

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

IRENE WRIGHT

APPELLANT

V.

NO. 2010-WC-01881-COA

**UNIVERSITY OF MISSISSIPPI MEDICAL
CENTER AND MISSISSIPPI INSTITUTIONS
OF HIGHER LEARNING**

APPELLEES

***ON APPEAL FROM
THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS
COUNTY, MISSISSIPPI AND THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION***

BRIEF OF APPELLEES

► ORAL ARGUMENT REQUESTED ◀

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Irene Wright, Claimant/Appellant;
2. University of Mississippi Medical Center, Employer/Appellee;
3. Mississippi Institutions of Higher Learning, Carrier/Appellee;
4. John Hunter Stevens, Esquire, attorney for the Claimant/Appellant;
5. Joseph T. Wilkins, III, Esquire, attorney for the Employer-Carrier/ Appellees;
6. The Honorable Cindy P. Wilson, Administrative Judge, Mississippi Workers' Compensation Commission; and
7. The Honorable Malcolm Harrison, Circuit Court Judge.

This the 18th day of March, 2011.



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I. STATEMENT OF THE FACTS

On February 25, 2010, the Administrative Law Judge ruled that Claimant/Appellant, Irene Wright, also known as Irene Tyler, did not prove she suffered any permanent disability and/or loss of wage-earning capacity, and the claim for workers' compensation benefits was denied and dismissed.

Appeal was made by the Claimant on March 3, 2010 to the Full Commission that the Order was against the overwhelming weight of the evidence; that Claimant was entitled to benefits.

The Full Commission Order dated June 10, 2010 affirmed the Order of the Administrative Judge denying benefits.

The Claimant appealed that decision to the Circuit Court of Hinds County on June 29, 2010, averring that Ms. Wright sustained a loss of wage-earning capacity, entitling her to benefits under the Workers' Compensation Act.

The Order of the Circuit Court of Hinds County affirmed the Order of the Mississippi Workers' Compensation Commission on October 22, 2010 denying benefits.

From that Order, the Claimant appealed to the Court of Appeals.

II. SUMMARY OF THE CASE

Appellant, Irene Wright, is married to Willie Tyler, Sr. She has a five-year-old son, a thirteen-year-old daughter, and was expecting a third child at the time of the hearing on September 21, 2009. Appellant was 36 years of age and working as an Avon representative and as a sales person in the Jackson Medical Mall at a gift shop owned by her husband. Ms. Wright also sold Avon Products at the gift shop. (R. Vol. 3, p.39). Appellant worked five days a week, five hours a day, and was paid \$20.00 per day in cash. (R. Vol. 3, p.40). Ms. Wright had no knowledge as to how her salary was determined or if her husband was successful in his operations of this business.

Appellant testified that her past work experience has been at such places as Captain D's, Kentucky Fried Chicken, and Checkers. Her work at the University Medical Center ("UMMC") began in the year 2001.

On March 7, 2002, Mr. Wright alleges that she and five other employees were attempting to move an overweight patient when she experienced pain in her neck and back. (R. Exh. Vol., E/C's Exh. #5, p.8).

Ms. Wright acknowledges seeing numerous medical providers, many of whom she could not recall, to include chiropractors, as well as Dr. Denzil Robertson, Dr. Adam Lewis, and Dr. Rahul Vohra. Ms. Wright testified that she attempted to return to work after a period of time, but this caused her pain. (R. Exh. Vol., E/C's Exh. #5, p.10). Appellant believes she attempted to work as a nurse's assistant in 2005, unsuccessfully. (R. Exh. Vol., E/C's Exh. #5, p.11). Ms. Wright testified that her work as an Avon sales representative routinely netted \$75.00 to \$100.00 per week. However, she admitted on May 4, 2007 that she earned \$175.00 to \$200.00 per week from her sales position which she shared with Dorothy Young. (R. Vol. 3, p.33).

Appellant's tax return for the year 2006 was introduced as an exhibit (E/C's Exhibit #10) and reveals that her business income for the year 2006 showed a net profit of \$9,531.00 for the sale of Avon Products. (R. Vol. 3, p.33, R. Exh. Vol., Claimant's Exh. #1). Ms. Wright alleges that this figure includes earnings from her work at UMMC. However, the Form 1099 clearly shows income from Avon Products for this figure. (R. Exh. Vol., E/C's Exh. #10). In Ms. Wright's deposition, taken May 15, 2007, she denied that she had any income exceeding \$5,000.00 in sales from Avon. (R. Exh. Vol., E/C's Exh. #5, p.23). Ms. Wright worked during the year 2006 at UMMC, beginning April 18, 2006 and worked through September 29, 2006. (R. Exh. Vol., E/C's Exh. #5, pp.24-25). Appellant's post-injury wages for this period show her earnings at \$7.38 per hour.

Ms. Wright quit this job as a file clerk on September 15, 2006, alleging a back injury after her work day ended at UMMC. Her supervisor, Bridget Booker, testified that Appellant worked in filing which required no lifting and that she operated a copy machine. (R. Vol. 3, pp.44-45). Ms. Booker also testified that the Appellant made no complaints of a back injury. (R. Vol. 3, p.46). Clerks, including Wright, never lifted anything of any significance, no file could ever weigh over two to three pounds. (R. Vol. 3, p.48). Ms. Wright missed work and was called about her absence and then reported her alleged injury and was encouraged to see the emergency physician at UMMC but stated that she had her own doctor. (R. Vol. 3, p.48).

Appellant alleges an injury to her back on March 7, 2006, later corrected to be 2002. (R. Vol. 3, p.9). Ms. Wright admitted seeing numerous medical providers but could not remember seeing any physician in the year 2009 and was not sure when she last saw Dr. Lewis, her neurosurgeon. (R. Vol. 3, p.23). She admitted that this could have possibly occurred in the year 2007. (R. Vol. 3, p.24). She stated that her complaints of pain during this period of time were located in her back and neck and were to such a degree that she could not lift her legs and that her pain moved around. (R. Vol.

3, pp.21-22). She states that her pain in the year 2006 caused Appellant to quit her job as the file clerk. (R. Vol. 3, p.27).

It was stipulated that the Employer-Carrier/Appellees, University of Mississippi Medical Center and Mississippi Institutions of Higher Learning, had paid all benefits owed since the injury of March 2002 which approximated two years that Ms. Wright received benefits and remained off work. (R. Vol. 3, p.12; R. Exh. Vol., E/C's Exh. #5, p.11).

Even though Ms. Wright left in September 2006, she did not seek medical attention until October 2006 when Dr. Adam Lewis again saw her. He treated Ms. Wright conservatively, never recommending any surgical intervention, and diagnosing her as having lumbar spondylosis. (R. Exh. Vol., Claimant's Exh. #3).

Dr. Rahul Vohra evaluated the Appellant on several occasions over a period of approximately two years. Ms. Wright was first seen by Dr. Vohra in the year 2002. He noted illness behavior and allowed her to return to work on April 21, 2003 with no restrictions. A Functional Capacity Evaluation (FCE) was performed on March 20, 2003 at which time Appellant was noted to be self-limiting throughout the evaluation, secondary to complaints of low back pain and neck pain. Ms. Wright displayed inconsistent performance throughout the evaluation with pain behavior. Appellant never performed to her true physiological maximum. (R. Exh. Vol., Claimant's Exh. #2, pp.3-4). Dr. Vohra saw Ms. Wright in October 2004 for neck and left shoulder complaints and diagnosed her as having mild degenerative disc disease. A second FCE was performed July 8, 2005 which also revealed inconsistencies in pain behavior. Dr. Vohra noted that on April 15, 2005, Ms. Wright did not have any surgical lesions, was at MMI, and demonstrated illness behavior. The FCE confirmed that she was self-limiting in her evaluation. He allowed Appellant to return to work with a 50 pound

lifting restriction and determined she had a 5% whole body impairment which had not changed since his evaluation in May 2003. (R. Exh. Vol., Claimant's Exh. #2, p.3).

Appellees employed a vocational rehabilitation counselor, Bruce Brawner, to assist in returning Ms. Wright to gainful employment. His involvement began in August 2003. (R. Vol. 3, p.54). At that time, he offered light-duty jobs to Appellant and testified that she could perform many of the jobs offered, including the file clerk job offered in the year 2006. (R. Vol. 3, p.51).

At the time of the hearing, Irene Wright was working at the Medical Mall for her husband and earning \$20.00 per day. She was also continuing to work as an Avon sales representative. Appellant presented no medical evidence after Dr. Lewis' records of October 2006. No records were presented that the Claimant continued to suffer requiring treatment in 2007, 2008, 2009 or 2010.

III. SUMMARY OF THE ARGUMENT

The Circuit Judge in his Order of October 22, 2010 enumerated the criteria utilizing Rule 5.03 of the URCCC which would direct his attention as to whether or not the Court would affirm the decision of the Administrative Judge and the Full Commission, or reverse those decisions. The Circuit Judge correctly noted that this duty was to determine if the decision of the Full Commission was supported by substantial evidence; if the decision was arbitrary and capricious; or if the decision was beyond the power of the Full Commission to make; or if that decision violated some statutory or constitutional right. The Circuit Judge found no error and affirmed the decision of the Full Commission.

This Court is well versed in noting the standard of review to determine if a decision of the Full Commission is based upon substantial evidence. This Court has consistently followed its position that it would reverse a decision of the Full Commission only if the Order was clearly erroneous or contrary to the weight of the credible evidence. *Hedge v. Leggett & Platt*, 641 So. 2d 9, 12 (Miss. 1994). Moreover, in *Lanterman v. Roadway Express, Inc.*, 608 So. 2d 1340, 1345 (Miss. 1992), the Court reaffirmed that it would not re-weigh the evidence to determine where, in the Court of Appeals' opinion, the preponderance of the evidence lies; that it would overrule a decision of the Mississippi Workers' Compensation Commission for an error of law or for an unsupportable finding of fact. *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

The Appellees submit that the decision of the Full Commission is based upon substantial evidence and the decision should be binding on the Court of Appeals. *Vance v. Twin River Homes*, 641 So. 2d 1176, 1180 (Miss. 1994).

The only allegation of error is that Ms. Wright suffered a loss of wage-earning capacity. No specific evidence is submitted by the Appellant in her brief, only that she was earning \$321.00 a

week when she was injured, and at her work as a file clerk, earned \$6.12 per hour. (R. Exh. Vol., Appellant's Brief, p.2). Ms. Wright acknowledged that she routinely worked one or two jobs, part time. (R. Vol. 3, p.9). She introduced her own statement, Claimant's Exhibit #1, that she earned \$175.00 to \$200.00 per week in sales stating that this income was divided with her partner, Dorothy Young. Yet, Appellant's tax return for the year 2006 filed in her own name and not jointly with her husband, reflects her income from UMMC to be \$6,229.94. The Appellees' Wage and Employment Information submitted as E/C's Exhibit #4 discloses income of \$6,229.94, which computes to \$7.08 per hour. Appellant's income from Avon Products in 2006 was \$9,531.00 which computes to an average weekly wage of \$183.29, or \$4.58 per hour. Ms. Wright's combined income would total \$11.66 per hour.

Under § 71-3-3(i), "Disability" is defined as:

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

Ms. Wright has shown her ability to earn wages in other employment to include where she presently works as an employee of her husband and as an Avon representative. No physician has told her not to work, only to work within certain lifting restrictions. The Appellees would show that her job as a file clerk at the UMMC fell within those restrictions and that Ms. Wright left that job on her own volition, without cause. At the time of the hearing before the Mississippi Workers' Compensation Commission, Ms. Wright had not sought medical attention for a number of years.

The Appellees would show that Appellant's testimony is self-serving, was inconsistent, and should give rise to serious suspicion as to the seriousness of her injury and should question her credibility as a witness. Not only did Ms. Wright deny that she earned \$9,531.00 as reflected in her

Federal Income Tax Return from Avon Products, she did not even use her name, Irene Wright. Rather, she used the name Irene Tyler for some reason.

Further, Appellant stated that because of her injury, her legs would not work; that she had pain all over; etc. This was not demonstrated in the courtroom and gave rise to her credibility when she could not remember seeing a physician in the years 2008 or 2009. It should be noted that UMMC has an emergency room readily equipped to evaluate and treat any employee who is injured on the job. However, Appellant did not seek treatment at the emergency room at UMMC or at any facility offered by UMMC.

The physicians who did examine and treat Appellant did utilize standard criteria in attempting to evaluate Ms. Wright's ability to return to work. For that reason, an FCE was performed on two separate occasions to determine Appellant's capacity and ability to work.

The first FCE was performed March 19-20, 2003 at Dr. Vohra's request and noted these inconsistencies:

The client demonstrated an inconsistent performance by the following:

1. Minimal increase in heart rate with increase in weight or reports of increased pain. The patient had decreased heart rate from 20# to 30# on horizontal lift.
2. Physical assessment was not consistent with functional testing. The patient had 3+ quad strength with giveaway weakness noted on manual muscle testing which is inconsistent with ability to perform full squat and stand back up.

Appellant's pain behavior also was noted in that the Appellant "stopped herself on all weighted capacities. The patient was grunting, grimacing, closing her eyes at times. The patient held her back after 30# on horizontal lift. The patient had frequent verbal complaints of pain." (See Appellees' R.E. #10).

The second FCE was performed on September 7-8, 2005, also at Dr. Vohra's request. The therapist noted that Ms. Wright "was self-limited by complaints of pain stopping herself on all weighted capacities, trunk bending" to the extent that her physiological maximum was never reached. As in the FCE performed in 2003, inconsistencies were noted of her grip strength, on the BTE work simulator and she exhibited pain behavior as she had done in the year 2003. (See Appellees' R.E. #12).

The Administrative Judge witnessed Appellant's pain behavior in the courtroom noting that her decision was based upon "the pleadings, pre-hearing statements, stipulations, lay and medical evidence, the demeanor of the witnesses at the hearing, and the applicable law . . .". (Appellees' R.E. #6, p.85; R. Vol. 2, p.85).

Ms. Wright's complaints of pain and difficulty were not borne out by any supporting testimony. Only the Appellant testified in her behalf. Her testimony regarding complaints of pain and discomfort were refuted by her supervisor at UMMC, Bridget Booker. There has been no showing of incapacity by Ms. Wright nor have her post-injury earnings been explained as being an unreliable basis for estimating her capacity.

The Mississippi Workers' Compensation Commission is the ultimate fact finder and affirmed the finding of the Administrative Judge that Ms. Wright suffered no permanent disability or loss of wage-earning capacity. The argument that testimony of the vocational/rehabilitation specialist, Bruce Brawner, reflects a loss of wage-earning capacity, it without merit since Appellant's argument did not take into consideration any Avon earnings or earnings at the Medical Mall or her attempts to work at jobs found by Mr. Brawner.

Appellant's sole apparent error committed by the Full Commission and the Circuit Court is in not awarding benefits. No error of law or fact is presented by Ms. Wright, only that the

compensation system is broken. Appellees submit that the definition of disability requires any injured employee to seek work at the same or other employment. MISS. CODE ANN. § 71-3-3(i).

Appellant did return to work and worked as a file clerk at UMMC and for Avon Corporation where she earned more than she did prior to her injury. Appellant did not overcome the presumption of no loss of wage-earning capacity. The Orders of the Administrative Judge, the Full Commission, and the Circuit Court of Hinds County should be affirmed in all respects and disability benefits denied to Ms. Wright.

IV. CONCLUSION

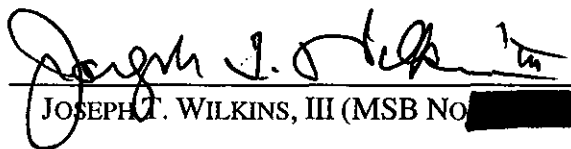

Appellant seeks some award from the Commission for wage loss for a 2002 injury during which time Ms. Wright has drawn workers' compensation benefits and earned wages from secondary employment. Appellant's own tax return for the year 2006 clearly shows significant earnings from Avon of \$183.29 per week. Ms. Wright quit her job at the University of Mississippi Medical Center, a job which fell within any medical limitations. No medical provider instructed her to leave that job nor did she seek immediate medical attention after leaving on September 15, 2006. Ms. Wright has shown by her testimony and work since 2002 that she sustained no permanent disability and has demonstrated an ability to raise a family and perform other employment. She does not fit the definition for "disability" as defined by the Act.

The decision of the Full Commission affirming the Order of the Administrative Judge should be affirmed by the Circuit Court.

Respectfully submitted, this the 18th day of March, 2011.

UNIVERSITY OF MISSISSIPPI MEDICAL CENTER AND
MISSISSIPPI INSTITUTIONS OF HIGHER LEARNING,
Appellees

BY: WILKINS TIPTON, P.A.

BY: 
JOSEPH T. WILKINS, III (MSB NO. )

CERTIFICATE OF SERVICE

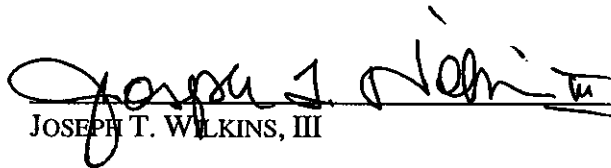
I, JOSEPH T. WILKINS, III, attorney for Appellees, do hereby certify that I have this day mailed, by U. S. mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLEES** to:

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The Honorable Malcolm O. Harrison
Circuit Court Judge
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[CIVIL ACTION No. 251-10-584-CIV]

THIS, the 18th day of March, 2011.


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