IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-WC-01521-COA

ROBERT PRUITT **APPELLANT**

v.

HOWARD INDUSTRIES, INC. **APPELLEE**

DATE OF JUDGMENT:	09/20/2016
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANT:	LINDSAY ERIN VARNADOE
ATTORNEYS FOR APPELLEE:	RICHARD LEWIS YODER JR. WILLIAM LAWRENCE THAMES
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
DISPOSITION:	AFFIRMED - 12/05/2017
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., WILSON AND GREENLEE, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Robert Pruitt, a "final assembler" employed by Howard Industries, suffered a lower-back injury while on the job. Pruitt's injuries were treated, and he returned to work. Pruitt then filed a petition to controvert with the Mississippi Workers' Compensation Commission (Commission). Following a hearing on the merits, an administrative judge found that Pruitt was to undergo an additional MRI of his lower back. After the additional MRI, the administrative judge issued an amended order and found that Pruitt did not suffer any permanent disability or loss of wage-earning capacity. Pruitt appealed to the Commission, which adopted the findings of the administrative judge. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Pruitt began working at Howard Industries in 1992 loading steel onto a platform. Pruitt performed this job until 2000, at which time he left his employment with Howard Industries and began a full-time career in ministry. In 2004, Pruitt returned to work for Howard Industries as a final assembly-line worker. As part of his duty as a final assembler, he often would bolt down transformer air compartments to pallets. On July 9, 2012, while in the scope of his employment, Pruitt was lifting an air-compressor unit on a transformer, when "something popped in [his] back . . . and [he] couldn't move at all."

¶3. Several doctors examined Pruitt after his injury. He first went to MEA Medical Clinic in Laurel, where an MRI revealed that Pruitt had lumbar spondylosis in his lower back. He then was referred to Dr. Michael Patterson of Southern Bone & Joint Specialists, who treated Pruitt conservatively without the need for surgery and released Pruitt to return to "full duty work" with no restrictions. On August 26 and 27, 2013, Robbie Bishop, an occupational therapist with similarly named Southern Bone and Joint Rehabilitation, performed a functional-capacity-evaluation (FCE) test on Pruitt and assigned him a three-percent impairment of the whole body with certain restrictions. Following his FCE, he returned to work at Howard Industries in the same position with accommodations.[1]

¶4. On May 5, 2014, Pruitt filed a petition to controvert with the Commission alleging he had sustained a compensable injury to his back in 2012 while in the scope of employment with Howard Industries. Howard Industries admitted that the injury occurred in the scope of

[1] Pruitt testified that when he returned to work after his injury he mostly drove a forklift or hyster, which he had not done before his accident.

employment but denied that he had suffered any loss of wage-earning capacity as a result of the injury.

¶5. On August 21, 2015, Dr. Rahul Vohra, of NewSouth Neurospine, conducted an independent evaluation of Pruitt and reviewed all of his medical records relating to his back injury. Dr Vohra found that Pruitt reached maximum medical improvement (MMI) in September 2013 and recommended that a second MRI be taken to compare acute and structural damages.

¶6. On October 15, 2015, a hearing on the merits was held before an administrative judge. The administrative judge agreed with Dr. Vohra's opinion and ordered Pruitt to undergo a second MRI of his lower back. On April 12, 2016, following the results of the second MRI, the administrative judge issued an amended opinion and order, finding that Pruitt failed to prove that he suffered any permanent disability or loss of wage-earning capacity. Pruitt sought review from the Commission, which affirmed and adopted the decision of the administrative judge. Pruitt appealed.

STANDARD OF REVIEW

¶7. In reviewing the decision of the Commission, this Court's review is limited to "whether the Commission erred as a matter of law or made findings of fact contrary to the overwhelming weight of the evidence." *Smith v. Johnston Tombigbee Furniture Mfg. Co.,* 43 So. 3d 1159, 1164 (¶15) (Miss. Ct. App. 2010). When the Commission accepts the findings and conclusions of the administrative judge, this Court reviews those findings and conclusions as those of the Commission. *McDowell v. Smith*, 856 So. 2d 581, 585 (¶10)

(Miss. Ct. App. 2003). Because the Commission serves as "ultimate fact-finder and judge of the credibility of witnesses," we "may not reweigh the evidence [that was] before the Commission." *Pulliam v. Miss. State Hudspeth Reg'l Ctr.*, 147 So. 3d 864, 868 (¶16) (Miss. Ct. App. 2014). However, we review the Commission's application of law de novo. *Spann v. Wal-Mart Stores Inc.*, 700 So. 2d 308, 311 (¶12) (Miss. 1997).

DISCUSSION

¶8. In his only issue on appeal, Pruitt contends that the Commission's decision was not supported by substantial evidence. Specifically, Pruitt argues that the evidence proved he suffered a loss of wage-earning capacity; thus, he was entitled to permanent partial disability benefits.

¶9. In Mississippi, "disability" is defined as an "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 the extent thereof must be supported by medical findings." Miss. Code Ann. § 71-3-3(i) (Rev. 2011). Therefore, "disability" consists of two elements—an actual physical injury and the loss of wage-earning capacity. *Gregg v. Natchez Trace Elec. Power Ass'n*, 64 So. 3d 473, 476 (¶10) (Miss. 2011). Moreover, "[t]he claimant bears the burden of proof of disability and the extent thereof." *Univ. of Miss. Med. Ctr. v. Smith*, 909 So. 2d 1209, 1218 (¶31) (Miss. Ct. App. 2005).

¶10. Pruitt suffered an injury to his lower black, which resulted in a "3% whole person impairment." This is significant because, unlike in a scheduled-member case, in a "body as a whole" case "the only available measure for computing allowable benefits to consider is

the claimant's overall diminished wage-earning capacity." *Arendale v. Balkamp Inc.*, 879 So. 2d 448, 452 (¶10) (Miss. Ct. App. 2003). Further, in body-as-a-whole cases, a rebuttable presumption of no loss of wage-earning capacity exists when a claimant returns to his same or similar employment and earns the same or higher wages. *Weathersby v. Miss. Baptist Health Sys. Inc.*, 195 So. 3d 877, 883 (¶25) (Miss. Ct. App. 2016). A claimant can rebut this presumption by

> evidence on the part of the claimant that the post-injury earnings are unreliable due to: [(1)] increase in general wage levels since the time of accident, [(2)] [the] claimant's own greater maturity and training, [(3)] longer hours worked by [the] claimant after the accident, [(4)] payment of wages disproportionate to capacity out of sympathy to [the] claimant, and [(5)] the temporary and unpredictable character of post-injury earnings.

Id. (quoting *Gen. Elec. Co. v. McKinnon*, 507 So. 2d 363, 365 (Miss. 1987)). Additionally, "any [other] factor or condition which causes the actual post-injury wages to become a less reliable indicator of earning capacity will be considered." *Id.*

¶11. In applying the relevant law to the claim and evidence before us in the present case, a rebuttable presumption of no loss of wage-earning capacity arose because Pruitt's post-injury wages exceeded his pre-injury wages. Pruitt's testimony and the documentary evidence offered at the hearing both indicate that his pre-injury pay grade was an "11-3" with an hourly wage of $12.46 per hour and his post-injury pay grade was an "11-3 " with an hourly wage of $12.91. Rather than decrease, Pruitt's hourly rate of pay increased. Further, Pruitt testified that he was a final assembler before his injury and, when he returned to work after his FCE, he remained a final assembler—driving a forklift or hyster, but still performing a production job on the floor of Howard Industries. Moreover, not only was Pruitt's job title

and wage the same, but he was employed in the same plant and division as before his injury. Therefore, it is clear that a rebuttable presumption of no loss of wage-earning capacity was present.

¶12. With a rebuttable presumption of no loss of wage-earning capacity established, it was Pruitt's burden to rebut that presumption, and the Commission found that he failed to do so. Under our limited deferential standard of review, we cannot say that the Commission's decision was clearly erroneous. Pruitt did not present any evidence of an increase in general wage levels since his injury, that he was working additional hours for the same pay, that he was being paid out of his employer's sympathy, or of any other circumstance that would compel the conclusion that his post-injury wages were an unreliable indicator of his wage-earning capacity. Rather, Pruitt admitted that he could not work as many hours as before his injury yet his wage had increased. Further, Howard Industries presented evidence that both his hourly wage and his gross wage had increased, while he remained in the same job.

¶13. Pruitt contends that he established a loss of wage-earning capacity because his doctors assigned him a three-percent whole-person impairment and released him to return work with light-duty work restrictions. Pruitt asserts that these restrictions did not allow him to lift greater than twenty pounds and prevented him from working overtime, which he asserts he had done prior to his injury. Further, he asserts that the Commission erred in not considering, due to his restrictions, his loss of access to employable jobs in the event of separating from Howard Industries.

¶14. It is undisputed that Pruitt suffered a three-percent whole-body impairment and was placed on light-work restrictions when he returned to work after his injury. However, the Mississippi Supreme Court has explained that "a claimant who has suffered a functional/medical disability of 15% may have no industrial disability at all if the functional impairment does not impede the claimant's ability to perform the duties of employment." *Robinson v. Packard Elec. Div.*, *Gen. Motors Corp.*, 523 So. 2d 329, 331 (Miss. 1988). To establish an industrial impairment, the claimant must prove (1) the presence of a medical impairment and (2) the loss of wage-earning capacity. *Id.* In the present case, the Commission determined that Pruitt failed to show that the limitation placed on him had any impact on his "ability to perform the duties of [his] employment" or "resulted in a loss of wage-earning capacity." *Id.* This determination is supported by substantial evidence.

¶15. While Pruitt has permanent light-work restrictions, his testimony clearly indicated that he was performing a production job at Howard Industries, just as he was before his injury. Pruitt asserts that after his injury he operated a forklift, which he had not done before. However, Loren Koski, vice president of Howard Industries, testified that Pruitt's job as a forklift operator was a necessary production job and that "between 10 and 12" other final assemblers operate forklifts and "[p]eople get moved around a lot."[2] Moreover, Pruitt by his own testimony admits he returned to work at the same plant, in the same division, and in the same job but making a higher wage.

[2] Koski also testified that the final assembler job has "a vast range of duties." Therefore, Koski stated that "[Pruitt] can perform a final assembler job perfectly fine with his restrictions."

¶16. Pruitt asserts that his restrictions will not allow him to work overtime as he did before his injury and that the restrictions have limited his employment opportunities in the event that he were to separate from Howard Industries. However, neither of these assertions has merit. Koski testified that Pruitt "does not have a restriction in the number of hours he can work" and that no Howard Industries employees are guaranteed overtime, especially in Pruitt's division because of its cyclical nature. Further, Pruitt admits that he has not applied for any other jobs outside Howard Industries, nor did he produce any evidence that he was in danger of termination. Nonetheless, the record clearly indicates that Pruitt's post-injury wages exceed his pre-injury wages and, therefore, Pruitt failed to prove any loss of wage-earning capacity.

CONCLUSION

¶17. Employing our limited standard of review, the Court finds that the Commission properly applied the presumption that Pruitt suffered no loss of wage-earning capacity because Pruitt's post-injury wages were higher than his pre-injury wages. Moreover, the Commission's finding that Pruitt failed to produce sufficient evidence to rebut this presumption is supported by substantial evidence. Therefore, we affirm the Commission's decision.

¶18. **AFFIRMED.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, FAIR, WILSON, WESTBROOKS AND TINDELL, JJ., CONCUR. CARLTON, J., NOT PARTICIPATING.