00 per week;

The maximum medical improvement was attained by the claimant on July 28, 2003.

SUMMARY OF FACTS

Claimant was a 23 year employee of Mississippi Baptist Medical Center, and worked as a licensed practical nurse. (T. 22) The Claimant sustained an admitted injury to her back, and the Employer and Carrier paid medical and temporary indemnity benefits. (T. 1) Subsequently, after being released by her physicians with restrictions that indisputably prevented her from returning to her job of 23 years as a licensed practical nurse. (Ex. 1, Record MWCC H-8022 Transcript; P. 22). Claimant underwent significant job search efforts, and even with assistance from vocational rehabilitation personnel hired by the Employer and Carrier, the Claimant was not able to find suitable employment. (T. 23) The Claimant has been declared disabled by the Social Security

Administration, continues to take significant narcotic pain medication, and was found to have sustained a 50% loss of wage of earning capacity by the Administrative Law Judge. (Ex.2, Appellant Excerpts; P. 30).

Christine Lang, despite only completing a 9th grade education, obtained her GED, and in 1979 became a licensed practical nurse. (T. 22) The Claimant was a long-term, loyal employee of Mississippi Baptist Medical Center.(Ex. 1, MWCC H-8022 Transcript; P.12). She worked for Baptist immediately after she received her nursing license, and worked for them until her admitted injury. (T. 12) She began work in 1979, and worked until her physicians informed her that she could not continue to do the work in March, 2003. (T. 22)

Despite her lack of education, the Claimant had an admitted wage of $641.00 per week as of the date of her injury. (Ex. 2, Appellant Excerpts; P.30). As a result of her long-term employment with Baptist, at the time the Claimant's physician stopped her from working, she only needed three more years to be vested with her retirement. (T. 22) At the time of the accident the Claimant was 52 years of age.(T. 1) The Claimant's job throughout that complete 23-year period involved all the usual physical requirements of a licensed practical nurse, which is classified as a heavy lifting position. (T. 39)

Sometime in 2000 before the admitted injury, the Claimant started having some back pains, and at no point did she attribute any of these back problems to her job at Baptist.(Ex.1, MWCC H-8022 Transcript; P.15). Nonetheless, she was treated by Dr. John Neill, a neurosurgeon in Jackson, who performed back surgery on her in June of 2001. (T. 15) Dr. Neill released the Claimant to full-duty and to return to her job as a licensed practical nurse. (T. 15) She returned to work at Baptist to her usual job, without problems for approximately 7 to 8 months. (T. 15) There is no dispute that she

had any problem doing her job, and had nothing other than good performance until this injury.

The unrefuted evidence shows that the Claimant sustained an injury to her lower back, on approximately January 31, 2002, while lifting a patient. (T. 18) She continued to try and work with her condition, and it was some time before she returned to a physician. (T. 17) The Claimant saw Dr. Neill, who referred her to Dr. Vohra. (T. 19) She was unable to continue working, and was taken off work by her physicians after March of 2003. (T. 17) It is important to note that prior to January 31, 2002, the Claimant's unrefuted testimony was that she was allowed to return to work without problems after the previous surgery by Dr. Neill. (T. 15)

The Claimant previously filled out an investigative report shortly after the accident, which was given to her supervisor, but was ultimately lost, so the Claimant filled out a second report of injury in the spring of 2002, describing the injury as lifting a 300-pound patient. (T. 17) After their investigation, the Employer and Carrier accepted the claim as compensable, and began paying temporary disability benefits, beginning on May 13, 2002, continuing until February 24, 2004. Medical benefits were also paid by the Carrier. (T. 17)

Dr. Vohra primarily treated the Claimant for the disabling condition caused by the unrefuted lifting incident in January of 2002. (Ex. 3, Vohra Deposition; P.5). Dr. Vohra's opinion was that the problem was consistent with the lifting injury, per Claimant's history. (T. 17) Dr. Vohra treated the Claimant September 23, 2002, and gave her a course of medication and physical therapy, ultimately giving her an MMI date of July 23, 2003, and assigning her a 5% permanent partial impairment rating. (T. 2) He further gave the Claimant a permanent light-duty with lifting restrictions, which would not allow her to return to her usual occupation as a licensed practical nurse. (Ex. 1, MWCC H-8022 Transcript; P.21).

The Claimant was also treated by Dr. Laseter for chronic pain, and continues to receive treatment through Dr. Vohra, and his nurse practitioner, which has continued into 2007 to prescribe medication for all aspects of the chronic pain she continues to suffer. (T. 23) Dr. Vohra's opinions, based on a reasonable degree of medical probability, are that the ratings and restrictions are related to the injury the Claimant sustained at Baptist. (Ex.3, Vohra Deposition; P.17) He further testified that the Claimant will likely continue to have to take narcotic pain medication, including Lorcet, Neurontin and Zoloft, as a result of this injury. (T. 19) There was no evidence in the record to refute the findings of these physicians.

Although the Claimant was found totally disabled by the Social Security Administration, she also testified with conviction to a very exhaustive and credible job search, including an attempt to return to the Baptist, especially since she only had three years to invest in her retirement.(Ex.1, MWCC H-8022 Transcript; P.19). The record is void of any evidence of any offer to return to work by Mississippi Baptist Medical Center. (T. 19) Furthermore, Jennifer Oubre, the vocational specialist who testified on behalf of the Employer and Carrier, testified that there was no effort made by her for an almost three-year period up until the hearing to even determine if there was a job available in the vast employer of Baptist Hospital. (T. 71) To the contrary, Ms. Oubre only was able to find eight potential employers, none of which offered the Claimant a position despite concerted efforts by the Claimant and Ms. Oubre to apply for these jobs. (T. 70) Ms. Oubre further admitted in her testimony, based on her expert opinion, that the Claimant would <u>not</u> be able to fulfill the physical requirements of a licensed practical nurse. (T. 70). This was the only job that the Claimant had for over 23 years. Ms. Oubre further acknowledged that it would be difficult for the Claimant to return to any type of job, considering the strong narcotic pain medications, and did not dispute the

legitimacy of the Claimant's independent job search efforts, without the assistance of Ms. Oubre. (T. 71) The Employer and Carrier submitted no evidence to refute that the Claimant's injury occurred on the job as she testified, evidence to refute that the Claimant could not return to her previous occupation as an LPN, nor any legitimate job offer by their Employer or through their expert witness.

SUMMARY OF THE ARGUMENT

The Claimant submits that the evidence is unrefuted and that the Order of the Administrative Law Judge is correct and should be reinstated. All the evidence presented in this case point to the fact that she is 50% disabled after her injuries and would only be able to work a job that required no heavy lifting. The average wage of the jobs found by the Defense's Vocational Therapist, Ms. Oubre, paid $7.48 an hour and The Claimant was not hired to fill any of those positions. Ms. Oubre also testified at trial that The Claimant was cooperative during their meetings to find work and that given her restrictions, she could no longer be a licenced practical nurse. The only evidence submitted by the Employer and Carrier to even attempt to dispute that the Claimant had not sustained a loss of wage earning capacity is the introduction of videotaped surveillance of the Claimant, which shows nothing. As such, the Order of the administrative judge should be reinstated.

ARGUMENT

The Administrative Law Judge correctly found that the Claimant sustained a 50% loss of wage earning capacity as a result of the admitted injury sustained by the Claimant. (Ex. 2, Appellant Excerpts; P.30) There was no evidence to show that the Claimant could now earn a wage anywhere near the $641.00, as stipulated by the Employer and Carrier. (T. 20) In fact, the jobs found by the Defendant's Vocational Therapist that were presented to The Claimant to apply for had an average

salary of $7.48 per hour. A job which pays $7.48 earns roughly $300 in a 40 hour work week, an number which would reflect more than a 50% loss in wage for The Claimant (actually 53.3%). But even these employers have not hired The Claimant with her current injuries. The Defense's own Vocational Therapist expert has attempted to find The Claimant a job, but hasn't found a viable option anywhere close to the $12.82 an hour the Full Commission decided arbitrarily that The Claimant should be able to make. There has been no basis in the evidence which supports an award lower than 50% loss in wage, any other determination is against the evidence and either arbitrary or capricious.

The only evidence submitted by the Employer and Carrier to refute the clear evidence of significant disability was multiple videotapes of surveillance of the Claimant shopping at a second-hand store, fishing, and trying to get food to eat. (T. 29). As correctly found by the Administrative Law Judge, the sole evidence produced by the Employer and Carrier in the videotapes showed activities that "were hardly strenuous." and didn't show any movement that wouldn't be expected from the Claimant. (T. 29)

While the Judge's findings indicate the Claimant did have a surgery by Dr. Neill as a result of an injury, the description of the facts in her Order unequivocally reveal that she understood that the Claimant had the surgery by Dr. John Neill, a result of a problem before the admitted incident, which occurred in January of 2002, and the unrefuted evidence that Dr. John Neill released her to return to work full-duty. (T. 26) The evidence is clear.

The Employer and Carrier now attempt to make the preposterous argument that apparently it decided that the Claimant did not get hurt on the job, and are questioning whether or not she had an injury. This is despite the fact that they paid over $16,000.00 in temporary benefits, paid medical

expenses, and despite the unrefuted opinions of Dr. Rahul Vohra, the primary treating physician. (Vohra Deposition at 17). The Employer and Carrier offered no medical evidence to refute, or provide otherwise. There is no evidence in this record to sustain that the 23-year long-term, loyal employee did not sustain an injury on the job.

Instead, the Employer and Carrier make unsubstantiated accusations to her character, despite her 23-year tenure with them. They engage in deceit and trickery in an attempt to undertake surveillance on a Claimant who gave them a 23-year sacrifice of employment, and was loyal and productive throughout the whole period.(Ex.1, MWCC H-8022 Transcript; P.25). The Employer and Carrier urged the Commission to change the findings of the Administrative Law Judge; however, they offered no evidence to substantiate such preposterous speculation. The record is void of evidence that the Employer made any kind of accommodation to the Claimant after 23 years. (T. 19) The Employer and Carrier's own expert was hired specifically to testify and allegedly try to find work for the Claimant through vocational services. (T. 63) Despite being involved in the Claimant's case for over two and half years, not one piece of evidence reflects an offer of employment by Baptist. (T. 19)

The Employer and Carrier have the burden of proving apportionment, which they apparently argued that there is evidence of. There is no evidence that Dr. Neill gave the Claimant any restriction which affected her ability to work when he returned her to work before her admitted injury. In short, the Employer and Carrier's argument is speculative, and does not justify reversal of the Administrative Law Judge's findings.

The interpretation of the Mississippi Workers' Compensation Act has long recognized principles that:

a. Close questions are typically resolved in favor of the injured worker; and

b. This furthers the statutory mandate that doubtful cases are to be resolved in favor of compensation so as to satisfy the beneficent remedial purpose of statutory law. (Emphasis added.) *Marshall Durbin Companies v. Warren, No. 91-CC-1133 (Miss. January 27, 1994) Slip Op. at 10; General Electric Co. v. McKinnon; 507 So. 2d 363, 367 (Miss. 1987); Barham v. Klumb Forest Products [*380] Center, Inc.,453 So. 2d 1300, 1304 (Miss. 1984).* With no evidence to the contrary and while affirming most of the affirmative findings that claimant's injury obviously occurred on the job, amazingly, the Full Commission lowered the award with no evidence to the contrary. (Ex.2, Appellant Excerpts; P.39). They basically pulled this figure "out of the sky". There is no question that their finding, in lowering the award for no apparent reason, was against the overwhelming and substantial weight of the evidence. (T. 39) The lowering of the Administrative Law Judge's findings do not justify reversal, modification or change in any manner, shape or kind. As such, the Full Commission erred in interfering to change or modify those findings in any way. A finding can be found to be clearly erroneous when ... the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its finding of fact and its application of the Act. *J. R. Logging v. Halford, 765 So.2d, 580, 583 (Miss. Ct. App. 2000).* (citations omitted) At a minimum, the Commission's findings in arbitrarily reducing the award by 80% is clearly erroneous. More likely, the findings with no evidence to substantiate or support a reduction of this amount is arbitrary and capricious.

Respectfully, Appellant requests this Court, at its appellate level, reverse the findings of the Full Commission and reinstate the findings <u>in total</u> of the Administrative Law Judge.

CONCLUSION

In deciding this case it is important to remember that workers' compensation law is to be liberally and broadly construed, resolving doubtful cases in favor of compensation so that the beneficent purposes of the act may be accomplished. *Marshall Durbin Companies v. Warren, No. 91-CC-1133 (Miss. January 27, 1994) Slip Op. at 10; General Electric Co. v. McKinnon; 507 So. 2d 363, 367 (Miss. 1987); Barham v. Klumb Forest Products [*380] Center, Inc.,453 So. 2d 1300, 1304 (Miss. 1984).* A liberal reading of the facts of this case, combined with the Employer's evidence which showing nothing but injury and good faith effort by The Claimant requires a finding for the claimant. Even the Defendant's expert Vocational Rehabilitation Consultant testified that The Claimant was cooperative during the job search, that she could not go back to her job as a licensed practical nurse, and that no offers of another position were made by Baptist. Record II at p. 72. Much of the defense of the Employer and Carrier against The Claimant is unsubstantiated and makes this case seem like a he said she said situation. The case is not he said she said however as the Claimant has shown by the testimony of several experts that the injuries arose on the job at Baptist and have inhibited Ms. Lang's ability to work. Given these facts and the liberal construction rule a finding that lost anything less than 50% wage earning capacity is without the support of law and certainly against the overwhelming weight of the evidence. The finding of the Commission should be reversed and the Administrative Judge's ruling be reinstated.

Respectfully submitted, this the 27 day of JAN, 2010.

CHRISTINE LANG, APPELLANT

BY: _____

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CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for Christine Lang, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above and foregoing document to:

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William Coleman
Hinds County Circuit Court Judge
P. O. Box 27
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DATED this the 27 day of Jan, 2016.

JOHN HUNTER STEVENS