

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

IRENE WRIGHT

APPELLANT

VS.

CAUSE NO. 2010-WC-01881-COA

**UNIVERSITY OF MISSISSIPPI MEDICAL CENTER,
A MEMBER OF THE MISSISSIPPI INSTITUTIONS
OF HIGHER LEARNING**

APPELLEES

**APPEAL FROM THE DECISION OF THE
CIRCUIT COURT OF HINDS COUNTY**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Irene Wright, 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. Irene Wright, Appellant
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC , Counsel for Appellant
3. University of Mississippi Medical Center. - Appellee
4. Mississippi Institutions of Higher Learning - Appellee
5. Joseph T. Wilkins, III, Esq., Counsel for Appellees

Respectfully submitted, this the 10th day of February, 2011.

IRENE WRIGHT, APPELLANT

BY: GRENFELL, SLEDGE & STEVENS, PLLC

BY: _____

JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. The Claimant sustained an admitted on-the-job injury. Even conservative physicians picked by the insurance carrier found undisputed permanent disability, and restrictions that unequivocally the Employer admitted prevent her from returning to work as a certified nurse's aide (CNA). To award no benefits for her loss of wage-earning capacity is reversible error.

INTRODUCTION

The Claimant sustained an admitted on-the-job injury. Even conservative physicians picked by the insurance carrier found undisputed permanent disability, and restrictions that unequivocally the Employer admitted prevent her from returning to work as a certified nurse's aide (CNA). To award no benefits for her loss of wage-earning capacity is reversible error.

STATEMENT OF THE FACTS

Ms. Wright is 36 years old and resides in Jackson, Mississippi. She is a high school graduate and attended the Mississippi Job Corps from 1991 to 1992. Additionally, she is a certified nurse's assistant (CNA). Ms. Wright's past employment includes cooking at various restaurants and serving as a cashier. She has worked at Captain D's, Kentucky Fried Chicken and Checkers. She began working at UMC in 2001. The subject injury occurred while the Claimant was lifting a patient. She has been treated by Dr. Denzil Robinson, Dr. Adam Lewis, Dr. Rahul Vohra, a family nurse practitioner and several chiropractors. Ms. Wright testified that prior to this back injury, she had no problems with her back. When she was released to light duty, Ms. Wright returned to UMC and was advised that no light duty was available so she, Ms. Wright, testified that at her request, her physician lifted her restrictions, she returned to work as a CNA and within three months her back was hurting so she relocated to a file clerk position. She worked in the patient accounts department making \$6.12 per hour, substantially less than she made as a CNA. Subsequently, she was assessed restrictions. She attempted to perform the light duty job but was unable to do so. It is Claimant's testimony that she did not return to UMC and no other job offer was communicated to her.

SUMMARY OF THE ARGUMENT

Claimant submits that the Commission ignored overwhelming evidence, and unfairly

evaluated the testimony of the vocational rehabilitation expert testifying for the Employer and Carrier. The unequivocal undisputed proof was that the Claimant could not return to her prior occupation as a certified nurse's assistant (CNA), her profession before the admitted injury. Claimant underwent a significant job search, and the evidence from her medical providers was not disputable that she could not return to her prior occupation as a CNA. Even their own witness admitted that this overwhelmingly fact does support a finding of at least some portion for a loss of wage-earning capacity.

There is much testimony about an alleged accommodation to return to work as a file clerk at UMC. The actual evidence supports a loss of wage-earning capacity, even if you find that she is capable of doing this job. The admitted average weekly wage before the injury of a CNA for her was \$321.00 per week. The job that she was offered as a file clerk in May of 2006 indicate that she was offered and returned to employment at least for a period of time as a file clerk making \$6.12 per hour. Claimant submits that the Administrative Law Judge unfairly interpreted the evidence, and unfairly favored the Employer and Carrier, when the Employer's own expert testified that the Claimant's loss was unequivocal. Mr. Brawner testified as follows:

Q. Mr. Brawner, you would acknowledge then tendered here as an expert, that based on the restrictions, not just those that Dr. Robertson gave, but also the independent medical exam or second opinion from Dr. Vohra, she cannot be a CNA anymore?

A. True.

Q. And that's the job she's had since she was 19 years old. Those jobs are eliminated from her as a potential way of making – wage-earning capacity; is that right?

A. Well, that was certainly her job of injury. She had some other jobs, but that was her

job of injury, yes, sir.

Q. She cannot do those jobs?

A. She cannot do the job as a CNA.

Q. I missed it, but some of the – you were initially retained in August of 2003?

A. I believe that's correct.

Q. And you – at that point, Dr. Robertson had given her sedentary restrictions?

A. That was the way it was termed. Yes, sir.

Q. And would it be an accurate statement that at no time from at least August of 2003 until April of 2006, you were never asked – or no one from University Medical Center contacted you about trying to find her – about offering her a position within those restrictions?

A. Well, I think that would be true up through Dr. Vohra releasing her in 2005, in August of 2005. I think the focus at that point was to see whether or not there might be something back at UMC, but initially –

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Mr. Brawner's testimony overwhelmingly supports a loss of wage-earning capacity, and the Claimant should be entitled to an award as required by law. At a minimum, she should be entitled to two-third's of the wage loss of a difference between \$320.00 per week and \$243.80 for a 40 hour work week at \$6.12. This would reveal, at a minimum, an award of approximately \$50.00 per week for 450 weeks for her admitted inability to return to her profession. The Administrative Law Judge ignored this evidence. Upon proper review of the medical evidence, and the credible testimony of the Claimant, this Commission will find that the Claimant has sustained a loss of wage earning

capacity. To find otherwise would be against the overwhelming weight of the evidence. As such, Claimant respectfully requests this Commission award Claimant accordingly, based on the unequivocal medical testimony that she is unable to return to her prior occupation, and her undisputed testimony of continued problems, job search efforts, blatantly and clearly outweigh the testimony of a vocational consultant who speculatively testified as to wage-earning capacity.

In Mississippi, the workers' compensation system has forsaken the injured worker. This case is a prime example of a system broken. Ms. Wright was a long-term loyal employee who sustained a legitimate injury. It is undisputed that she cannot return to her usual profession as a CNA that she did most of her work life. She is unable to return to that job forever. Her unrefuted testimony was that she attempted to return to work at a job as a file clerk, allegedly within her light duty restriction which paid lower than she was making as a CNA. Her undisputed testimony was she could not return to that job without significant pain and difficulty. This is not disputed. Under Mississippi law, this Court has an obligation to reverse the findings of the Commission if they are against the substantial weight of the evidence. *J.R. Logging v. Halford*, 765 So.2d, 580, 583 (Miss. Ct. App. 2000). In addition, the Workers' Compensation Commission has forsaken the intent and purpose of the Act that it should be liberally construed in favor of the Claimant. *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). This case typifies that what an Employer and Carrier will do to purchase a defense in an attempt to award a legitimately injured, permanently impaired Claimant zero benefits. In this case, despite her Employer being the largest Employer of physicians in the State of Mississippi, and having some of the most competent doctors to treat her, they instead

send her to a known conservative doctor for treatment (Dr. Vohra). Furthermore, they retain a paid expert, vocational rehabilitation consultant, to testify that the Claimant can work. There is no question, but that the Judge and Commission in this case relied, unequivocally on this paid expert to deny benefits to the Claimant. The Commission ignored treating physicians' opinions, with the exception of the doctor that they pushed her to go to knowing he would be favorable to the employer. Even if you find that she could do the position she had as a file clerk (which she could not), she still would have an undisputed loss of wage earning capacity. Even by the Employer's own admissions, she is making less money per week than she would as a CNA. To find that this Claimant, under these facts, does not have a loss of wage earning capacity is abhorrent. It is an absolute rejection of the intent and principles and statutes of the Workers' Compensation Act. The findings of the Commission are against the substantial weight of the evidence and should be reversed.

CONCLUSION

The Claimant sustained a legitimate injury. The evidence shows clearly, and is not disputed, that she cannot return to her previous occupation as a certified nurse's aide, and will never be able to return to that profession. The Employer and Carrier admitted this, and its own experts admitted this fact. The Judge and the Commission was wrong in not awarding her benefits as she has demonstrated undisputedly a loss of wage-earning capacity. Based on this fact alone, the Commission erred in not awarding her benefits. The purpose and intent of the Workers' Compensation Act is to provide compensation for loss of wage-earning capacity. The Commission's finding must be reversed, and an award made for the loss of wage-earning capacity based on the overwhelming evidence. As such, Appellant respectfully submits the Commission Order and Administrative Law Judge's findings be reversed.

RESPECTFULLY submitted, this the 10 day of February, 2011.

IRENE WRIGHT, APPELLANT

BY: _____

John Hunter Stevens

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CERTIFICATE OF SERVICE

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

Joseph T. Wilkins, III, Esq.
WILKINS & TIPTON, P.A.
P. O. Box 13429
Jackson, MS 39236-3429

Hon. Bob Gowan
Hinds County Circuit Court Judge
P. O. Box 22711
Jackson, MS 39225-2711

DATED, this the 18 day of February, 2011.



John Hunter Stevens