

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00697 COA**

**CITY OF PASCAGOULA AND MISSISSIPPI
MUNICIPAL WORKERS' COMPENSATION GROUP**

APPELLANTS

v.

RICHARD D. BROWN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	06/06/96
TRIAL JUDGE:	HON. KATHY KING JACKSON
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	JACKYE L. CHAPMAN MICHAEL J. MCELHANEY
ATTORNEY FOR APPELLEE:	BRENT M. BICKHAM
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	AFFIRMED DECISION OF THE COMPENSATION COMMISSION
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE BRIDGES, C.J., DIAZ, AND COLEMAN, JJ.

DIAZ, J., FOR THE COURT:

Richard Brown's shoulder was injured during the course of his employment with the City of Pascagoula. Brown had several surgeries and was eventually found by the administrative judge and the Workers' Compensation Commission to have a sixty percent loss of industrial use of the right upper extremity, entitling him to permanent partial disability benefits. This finding was affirmed on appeal to the Circuit Court of Jackson County. The City of Pascagoula and the Mississippi Municipal Workers' Compensation Group now appeal claiming that there was insufficient evidence to support these findings. We hold that there is sufficient evidence, and we affirm the decision of the circuit court.

FACTS

Brown began working for the City of Pascagoula on August 14, 1981 as a laborer. He was later promoted to a foreman--the position he held at the time of his injury. Brown's injury occurred when he was getting into his truck and another truck hit his right shoulder with a water keg that was attached to the passing truck. Dr. Wiggins examined Brown and treated him for six months. Brown testified that the pain did not subside, but instead continued to increase. Dr. Wiggins performed arthroscopic surgery on August 17, 1989, and Brown returned to work that December. In July 1990, Brown again underwent surgery and returned to work in October 1990. From October 1990 until the hearing on May 24, 1995, Brown continued to work, periodically being placed off work by Dr. Wiggins and then later being released to return to work. Both parties stipulated that Brown's hourly wage was \$9.54, or \$381.60 for a forty-hour week at the time of the hearing, the same wage he was earning prior to his injury.

At the hearing, the administrative judge and the Commission found that Brown's 20% impairment to his shoulder resulted in a 60% loss of industrial use of his shoulder, entitling him to permanent partial disability benefits. The circuit court affirmed this finding as do we.

ISSUE

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE COMMISSION'S AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS TO BROWN?

This Court's review of the circuit court is limited to the same as that of the circuit court's review of the Commission in that absent an error of law, where substantial credible evidence supports the Commission's decision, neither court may interfere. *Smith v. Jackson Constr. Co.* 607 So. 2d. 1119, 1124 (Miss. 1992). That is, this Court will not determine where the preponderance lies when the evidence is in conflict, as long as there is substantial evidence to support the finding. We may interfere only when the agency's actions are seen as arbitrary and capricious.

In the case before us, the Commission had substantial evidence to support its finding, and its actions are in no way arbitrary or capricious. The appellants argue that to be awarded permanent partial disability Brown must prove, not only a medical impairment, but also a loss of wage-earning capacity resulting from the medical impairment. *International Paper Co. v. Kelley*, 562 So. 2d 1298, 1302 (Miss. 1990). The appellants contend also that because Brown returned to work and eventually made the same or greater salary, that there was no loss in his wage-earning capacity. The appellants cite as authority *Agee v. Bay Springs Forest Prods.*, 419 So. 2d 188 (Miss. 1982), where the employee sustained a back injury and returned to work after an operation making the same wage as before his injury.

Agee can be distinguished from the case before us on several points. Brown was demoted from a foreman to a laborer. Brown points out that the only reason he is making as much as he is now earning is because of the across-the-board raises which he has received over the five years. In other words, laborers are now making what foremen were making five years ago. Brown has demonstrated

a loss of wage earning capacity because he is no longer able to make a foreman's wages. The employee in *Agee* had one surgery and returned to work only four months later to his pre-injury wage. Here, Brown returned to work after having several surgeries and five years later was only able to make his pre-injury wage. Also the employee in *Agee* apparently did not rebut the presumption which arises when an employee returns to work making the same as his pre-injury wage. The rebuttable presumption is that there has been no loss in wage-earning capacity when the employee is making the same as he was prior to his injury. *Id.* However, Brown has rebutted this presumption by proving that not only is he restricted as to the duties which he can now perform, but he was not making as much as a foreman at the time of his trial.

We find that there was more than sufficient evidence to support the Commission's and the circuit court's holding that Brown is permanently partially disabled. We therefore affirm.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.