IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2015-WC-01760-COA

BETTYE LOGAN **APPELLANT**

v.

KLAUSSNER FURNITURE CORPORATION D/B/A BRUCE FURNITURE INDUSTRIES AND AMERICAN CASUALTY COMPANY OF READING, PA **APPELLEES**

DATE OF JUDGMENT:	10/23/2015
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEYS FOR APPELLANT:	ROY O. PARKER HALEY WADE MCINGVALE II
ATTORNEYS FOR APPELLEES:	AMY LEE TOPIK JOSEPH ANTHONY GERACHE III
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
DISPOSITION:	REVERSED AND REMANDED - 11/15/2016
MOTION FOR REHEARING FILED:	11/29/2016 - DENIED; REVERSED AND REMANDED - 08/15/2017
MANDATE ISSUED:	

MODIFIED OPINIONS ON MOTION FOR REHEARING

EN BANC.

GREENLEE, J., FOR THE COURT:

¶1. The motion for rehearing is denied. The previous opinions of this Court are withdrawn, and these opinions are substituted in their place.

¶2. This is an appeal from a decision of the Mississippi Workers' Compensation Commission in which Bettye Logan was found to have incurred a permanent partial disability (scheduled member) with a sixty-percent loss of industrial use of her left lower extremity

stemming from an admittedly work-related injury. Logan appealed the decision of the Commission to this Court, claiming that she is entitled to the maximum allowable amount of permanent total disability under the law instead of the lower amount awarded by the Commission. This is the second appeal this Court has heard stemming from Logan's workers' compensation claim for disability benefits. In *Logan v. Klaussner Furniture Corp.*, 127 So. 3d 1138 (Miss. Ct. App. 2013) (*Logan I*), we held that (1) "at the very least, Logan should have been assessed a loss of wage-earning capacity[,]" and (2) the "evidence in this case supports a finding of permanent partial or total disability[,]" *Id*. at 1142-43 (¶¶20-21), and remanded the case to the Commission for further proceedings consistent with the Court of Appeals' decision. *Id*. at (¶23). After remand, the Commission assessed Logan a loss of industrial use instead of determining her loss of wage-earning capacity, which was inapposite to our decision in *Logan I*. Because the Commission's subsequent decision did not comport with our findings in *Logan I*, we reverse and remand for further proceedings consistent with this opinion.

¶3. The dissent disagrees asserting that Logan's injury was to her leg and therefore her assessment and recovery should be limited to the scheduled-member provisions of Mississippi Code Annotated section 71-3-17(c)(2) (Rev. 2001). The dissent misapplies our *Logan I* ruling that, "at the very least," Logan had a loss of wage-earning capacity, the amount of which should have been assessed. The dissent treats that portion of our opinion dealing with loss of wage-earning capacity in *Logan I* as dicta. "Dicta" is an opinion of a judge that does "not embody the resolution or determination of the specific case before the

court. Expressions in a court's opinion that go beyond the facts before the court and therefore are individual views of the author of the opinion and not binding in subsequent cases as legal precedent." 3 *West's Encyclopedia of American Law*, at 427 (2d ed. 2005); *see also* Black's Law Dictionary (6th ed. 1990). However, the language of *Logan I* that Logan should have been assessed a loss of wage-earning capacity and that Logan had suffered a permanent partial or total disability was the stated reason for the *Logan I* remand to the Commission. Also, loss of wage-earning capacity is only pertinent when a court has found the disability calculation should be governed by criteria other than the limited scheduled-member criteria of section 71-3-17(c)(1)-(24).

¶4. The dissent takes issue with the use of section 71-3-17(c)(25) when permanent partial disability is warranted, arguing its use is limited to a narrow range of "other" circumstances. But section 71-3-17(c)(25)'s use is for that type of condition where there is permanent partial disability and a loss of wage-earning capacity. The dissent's import would be that after remand the Commission may ignore or interpret the Court's mandate to modify the factual and legal ruling although otherwise directed by this Court. The dissent also suggests that we should prescribe a result rather than remand for a finding of Logan's loss of wage-earning capacity, therefore dispensing with this case more conveniently.

FACTS AND PROCEDURAL HISTORY

¶5. Logan was employed by the Klaussner Furniture Corporation d/b/a Bruce Furniture Industries. On October 9, 2003, Logan was injured when her foot became caught in some fabric fibers at work, causing her to fall. Logan filed a petition to controvert with the

Commission on December 9, 2004, and a hearing was held on August 12, 2010.

¶6. On July 29, 2011, the administrative judge (AJ) entered an order finding that Logan had not suffered any industrial loss of use to her left lower extremity. Logan then filed a petition for review before the full Commission. On February 6, 2012, the full Commission affirmed the decision of the AJ.

¶7. Logan appealed to this Court, and on June 4, 2013, we reversed and remanded the decision of the Commission in *Logan I*, where we found that (1) "at the very least, Logan should have been assessed a loss of wage-earning capacity[,]" and (2) the "evidence establish[ed] that Logan ha[d] suffered a permanent partial or total disability." *Logan I*, 127 So. 3d at 1142-43 (¶¶20-22).

¶8. On remand, the AJ again conducted an analysis of the prior evidence and claim of Logan rather than focusing on the findings within the opinion of the Court of Appeals. The AJ then found that Logan suffered a sixty-percent loss of industrial use to her left lower extremity. On October 23, 2015, the Commission affirmed the decision of the AJ, stating that it agreed with the AJ that Logan had the ability to return to employment at least at a sedentary level based on the medical and vocational evidence. The Commission's ruling relegated Logan to permanent partial disability (scheduled member) instead of permanent partial disability (body as a whole) or permanent total disability. The Commission's ruling also limited Logan to the 175 weeks of compensation allowable under the schedule for the loss of industrial use of her leg (scheduled member), instead of the 450 weeks allowable for her loss of wage-earning capacity under either permanent total disability or permanent partial

disability (body as a whole). On November 20, 2015, Logan appealed the decision of the Commission to this Court.

DISCUSSION

¶9. While there are multiple issues raised by Logan, her appeal boils down to one: whether the Commission erred by not finding that she suffered a permanent total disability for the maximum of 450 weeks of compensable time,[1] following our prior opinion in *Logan I*.

¶10. When we review the rulings of the Workers' Compensation Commission, "[t]he Commission's decision will be reversed only if it is not supported by substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law." *Lovett v. Delta Reg'l Med. Ctr.*, 157 So. 3d 88, 89-90 (¶7) (Miss. 2015). "If the Commission's order is supported by substantial evidence, this Court is bound by the Commission's determination, even if the evidence would convince us otherwise if we were the fact-finder." *Forrest Gen. Hosp. v. Humphrey*, 136 So. 3d 468, 471 (¶14) (Miss. Ct. App. 2014). As the fact-finder, the Commission determines issues of the credibility of the witnesses and evidence before it, and those determinations are afforded substantial deference. *Wagner v. Hancock Med. Ctr.*, 825 So. 2d 703, 706 (¶10) (Miss. Ct. App. 2002) (citing *Miss. Pub. Serv. Comm'n v. S. Cent. Bell Tel. Co.*, 464 So. 2d 1133, 1135 (Miss. 1984)). The Commission's application of law is

[1] Logan's claims were that (1) the Commission's decision was arbitrary, capricious, and contrary to the instruction of this Court, (2) the Commission erred in failing to treat her case as a loss-of-wage-earning-capacity case due to the industrial loss of use to her left lower extremity, making her totally occupationally disabled, entitling her to one-hundred-percent permanent total disability, and (3) that her age and education entitled her to permanent total disability.

reviewed de novo. *Lifestyle Furnishings v. Tollison*, 985 So. 2d 352, 358 (¶16) (Miss. Ct. App. 2008) (citing *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 45 (¶10) (Miss. 1999)).

¶11. However, when the Court of Appeals has already addressed a case by a ruling—barring a grant of certiorari by the Mississippi Supreme Court—a question settled by the Court of Appeals should be treated as no longer open for review, and such decisions constitute a body of precedent that should be followed in subsequent cases. *See White v. Williams*, 159 Miss. 732, 132 So. 573, 575 (1931); *Moss Point Lumber Co. v. Bd. of Sup'rs of Harrison Cty.*, 89 Miss. 448, 42 So. 290, 302 (1906); Miss. Code Ann. § 9-4-3(2) (Rev. 2014).

¶12. Whether a claimant's "permanent disability is partial or total is a question of fact determined by the evidence as a whole, including both lay and medical testimony." *Howard Indus. Inc. v. Satcher*, 183 So. 3d 907, 912 (¶14) (Miss. Ct. App. 2016) (citing *McGowan v. Orleans Furniture Inc.*, 586 So. 2d 163, 167 (Miss. 1991)). When an injury is incurred under Mississippi Code Annotated section 71-3-17(c)(1) to (24) (Supp. 2016) (permanent partial (scheduled-member) disability) that results in a permanent and total loss of wage-earning capacity within section 71-3-17(a) (permanent total disability), section 71-3-17(a) controls exclusively, and the claimant is not limited to the number of weeks of compensation prescribed in section 71-3-17(c). *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1128 (Miss. 1992).

¶13. Permanent partial disability (scheduled member) under section 71-3-17(c)(1) to (24) makes a benefit "payable for loss or loss of use, and effect on wage-earning capacity is not

part of the calculation of the benefit and is not part of the burden of proof." John R. Bradley & Linda A Thompson, *Mississippi Workers' Compensation* § 3(2)(A) (2016). Permanent partial disability (body as a whole) under section 71-3-17(c)(25) "calls for evidence on loss of wage-earning capacity and sets a formula for the benefits as two-thirds of the loss of that capacity." Bradley & Thompson, at § 3(1)(C).

¶14. The Commission's finding focused on Logan's leg as a scheduled member covered under section 71-3-17(c)(2). As stated above, with regard to Logan's injury, we held in *Logan I* that the evidence supports her injury (1) was a permanent partial or total disability, and (2) "at the very least, Logan should have been assessed a loss of wage-earning capacity." *Logan I*, 127 So. 3d at 1142-43 (¶¶20-21). Given that a loss of wage-earning capacity is only pertinent to section 71-3-17(c)(25) with respect to a finding of permanent partial disability, and that we said in *Logan I* that, "at the very least, Logan should have been assessed a loss of wage-earning capacity[,]" if the Commission were to find that Logan's disability was permanent and partial, then section 71-3-17(c)(25) would be the only plausible section under which it could compensate. For permanent and total disability, then section 71-3-17(a) would apply.

¶15. Therefore, either section 71-3-17(a) (permanent total) or (c)(25) (permanent partial) controls in this case, not section 71-3-17(c)(2) as applied by the Commission. Thus, the Commission's decision is based on an erroneous application of law. As such, this case must be reversed and remanded to the Commission for it to determine the amount of Logan's loss of wage-earning capacity and apply that accordingly under either the permanent total or the

permanent partial disability provisions of section 71-3-17(a) or (c)(25).

CONCLUSION

¶16. We reverse and remand the finding of the Commission for further proceedings consistent with this opinion.

¶17. **REVERSED AND REMANDED.**

LEE, C.J., IRVING, P.J., BARNES, ISHEE AND WESTBROOKS, JJ., CONCUR. WILSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY GRIFFIS, P.J., CARLTON AND FAIR, JJ.

WILSON, J., DISSENTING:

¶18. The revised majority opinion issued in response to the motion for rehearing misstates and confuses the law by holding that Mississippi Code Annotated section 71-3-17(c)(25) (Rev. 2011) applies to the award of permanent partial disability benefits in cases involving an injury to a scheduled member. As explained below, this provision applies only to *non*-scheduled-member injuries. The decision of the Commission should be affirmed because it is consistent with our holding in the prior appeal in this case and it is supported by substantial evidence. Accordingly, I respectfully dissent.

¶19. In a prior appeal in this case, this Court held that the "evidence establish[ed] that Logan has suffered a permanent *partial or total* disability," and we remanded the case "to the Commission for a determination of the appropriate award of compensation" in light of our holding. *Logan v. Klaussner Furniture Corp.*, 127 So. 3d 1138, 1143 (¶22) (Miss. Ct. App. 2013) ("*Logan I*") (emphasis added). On remand, the Commission followed this Court's instructions. The Commission found that Logan failed to prove a total loss of wage-

earning capacity and thus failed to establish a permanent total disability. However, consistent with this Court's mandate, the Commission found that Logan had established a 60% industrial loss of use to her left lower extremity. Therefore, the Commission awarded Logan 105 weeks of compensation for her scheduled-member injury.[2] *See* Miss. Code Ann. § 71-3-17(c)(2) (permanent partial disability for loss or 100% loss of use of a leg entitles the claimant to 175 weeks of compensation).

¶20. Logan again appealed from the decision of the Commission, and in this Court's initial (now withdrawn) opinion, the majority held that the Commission misapplied the law and our mandate in *Logan I* "because section 71-3-17(a) controls, not section 71-3-17(c) as applied by the Commission." *Logan v. Klaussner Furniture Corp.*, No. 2015-WC-01760-COA, 2016 WL 6753887, at *2 (¶10) (Miss. Ct. App. Nov. 15, 2016) (6-4 decision). However, section 71-3-17(a) applies only to cases of permanent *total* disability. Therefore, by holding that "section 71-3-17(a) controls," the majority was effectively holding that—as a matter of law—Logan was entitled to permanent *total* disability benefits. This was not consistent with our opinion in *Logan I*, which specifically stated three times that the evidence supported a finding of "permanent *partial or total* disability." *Logan I*, 127 So. 3d at 1142-43 (¶¶20-22) (emphasis added). On rehearing, the majority appropriately recognizes that section 71-3-17(a) does not control to the exclusion of section 71-3-17(c).

¶21. The majority now holds that "either section 71-3-17(a) (permanent total) *or (c)(25)*

[2] The October 23, 2015 order of the Commission on remand is available at 2015 WL 6776924. The Commission's order affirmed an opinion and order of the administrative judge on remand, which is available at 2015 WL 2157595.

(permanent partial) controls in this case, not section 71-3-17(c)(2) as applied by the Commission." *Ante* at (¶15) (emphasis added). This revised holding is erroneous because, as the majority acknowledges, this is a scheduled-member case: Logan suffered an injury to her left leg that resulted in a 4% medical impairment to that leg. *Logan I*, 127 So. 3d at 1143 (¶22). Thus, the Commission properly awarded Logan permanent partial disability benefits according to the schedule, specifically, section 71-3-17(c)(2).

¶22. The majority's new holding that section 71-3-17(c)(25) may apply in a scheduled-member case is contrary to the plain language of the statute and precedent. Under the statute, the "schedule"—(c)(1) to (c)(24)—controls in cases of permanent partial disability involving the loss or loss of use of a scheduled member, such as a leg, and other specific injuries. Section (c)(25), in contrast, applies "[i]n all *other* cases" of permanent partial disability—i.e., in body-as-a-whole cases. Miss. Code Ann. § 71-3-17(c)(25) (emphasis added). As the Bradley and Thompson treatise explains, "[t]his section applies to body-as-a-whole injuries for which the benefits can run for 450 weeks and NOT to scheduled member injuries." John R. Bradley & Linda A. Thompson, *Mississippi Workers' Compensation Law* § 5:52 n.2 (2016) (capitalization in the original). This Court has made the same point:

> Having issued a finding of permanent partial disability with regard to Martinez's arm only [and not with regard to his rib and sternum], the Commission correctly concluded, as a matter of law, that Martinez's injury was subject to disability benefits under the scheduled member chart set forth in [section] 71-3-17(c)(1) *and not the general total body impairment scheme stated in [section] 71-3-17(c)(25)*.

Martinez v. Swift Transp. & Ins. Co., 962 So. 2d 746, 752 (¶26) (Miss. Ct. App. 2007) (emphasis added).

¶23. To be clear, this is *not* a case in which the claimant suffered *both* an injury to a scheduled member *and* a non-scheduled-member injury and thus might be entitled to both an award under the schedule *and* an award under (c)(25). *See Gen. Elec. Co. v. McKinnon*, 507 So. 2d 363, 366 (Miss. 1987). The *only* injury in this case is an injury to Logan's left leg that resulted in a 4% medical impairment to her leg. A claimant who experiences such a scheduled-member injury may be awarded permanent *total* disability benefits, but only if "the Commission finds that [she] sustained a *total* loss of wage earning capacity." *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1128 (Miss. 1992) (emphasis added). The Commission found that Logan did not sustain a total loss of wage-earning capacity, and its decision is supported by substantial evidence. Thus, the only remaining issue is whether Logan should be awarded permanent partial disability benefits pursuant to the schedule or under (c)(25). The Commission correctly awarded benefits under the schedule because (c)(25) does not apply to scheduled-member cases. Indeed, *Logan herself does not cite or rely on (c)(25)*; rather, her only argument on appeal is that the Commission erred by not awarding her permanent *total* disability benefits. Moreover, the majority does not cite—and I cannot find—any case applying (c)(25) to a scheduled-member injury. If this provision actually applied to scheduled-member cases, surely by now there would be at least one such case applying it.

¶24. I do not understand the basis for the majority's new holding that "either section 71-3-17(a) (permanent total) or (c)(25) (permanent partial) controls in this case, *not section 71-3-17(c)(2) as applied by the Commission*." *Ante* at (¶15) (emphasis added). Logan suffered

an injury to her leg, and the Commission found a permanent partial disability based on that injury. By its plain and clear language, section 71-3-17(c)(2) applies to cases of permanent partial disability based on leg injuries. The majority does not explain why (c)(25) applies to the exclusion of (c)(2). Is there something unique about this case that compels this result? Or does a claimant in a scheduled-member case get to choose which provision she prefers? Practitioners and the Commission apparently will have to figure this out in future cases.

¶25. I also do not understand why the majority remands with instructions that continue to hold open the possibility that "section 71-3-17(a) (permanent total) . . . controls." *Ante* at (¶15). The Commission has already addressed this issue and found that Logan failed to prove a permanent total disability under section 71-3-17(a). The Commission's finding is supported by substantial evidence and should be affirmed. If it is not supported by substantial evidence, then this Court should reverse and render and bring this case to an end. Either way, the Commission has already addressed the issue, so it is now ripe for review on appeal. By *again* remanding the case to the Commission with instructions to award *either total or partial* disability benefits, the majority simply invites another appeal. Indeed, the very issue that Logan wanted us to decide *in this appeal* was whether the Commission erred by finding that her disability is partial rather than total. For reasons that are unclear, the majority declines to address the issue that Logan actually raised on appeal.

¶26. In remanding this case again, the majority reasons that in *Logan I* we stated that "Logan should have been assessed a loss of wage-earning capacity," and that loss of wage-earning capacity is not the basis for calculating benefits under the schedule. Thus, the

majority reasons, our decision in *Logan I* must have included an implicit mandate to the Commission to apply (c)(25)—even though (c)(25) was not mentioned anywhere in the *Logan I* opinion. I respectfully disagree for four reasons. First, the Commission *did* consider wage-earning capacity on remand. It found that Logan failed to prove a total loss of wage-earning capacity under section 71-3-17(a), so she was not entitled to permanent *total* disability benefits. *See Smith*, 607 So. 2d at 1128. In a scheduled-member case such as this, that was the only finding that was necessary regarding wage-earning capacity.

¶27. Second, even in a permanent partial disability case involving a scheduled-member injury, "[w]age-earning capacity is a factor to be considered," and the Commission *should consider* any such evidence that is presented, even though "loss of use" is the ultimate measure of compensation in such a case. *Weatherspoon v. Croft Metals Inc.*, 853 So. 2d 776, 779 (¶14) (Miss. 2003). Thus, the mere fact that we directed the Commission to consider wage-earning capacity should not be taken as an implicit order to apply section 71-3-17(c)(25) rather than the schedule.

¶28. Third, if *Logan I*'s reference to wage-earning capacity meant anything more than that it should be considered under *Smith* and *Weatherspoon*, *supra*, then it was only dicta. Our holding in *Logan I* was simply that the Commission should award Logan compensation for a "permanent partial or total disability." *Logan I*, 127 So. 3d at 1142-43 (¶¶20-22). Anything beyond that holding was dicta.

¶29. Fourth, even if *Logan I* could somehow be read to include an implied mandate to apply (c)(25) in this scheduled-member case, "this Court may, in certain exceptional

instances, overturn a previous decision when that decision was manifestly erroneous, and upholding it on subsequent appeal would result in a grave injustice." *J.K. v. R.K.*, 30 So. 3d 290, 296 (¶22) (Miss. 2009). The notion that (c)(25) applies to scheduled-member cases is manifestly wrong, confuses the law, and should not be perpetuated even if our prior decision somehow suggested it.

¶30. The majority opinion misstates the law and will confuse the law substantially in scheduled-member cases. The Commission's decision should be affirmed because it is consistent with our opinion in *Logan I* and is supported by substantial evidence. I respectfully dissent.

GRIFFIS, P.J., CARLTON AND FAIR, JJ., JOIN THIS OPINION.