IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2004-WC-00930-COA

LANE FURNITURE INDUSTRIES, INC. **APPELLANT**

v.

BARBARA J. ESSARY **APPELLEE**

DATE OF JUDGMENT:	4/21/2004
TRIAL JUDGE:	HON. PAUL S. FUNDERBURK
COURT FROM WHICH APPEALED:	LEE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DAVID B. MCLAURIN JAMES GREGORY BROWN
ATTORNEY FOR APPELLEE:	KEITH SANDERS CARLTON
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	APPELLEE AWARDED PERMANENT TOTAL DISABILITY BENEFITS.
DISPOSITION:	REVERSED AND REMANDED: 05/31/2005
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE KING, C.J., CHANDLER AND BARNES, JJ.

KING, C.J., FOR THE COURT:

¶1. Lane Furniture Industries, Inc. appeals the decision of the Circuit Court of Lee County affirming the Mississippi Workers' Compensation Commission, which determined that Barbara Essary was entitled to permanent total disability benefits due to a work-related injury. Aggrieved by this decision, Lane Furniture raises the following issues which we quote verbatim:

I. The standard of review from a decision of the full Mississippi Workers' Compensation Commission requires an appellate court to review the decision of the commission as opposed to the administrative law judge where the commission enters its own findings of fact and conclusions of law.

II. An employer must refuse to reinstate or rehire a claimant in order for the injured worker to establish a prima facie case of total disability.

III. The Mississippi Workers' Compensation Commission erred as a matter of law, when it held the claimant was entitled to a presumption of permanent total disability after the commission found the claimant failed to return to work with the employer.

IV. The Mississippi Workers' Compensation Commission erred as a matter of law when it placed the burden of proof on the employer to contact the claimant regarding employment following her release from her doctor.

V. This Court should conduct a *de novo* review of the Mississippi Workers' Compensation Commission's findings of facts in light of applicable law, where the commission applied the improper legal standard.

VI. Assuming arguendo, this Court holds a Workers' Compensation claimant can make a prima facie case for total disability without first reporting back to her employer for work, then substantial credible evidence does not support the Mississippi Workers' Compensation Commission's finding that the claimant made a reasonable or diligent job search attempt.

¶2. Finding error, we reverse and remand to the Commission.

FACTS

¶3. In February 1994, Essary was employed as a sewing machine operator by Lane Furniture (formerly known as "Action"). While working at the factory on June 14, 2000, Essary injured her back while lifting material. According to Essary, on that same day, she went to see Dr. Hubbard, the company physician. Essary indicated that Dr. Hubbard took x-rays and referred her to a physician by the name of Dr. Eckman. Essary was advised by the nurse practitioner at Dr. Eckman's office to go home and rest for a week, after which she would be placed in physical therapy at the Aurora Spine Center. Essary stated that after the physical therapy sessions, her condition worsened.

¶4. Thereafter, Essary went to see Dr. Donald Smith, her family physician in Okolona. After a series of tests, it was determined that Essary had a herniated disk. Dr. Smith referred Essary to Dr. Craig Clark, a neurosurgeon, in Southaven.

¶5. Dr. Clark performed a costotransversectomy (microscopic surgery) on Essary on December 12, 2000. Dr. Clark concluded that Essary reached maximum medical improvement on March 30, 2001, and could return to work with restrictions as of April 15, 2001. Dr. Clark placed the following restrictions on Essary: (1) limited use of arms in extension, (2) weight limit of thirty pounds when lifting, pushing, or pulling, and (3) sit/stand for comfort. Dr. Clark indicated that Essary had sustained an impairment rating of sixteen percent to the body as a whole. Essary stated that Dr. Clark, in the presence of the company nurse, indicated that she could not perform her pre-injury job. Essary stated that upon being released by Dr. Clark, she carried the release form to Lane Furniture where she gave it to Jon Stembridge, the human resource manager. Thereafter, Lane Furniture did not contact Essary about returning to work.

¶6. Ms. Essary stated that she attempted to seek employment in the north Mississippi area at various food places and furniture stores. She stated that she was able to put in applications at some of the prospective places. Essary indicated that some places would not allow her to complete applications once she told them that she had been injured on her previous job, was disabled, and could not lift anything.

¶7. In July 2002, approximately fifteen months after her release to return to work, Essary met with Lane Furniture's vocational rehabilitation expert, Bruce Brawner. After consulting with Essary, Brawner identified several possible jobs which could be performed within her restrictions. Brawner indicated there were openings at Tico Credit, the Mississippi Job Service, and Citi Financial. Ms. Essary stated that she was told that Tico Credit was not hiring. She also indicated that clerical experience was needed for some of the jobs and that she did not possess those types of skills. According to Essary, there was no contact from any of the prospective employers.

¶8. Stembridge testified that he learned of Dr. Clark's release of Essary to return to work on May 2, 2001, when he saw her in the lobby of the factory. Essary gave Stembridge the notes from Dr. Clark

indicating that she would be at maximum medical improvement on March 30, 2001, and a note indicating the date she might return with certain restrictions, which was April 15, 2001.

¶9. Stembridge stated that the company's policy is that once an employee has been released to return to work, the employee has a duty to advise the employer of the release and any restrictions. Stembridge indicated that the company could have accommodated Essary's physical limitations by providing someone to assist her. Stembridge testified that the company had made accommodations for employees in similar circumstances.

¶10. Dr. Clark, in his deposition, stated that Essary should be able to return to work on a job that fit within the restrictions prescribed. He indicated that Lane Furniture would have to make a lot of accommodations if Essary returned to her pre-injury job.

¶11. On June 22, 2001, Essary filed a petition to controvert where she alleged that she was permanently disabled due to a back injury incurred at work on June 14, 2000. On August 21, 2002, a hearing was held before an administrative law judge on the sole issue of the "existence and extent of permanent disability attributable to the work-related injury." The parties stipulated to the injury, wages, temporary benefits, and the date of maximum medical recovery.

¶12. On December 17, 2002, the administrative judge entered an order finding that Essary was permanently and totally disabled as a result of her work injury and was entitled to permanent total disability benefits. The administrative judge determined the following:

> Considering those facts the Administrative Judge finds that Ms. Essary's failure to attempt to return to work for the Employer was reasonable under the circumstances.
>
> The real question in this case is whether an employer is likely to hire a sixty-two year old woman with limited education and a history of manual labor, who has had two back operations, who now has significant work restrictions, and who has been approved for social security disability. Ms. Essary's extensive, but unsuccessful, job search indicated that the answer to that questions is "No," and the Administrative Judge agrees.

> The Administrative Judge, therefore, finds that Ms. Essary is permanently and totally disabled and for that reason is entitled to permanent total disability benefits of $300.00 a week, beginning on the date of the injury, June 14, 2000, and continuing for 450 weeks. The Employer, of course, is entitled to credit for previously paid benefits.

¶13. On January 3, 2003, Lane Furniture entered a notice of appeal to the Full Commission. Following a hearing on August 11, 2003, the Commission, by a vote of two to one, affirmed the order of the administrative law judge. Commissioner Smith wrote the decision and Commissioner Quarles wrote a concurring opinion. Commissioner Schoby dissented with a written opinion.

¶14. On September 4, 2003, Lane Furniture entered a notice of appeal to the Circuit Court of Lee County which on April 21, 2004, sustained the order of the Full Commission. Lane Furniture now appeals that decision.

¶15. This Court finds issues II and IV to be dispositive of this matter and will therefore address them.

ISSUES AND ANALYSIS

Establishment of total disability.

¶16. Lane Furniture asserts that Essary failed to establish that she attempted to return to work and that her employer refused to reinstate or rehire her, and therefore has failed to establish an entitlement to total disability. A worker's compensation claimant must demonstrate (1) that he is medically disabled and unable to work, and therefore need not seek employment, or (2) that he has presented himself to his employer for work, and the employer failed or refused to reinstate him. *Hale v. Ruleville Health Care Center*, 687 So. 2d 1221, 1226 (Miss. 1997); *Lanterman v. Roadway Exp., Inc.*, 608 So. 2d 1340, 1347 (Miss. 1992). The burden does not rest with the employer to seek out the employee, and inquire as to whether he/she is interested in returning to work and if so, under what conditions.

¶17. The record presented to this Court clearly indicates that Essary did not present such proof of total medical incapacitation, as to eliminate the need to seek employment, nor did she present herself to Lane for reinstatement, and was refused employment. While we give deference to the decisions of the Commission, we do so only where those decisions are supported by substantial evidence, and are not inconsistent with the law. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). In the present case, the Commission's decision is neither supported by substantial evidence, nor consistent with the law.

¶18. The facts contained in this record do not establish that Essary was totally medically incapacitated, or that she attempted to return to her prior employment and was denied reinstatement by Lane. Indeed the record appears to reflect that Essary had determined that she was disabled and merely went through the pretext of seeking other employment as noted by her testimony. Particularly relevant to this is the following testimony:

> Q. Ms. Essary, since you were released from Dr. Clark, you basically feel like you're disabled?
>
> A. Yes, sir.
>
> Q. In fact, in your job searches with the perspective employers, some of them you indicated you were disabled; did you not?
>
> A. Yes, sir.
>
> Q. And some of them you indicated that you were not able to lift anything; is that correct?
>
> A. Yes, sir.
>
> Q. In fact, some of them you indicated your restrictions were far greater than what Dr. Clark stated; did you not?
>
> A. No. I just told them I couldn't reach, couldn't lift.

¶19. Clearly by her testimony Essary had determined in her mind that she was disabled, and communicated this determination to prospective employers. By telling prospective employers that she was disabled, Essary made the failure to hire her due to disability a self-fulfilling prophecy. Essary now argues that not being employed by those prospective employers, to whom she had stated she was disabled, is proof of her disability. Such a claim is not indicative of a good faith effort at seeking employment. Nor can such a claim be considered as providing substantial evidence upon which to base a finding of disability.

¶20. Additionally ,the Commission improperly placed upon Lane the burden of seeking Essary out to determine when and under what conditions she would return to work.

> Our supreme court has held that in order to recover an award of permanent disability benefits "[t]he burden is on the claimant to prove both medical impairment and loss of wage earning capacity." *Lanterman v. Roadway Express, Inc*., 608 So. 2d 1340, 1347 (Miss. 1992) (citations omitted). Pursuant to Miss. Code Ann. § 71-3-3(I) (Rev. 1995) in order for a claimant to make out a prima facie case for a finding of permanent disability, the claimant must show that he has sought and been unable to find work "in the same or other employment." *Hale v. Ruleville Health Care Center*, 687 So. 2d 1221, 1226 (Miss. 1997). Therefore, the claimant can make a prima facie case that he has met his burden of showing total disability by showing either that "the claimant, having reached maximum medical recovery, reports back to his employer for work, and the employer refuses to reinstate or rehire him," *Jordan v. Hercules*, 600 So. 2d 179, 183 (Miss. 1992), or "the claimant could not obtain work in similar or other jobs." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991).
>
> Once the prima facie case has been made "[t]he burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity." *Jordan*, 600 So. 2d at 183. The employer also has the burden to prove that the claimant's efforts to find "similar or other jobs" constituted a mere sham or unreasonable effort. *Taplin*, 586 So. 2d at 828.

Park Inn Int'l v. Hull, 739 So. 2d 487 (¶¶10-11) (Miss. Ct. App. 1999).

¶21. On cross-examination, Essary testified that she never attempted to go back to work at Lane Furniture (Action). She indicated that Lane Furniture failed to contact her for the purpose of returning to work or accommodating her restrictions as well.

¶22. The record reflects that Stembridge, the human resource manager, indicated that Essary would have been accommodated had she returned to work and that the company policy required that Essary notify the company of her date of release from the doctor to return to work. Stembridge testified that Lane Furniture had made accommodations for other employees under similar circumstances in the past.

¶23. In *Marshall Durbin, Inc. v. Hall*, 490 So. 2d 877, 880 (Miss. 1986), a claimant who was described as having a thirty percent disability to the body as a whole, and whose physical impairment due to the work-related injury was less than total, was awarded permanent total disability benefits. However, that claimant attempted to secure re-employment with the company, but was rejected. Essary admitted that she did not attempt to return to work at Lane. Essary indicated that she sought other employment because she was unaware of another job which she could perform at Lane. However, she did not establish (1) that she was medically unable to return to Lane, so as not to require that she seek re-employment there, (2) that any restrictions placed upon her employment were not subject to reasonable accommodation at Lane, (3) that Lane failed or refused to re-employ her, and (4) that considering any restrictions, she made reasonable efforts to seek similar or other employment.

¶24. This Court finds that the Commission 's decision, that Essary was totally disabled , as shown by her inability to find employment, was not supported by substantial evidence. This Court also finds that the Commission improperly placed upon Lane the burden of seeking Essary out to determine when she could return to work, and if so, under what circumstances.

¶25. Accordingly, we reverse and remand this matter to the Commission to determine (1) whether Essary was medically unable to return to Lane, so as to not require that she seek re-employment there, (2) whether or not any restrictions placed upon Essary's employment were subject to accommodation at Lane, and (3) whether considering any restrictions placed upon her employment, Essary made reasonable efforts to seek similar or other employment.

¶26. **THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS REVERSED AND THE CASE IS REMANDED TO THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. THE COSTS OF THIS APPEAL ARE ASSESSED EQUALLY TO THE APPELLANT AND THE APPELLEE.**

IRVING, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR. CHANDLER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES AND LEE, P.JJ., AND MYERS, J.

CHANDLER, J., DISSENTING:

¶27. With respect, I dissent from the majority's decision to reverse this case and remand it to the Commission for further findings. Our familiar standard of review is that this Court must affirm a decision of the Commission if it properly applied the law and was supported by substantial evidence. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (¶6) (Miss. 2003). The majority finds that the Commission improperly applied the law, which necessitates reversal and remand for proper application of the law. Curiously, the majority also concludes that there was not substantial evidence before the Commission to support a finding for Essary. Usually, this conclusion would necessitate a reversal of the Commission's award of benefits, not a remand for new fact-findings. *See Bechtel Corp. v. Phillips*, 591 So. 2d 814, 818 (Miss. 1991) (reversing and rendering a Commission decision that was unsupported by substantial evidence). Contrary to the majority's conclusion, I believe that the Commission properly

applied the law in this case and made all the requisite fact-findings, which were supported by substantial evidence. Therefore, I would affirm the decision of the circuit court affirming the Commission's award of permanent total disability benefits to Essary.

¶28. According to my perusal of the record and briefs, this is a relatively simple case in which the Commission, in affirming the decision of the administrative law judge, did not allocate an improper burden to Lane and rendered a decision substantially supported by the evidence. I believe it helpful to begin by outlining the burden-shifting framework for a claim of permanent disability. The disability inquiry focuses on whether a work-related injury caused the claimant to lose wage-earning capacity, meaning that the claimant's physical condition prevents her from commanding the pre-injury wage in the job market. *Kitchens v. Jerry Vowell Logging*, 874 So. 2d 456, 468 (¶44) (Miss. Ct. App. 2004). An injured employee may establish a prima facie case of permanent, total disability by proving that, after a reasonable job search, she cannot secure work in the same or other employment. *Pontotoc Wire Products Co. v. Ferguson*, 384 So. 2d 601, 603 (Miss. 1980). The case of *Jordan v. Hercules*, 600 So. 2d 179, 183 (Miss. 1992), stated that a claimant with a partial disability establishes a prima facie case of permanent, total disability by showing she reported back to the employer for work, and the employer refused to reinstate or rehire her.

¶29. The establishment of a prima facie case shifts the burden to the employer to show that the employee has in fact suffered no loss of wage earning capacity or only a partial loss of wage earning capacity. *Id.* at 183. The employer may accomplish this by showing that the claimant's job search was unreasonable or constituted a mere sham. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1227 (Miss. 1997). Moreover, there is a rebuttable presumption of no lost wage earning capacity if the employee returns to work after the injury and earns a wage equal to or exceeding her pre-injury wage.

Spann v. Wal-Mart Stores, Inc., 700 So. 2d 308, 313 (¶20) (Miss. 1997). The claimant may rebut the presumption with evidence that the post-injury wage was paid out of sympathy for the injured worker, that general wage levels increased since the time of the injury, or that there was some other reason that the wage does not reflect the claimant's actual wage earning capacity in the open labor market. *Id.* at (¶¶20-21).

¶30. The Commission must determine the existence and extent of a claimant's disability by considering the evidence as a whole, evaluating factors such as "the amount of the education and training which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances." *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 167 (Miss. 1991) (citing *Malone & Hyde of Tupelo, Inc. v. Kent*, 250 Miss. 879, 882, 168 So. 2d 526, 527 (1964)). In assessing the reasonableness of a claimant's job search, relevant factors for consideration are: "the economic and industrial aspects of the local community, the jobs available in the community and surrounding area, the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought." *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638, 641 (Miss. 1978). A claimant will be deemed permanently totally disabled if, due to the injury, she is disqualified for regular employment in the labor market. *Roling v. Hatten & Davis Lumber Co.*, 226 Miss. 732, 741, 85 So. 2d 486, 489 (1956).

¶31. This Court adheres to a limited standard of review of decisions of the Workers' Compensation Commission. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d at 778 (¶6). We will overturn the Commission decision only for an erroneous application of law or if the decision was not supported by substantial evidence and is arbitrary and capricious. *Id.* Absent these errors, this Court may not, in the exercise of its review function, invade the decision-making authority of the agency. *Miss. State Tax*

Comm'n v. Mississippi-Alabama State Fair, 222 So. 2d 664, 665 (Miss. 1969). Thus, a Commission decision that is supported by substantial evidence may not be overturned even if, were this Court acting as the fact-finder, we would have reached the opposite conclusion. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994).

¶32. In the instant case, the administrative law judge found that, because Essary did not present herself to Lane and request work, Essary was not entitled to a presumption of permanent, total disability pursuant to *Jordan*. Having dispensed with the *Jordan* presumption, the administrative law judge examined whether Essary had proven that she was unable to find work in the same or other employment. The administrative law judge found that Essary could not return to her pre-injury job at Lane. In fact, it was undisputed that Essary was medically unable to return to her pre-injury job. Dr. Clark stated that Essary could not return to her pre-injury job without "a lot of accommodations." Lane's human resources manager, Jon Stembridge, admitted that Essary's work restrictions would prevent Essary from returning to her pre-injury job.

¶33. Next, the administrative law judge dealt with Lane's argument that, in order to prove permanent, total disability, Essary had to show that she reported back to Lane and requested work. Lane argued that, had Essary requested employment, Lane would have crafted a job for Essary with accommodations for her work restrictions. The job with accommodations might have been entirely distinct from Essary's former job or might have been a modified version of her old job, with accommodation such as having an assistant lift the tubs and material for Essary. Lane reasoned that, because Essary never contacted Lane for work and Lane would have accommodated Essary had she done so, Essary was not entitled to permanent total disability benefits.

¶34. The administrative law judge rejected Lane's argument upon a finding that Essary's failure to attempt a return to work at Lane was reasonable under the circumstances. The administrative law judge cited evidence supporting his conclusion. The administrative law judge recognized that the rehabilitation nurse, Nancy Hamblin, had been present when Dr. Clark gave Essary her work restrictions in March 2001. From this fact, the administrative law judge found that Lane had been on notice of Essary's work restrictions since March 2001 and never contacted Essary about returning to work. The administrative law judge also cited the testimony of Essary and Stembridge about Essary's meeting with Stembridge at Lane. Both Essary and Stembridge stated that Essary gave him a copy of her work restrictions at that time. Essary testified that Stembridge, after reviewing her work restrictions, told her, "[it l]ooks like you may not be able to come back to work." Stembridge testified that he did not know of a job at Lane that Essary could perform within her work restrictions, and the administrative law judge found that Lane would have had to "make up a job" especially for Essary. The administrative law judge found that Essary's failure to apply at Lane was reasonable under the circumstances. The administrative law judge went on to consider Essary's job search, age, education, work history, injury, and social security disability status and found that Essary was permanently, totally disabled.

¶35. The majority concludes that the administrative law judge placed a burden upon Lane to offer Essary employment with accommodation. I disagree with the majority's interpretation of the administrative law judge's decision. As discussed above, the disability inquiry focuses on the claimant's loss of wage earning capacity, which may be evidenced by the claimant's job search. *Pontotoc Wire Products Co.*, 384 So. 2d at 603. During the job search, the claimant should seek jobs in the locality for which she is suited considering her age, education, work experience, and physical condition. *Id.* The administrative law judge recognized the undisputed evidence that Essary was no longer qualified to perform the duties

of her pre-injury job. Therefore, she was not required to attempt a return to her pre-injury job. *Ga. Pac. Corp. v. Taplin*, 586 So. 2d 823, 828-29 (Miss. 1991) (The law does not require the claimant to show that he has been rejected because of the disability at jobs for which he no longer considers himself a qualified applicant). To me, the real question raised by Lane's argument was whether or not Essary's job search was rendered unreasonable by her failure to inquire about the availability of work within her restrictions at Lane. The administrative law judge found from the evidence cited above that, during Essary's job search, it was reasonable for her to believe that Lane had no such work available. In my view, the evidence cited by the administrative law judge was substantial support for that conclusion.

¶36. Further, the administrative law judge did not presume Essary was disabled. Instead, after considering the various factors relevant to a finding of permanent disability, the administrative law judge found Essary to be permanently, totally disabled. The evidence showed that Essary was sixty-two years old, had a work history of manual labor, and lacked clerical skills. The administrative law judge stated that Essary had significant work restrictions. That finding was supported by the testimony of Dr. Clark as to Essary's work restrictions, his statement that Essary may be actually more or less impaired than indicated by those restrictions, and his statement that Essary could cause further injury to her back unless she stayed within the restrictions. The administrative law judge accepted Essary's job search and found it to be extensive but unsuccessful. Indeed, there was evidence that Essary contacted twenty-seven employers and the potential employers located by the vocational rehabilitation specialist, but her job search was fruitless. This level of diligence has been found to support a finding that the claimant's job search was reasonable. *See Pontotoc Wire Products Co.*, 384 So. 2d at 604. Obviously, the administrative law judge, who acted as the Commission's fact-finder in this case and observed all of the witnesses, rejected any evidence that Essary's job search was pretextual.

¶37. I believe that the evidence of Essary's advanced age, work history of manual labor, lack of clerical skills, physical condition, job search, and social security disability status substantially supported the administrative law judge's finding that Essary could not obtain regular work in the labor market. When substantial evidence exists supporting an agency decision, this Court may not disturb the agency decision even if, were this Court the fact-finder, we would have reached a different conclusion. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). Since the Commission has already determined the issues of Essary's inability to return to her pre-injury job, the import of Lane's assertion that it could have accommodated Essary, and the reasonableness of Essary's job search, I believe that further fact findings are entirely unnecessary. I would affirm the decision of the circuit court affirming the Commission.

BRIDGES AND LEE, P.JJ., AND MYERS, J., JOIN THIS SEPARATE WRITTEN OPINION.