IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-WC-00416-COA

HUDSPETH REGIONAL CENTER AND MISSISSIPPI STATE AGENCIES WORKERS' COMPENSATION TRUST	**APPELLANTS**
v.	
LINDA MITCHELL	**APPELLEE**

DATE OF JUDGMENT:	02/15/2018
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEYS FOR APPELLANTS:	JOSEPH T. WILKINS III NICHOLAS DENSON GARRARD
ATTORNEY FOR APPELLEE:	STEVEN HISER FUNDERBURG
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
DISPOSITION:	REVERSED AND RENDERED - 04/30/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

J. WILSON, P.J., FOR THE COURT:

¶1. Linda Mitchell was a state employee and a nurse supervisor at Hudspeth Regional Center. She injured her back at work, but about six weeks later she returned to work full-time at her same position with the same duties and no accommodations. She continued to work at Hudspeth for seven months thereafter until she was terminated for cause for refusing to see a patient under her care. Mitchell admits that she should not have refused to see the patient, and she did not exercise her right as a state service employee to appeal her termination. Instead, she filed a workers' compensation claim against Hudspeth.

¶2. The administrative judge (AJ) and the Workers' Compensation Commission initially found that Mitchell had sustained a total loss of wage-earning capacity and awarded her permanent total disability benefits. However, our Supreme Court reversed and remanded. The Supreme Court held that the AJ, the Commission, and this Court all erred by failing to apply a rebuttable presumption that Mitchell sustained no loss of wage-earning capacity. That presumption arose as a matter of law because Mitchell had returned to her same position with the same or greater earnings as prior to her injury. *Hudspeth Reg'l Ctr. v. Mitchell*, 202 So. 3d 609, 610-11 (¶¶7-9) (Miss. 2016) (citing *Omnova Solutions Inc. v. Lipa*, 44 So. 3d 935, 941 (¶17) (Miss. 2010)).

¶3. On remand, the AJ entered a new order that argued at length that the Supreme Court's decision was wrong. The AJ then reached the same result as before, finding that Mitchell sustained a total loss of wage-earning capacity and awarding permanent total disability benefits. The full Commission affirmed the AJ's order in part and "incorporate[d]" the AJ's "findings" in part. However, the Commission "amended" the AJ's order based on the Commission's own finding that Mitchell is "capable of performing minimum-wage employment" and thus had sustained a less-than-total loss of wage-earning capacity.[1] The Commission found that "the evidence as a whole rebuts the presumption that [Mitchell] sustained no permanent disability *due to her brief return to an accommodated position* before reaching maximum medical improvement." (Emphasis added.) The Commission then held

[1] The weekly benefit calculated by the AJ (for permanent total disability) and the weekly benefit calculated by the Commission (for permanent partial disability) were both capped by the same weekly maximum benefit. Therefore, the Commission's amendment to the AJ's order had no practical effect.

that Mitchell "successfully rebutted the presumption that she is entitled to no permanent disability *as a result of her brief return to accommodated employment*." (Emphasis added.)

¶4. The Commission's description of the applicable presumption includes a clear error of fact: Mitchell did not return to an "accommodated position" or "accommodated employment." Rather, Mitchell testified that six weeks after her injury, she returned to work at Hudspeth full-time with the same job duties and expectations as before and with no accommodations. Indeed, in this appeal, Mitchell does not attempt to defend the Commission's misstatement of the facts. We cannot ignore the Commission's factual error, as it improperly minimizes the Supreme Court's clear mandate and holding. This would be reason enough for us to reverse and remand the case again.

¶5. However, we also conclude that Mitchell failed to present substantial evidence to rebut the presumption that she sustained no loss of wage-earning capacity. For that reason, the decision of the Commission must be reversed and rendered.

FACTS AND PROCEDURAL HISTORY

¶6. Mitchell began working as a nurse after she obtained her associate degree in nursing in 1991. She began working for Hudspeth in 2003 as a registered nurse supervisor. Mitchell dispensed medications and provided care to individuals with intellectual or developmental disabilities who lived in the residential "cottages" on Hudspeth's campus. Mitchell supervised the second shift, which ran from 3 p.m. to 11 p.m. However, Hudspeth allowed Mitchell to complete her forty-hour work week in three days by starting early and working fourteen-hour days. Mitchell testified that her work as a nurse supervisor at Hudspeth was

"easy" compared to other nursing positions she had held because she was not expected to lift patients, and she had "a lot of free time."

¶7. Mitchell injured her back while at work in 2009. She returned to work after the injury and testified that she had fully recovered. However, Mitchell's medical records from 2009 show that she reported "relentless" and "chronic" low-back pain "since the 1990s" and "several" prior "back injuries." Subsequent records describe "degenerative disease" in her lower back and show that she received injections and continued to take medicines for her back pain. In her testimony in this case, Mitchell acknowledged that she had experienced back pain on and off for years.

¶8. In 2010, Mitchell was diagnosed with cancer. She underwent surgery followed by chemotherapy and radiation treatments. Mitchell testified that her treatments were successful, although she continued to take a chemotherapy pill that caused some fatigue. She also testified that she continued to suffer from lymphedema due to the removal of her lymph nodes during her cancer treatments. This condition causes painful swelling in Mitchell's right arm that worsens when she uses the arm.

¶9. On September 24, 2011, Mitchell fell and injured her back at work. While pulling a medication cart into a patient's room, she slipped and fell and landed hard on her buttocks. She was taken to the emergency room and told to follow up with Dr. Morris the following Monday. Dr. Winklemann also treated Mitchell before Dr. Morris released her to return to work on November 6, 2011. Mitchell was sixty-three years old at the time of her injury and subsequent return to work.

¶10. Mitchell testified she returned to the "same job" that she had performed prior to her injury. She had the same duties, expectations, and pay as before. She also continued to work full-time and fourteen-hour days. She did not request, nor was she given, any sort of accommodation. Mitchell testified that there is no such thing as "light duty" at Hudspeth. She testified that she "struggled" at times but "felt like [she] was doing [her] job properly" and got her "job done." Mitchell testified that "[n]othing changed about what [she] was expected to do" when she returned to work at Hudspeth after her injury. Mitchell continued performing all of her job duties without incident or accommodation for six months.

¶11. On May 5, 2012, at approximately 10:15 p.m., Mitchell was working at Hudspeth when she received a call from a supervisor at the Dogwood Cottage, one of the residential cottages on Hudspeth's campus. The supervisor asked Mitchell to examine a patient for a possible case of ringworm. Mitchell responded that "she had just left the [cottage] and . . . would not be coming back." Mitchell told the supervisor to "write up the incident however she wanted" and that another nurse could see the patient the following morning. Because Mitchell refused to see the patient, the supervisor had to call another nurse to examine the patient. In her testimony in this case, Mitchell admitted that she "should have gone back to the [cottage], [but she] didn't."

¶12. On June 4, 2012, Mitchell received "pre-termination notice" of a recommendation to terminate her employment. Mitchell's refusal to see the patient at the Dogwood Cottage was the primary reason for her recommended termination. Mitchell's conduct was deemed a "Group III offense," which is the "most serious" category of offense under State Personnel

Board regulations. Miss. Admin. Code § 27-110:9.1(C) (2012). Hudspeth also found that Mitchell was "rude and unprofessional in [her] conversation" with the cottage supervisor. The notice also listed approximately thirty reprimands that Mitchell had received for less serious Group I and Group II offenses from 2003 to 2009. The notice advised that Mitchell could respond in writing or orally at a pre-termination conference with Hudspeth's director. On June 12, 2012, Mitchell attended her pre-termination conference. On June 22, 2012, Hudspeth terminated Mitchell's employment for the reasons given in her pre-termination notice. Mitchell was informed of her right as a state service employee to appeal her termination to the State Employee Appeals Board. However, Mitchell chose not to appeal. She testified that she did not think an appeal "would do any good," and she did not want to pay the $100 filing fee. Instead, in October 2012, she filed a workers' compensation claim.

¶13. After she was fired at Hudspeth, Mitchell conducted only a limited search for new employment. She testified that she applied for four nursing jobs, three by online applications, and did not receive "any callbacks." She testified that, "of course, the first question" on a job application is "why you left your last job." Mitchell agreed that the reasons for her termination at Hudspeth might cause other employers not to want to hire her. Mitchell also testified that it was "between difficult and impossible" for her to find a new nursing job because she has only an associate degree in nursing (ADN), and today most employers require or prefer a bachelor of science degree in nursing (BSN).

¶14. In November 2012, Dr. Winkelmann wrote that Mitchell was "at MMI" with a "3% partial impairment to the body as a whole." In January 2013, at the request of Mitchell's

attorney, Dr. Winkelmann referred Mitchell for a functional capacity evaluation (FCE). The FCE was conducted in February 2013 and is described in more detail below.

¶15. Mitchell's workers' compensation case proceeded to a hearing on the merits on April 24, 2014. At the hearing, Mitchell testified that she would have continued working at Hudspeth had she not been terminated. She testified that she would return to the job if it was offered to her and that she was physically able to do the job.

¶16. Following the hearing, the AJ found that Mitchell had experienced a total loss of wage-earning capacity as a result of her September 2011 injury. Therefore, the AJ awarded Mitchell permanent total disability benefits at the maximum rate of $427.20 per week for 450 weeks. The full Commission affirmed the AJ's order, and this Court affirmed the Commission by an evenly divided Court. *Hudspeth Reg'l Ctr. v. Mitchell*, 202 So. 3d 617 (Miss. Ct. App. 2015), *rev'd*, 202 So. 3d 609 (Miss. 2016).

¶17. The Supreme Court granted certiorari and reversed 8–0, with one justice not participating.[2] *Mitchell*, 202 So. 3d at 611 (¶¶9-10). The Supreme Court held that the AJ, the Commission, and this Court erred by failing to apply a rebuttable presumption of no loss of wage-earning capacity. *Id.* The Supreme Court followed its prior decision in *Omnova*, *supra*. There, the Court held that "where an injured employee returns to work and receives the same or greater earnings as those prior to his injury, there is created a rebuttable presumption that he has suffered no loss in his wage-earning capacity." *Mitchell*, 202 So. 3d at 610 (¶7) (quotation marks omitted) (quoting *Omnova*, 44 So. 3d at 936 (¶17)). The

[2] Justice Maxwell did not participate in the Supreme Court's decision because he participated in the case as a member of this Court, having joined the dissent.

Supreme Court held that the *Omnova* presumption applies here because "Mitchell's case is no different" from *Omnova*:

> after [Mitchell] sustained [an] injury [at work], she returned to work in the same position at the same or higher rate of pay. She continued to work in that position for more than seven months after the injury until she was terminated for cause. So as in *Omnova*, a rebuttable presumption arose that Mitchell suffered no loss in her wage-earning capacity.

Id. at 610 (¶8) (brackets and quotation marks omitted); *see also id.* at 609 (¶2) ("Six weeks following the fall, Mitchell returned to work at the same position, and she carried out the same job duties as prior to the accident."). The Supreme Court held that the failure to apply the *Omnova* presumption was "legal error." *Id.* at 610-11 (¶¶8-9). Therefore, the Court reversed and remanded the case for "the Commission to apply the correct legal standard." *Id.* at 609 (¶1).

¶18. On remand, the AJ issued a lengthy opinion that primarily argued that the Supreme Court's decision was wrong.[3] The AJ asserted that *Omnova*'s presumption does "not apply to this case because [Mitchell] had not reached maximum medical improvement ('MMI') at the time she returned to work" and because Hudspeth "terminated [Mitchell] and subsequently refused to rehire her after she reached MMI." The AJ recognized that Hudspeth had "successfully convinced the Mississippi Supreme Court that [*Omnova*] is controlling in this case." However, the AJ opined that the Supreme Court had "accepted and applied a legal argument without consideration of the distinguishing nature of [Mitchell's] MMI date."

[3] The ALJ's amended opinion on remand is available at *Mitchell v. Hudspeth Reg'l Ctr. & Miss. State Agencies Self-Insured Workers' Comp.*, MWCC No. 1110464-M-1964-E22, 2017 WL 6663952 (Aug. 21, 2017).

The AJ then stated, "Hopefully, these remand proceedings will provide clarification of the law in this regard."

¶19. The AJ's opinion on remand also charged Hudspeth with "mislead[ing]" the Supreme Court "as to the holding in *Omnova*." Specifically, the AJ criticized Hudspeth for failing to "acknowledge to the Mississippi Supreme Court that the [*Omnova*] decision was inapplicable due to the MMI date."[4]

¶20. The AJ ultimately stated that Mitchell had rebutted the *Omnova* presumption. The AJ also reaffirmed her prior finding that Mitchell had experienced a total loss of wage-earning capacity. Therefore, the AJ again awarded Mitchell permanent total disability benefits.

¶21. The full Commission subsequently "affirm[ed] the [AJ's] finding" that Mitchell had sustained a "loss of wage-earning capacity."[5] The Commission "incorporate[d]" the AJ's "findings" on that issue as part of its final decision. As discussed above, the Commission erroneously stated that Mitchell returned to Hudspeth for a "brief" time in an "accommodated position" or "accommodated employment." The Commission then "amend[ed] the [AJ's

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[4] The AJ's criticism of Hudspeth was unjustified. Hudspeth's petition for a writ of certiorari and supplemental brief in the Mississippi Supreme Court clearly and repeatedly discussed the fact that Mitchell returned to work and was later terminated for cause prior to MMI. Moreover, in response to Hudspeth's cert petition, Mitchell made the same argument as the AJ—i.e., that the *Omnova* "presumption does not apply *prior to* an injured worker reaching [MMI]." Finally, the dissent in this Court had already specifically discussed the significance of Mitchell's MMI date. *Mitchell*, 202 So. 3d at 626 (¶33) (Wilson, J., dissenting). The relevant facts and issues were clearly discussed in the parties' filings in the Supreme Court and this Court's prior opinions. Hudspeth simply made a legal argument that the Supreme Court found persuasive. Hudspeth did not "mislead" anyone.

[5] The Commission's opinion on remand is available at *Mitchell v. Hudspeth Reg'l Ctr. & Miss. State Agencies Self-Insured Workers' Comp.*, MWCC No. 1110464-M-1964, 2018 WL 1127752 (Feb. 15, 2018).

ruling] to reflect [the Commission's own] finding that [Mitchell was] capable of performing minimum-wage employment and suffered $509.15 per week loss of wage-earning capacity, which is subject to the weekly maximum benefit of $427.20."[6] Hudspeth filed a timely notice of appeal, and the appeal was assigned to this Court.

ANALYSIS

¶22. "The standard of review in workers' compensation cases is limited. The substantial evidence test is used." *Weatherspoon v. Croft Metals Inc.*, 853 So. 2d 776, 778 (¶6) (Miss. 2003). This Court will reverse a decision of the Commission "only for an error of law or an unsupported finding of fact." *Id.* "Reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law." *Id.* However, this Court will reverse the Commission's order if the Commission's findings are "clearly erroneous and contrary to the overwhelming weight of the evidence." *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). The Commission's "[f]indings may be determined to be clearly erroneous, although there is some slight evidence to support them, if, on the entire record, the reviewing court is left with a firm and definite conviction that a mistake has been made by the Commission in its findings of fact." *S. Cent. Bell Tel. Co. v. Aden*, 474 So. 2d 584, 595 (Miss. 1985). We review issues

[6] The Commission apparently meant to say that it found that $509.15 was "sixty-six and two-thirds percent . . . of the difference between [Mitchell's] average weekly wages [at the time of her injury] . . . and [her] wage-earning capacity thereafter." Miss. Code Ann. § 71-3-17(c)(25) (Rev. 2011) (formula for permanent partial disability benefits in non-scheduled-member cases). Mitchell's average weekly wage was $1,053.68. The difference between that and forty hours at minimum wage would be $763.68, and sixty-six and two-thirds percent of that amount would round to $509.15.

of law de novo. *Cook v. Home Depot*, 81 So. 3d 1041, 1045 (¶3) (Miss. 2012).

I. The Commission misapplied the *Omnova* presumption.

¶23. The Commission and this Court are bound to follow the Supreme Court's prior decision pursuant to the mandate rule and the law-of-the-case doctrine. *See, e.g.*, *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 812 So. 2d 953, 960 (¶12) (Miss. 2002). Moreover, neither the Commission nor this Court has "the authority to overrule or ignore [S]upreme [C]ourt precedent." *Cahn v. Copac Inc.*, 198 So. 3d 347, 358 (¶35) (Miss. Ct. App. 2015).

¶24. The Supreme Court has held that when "an injured employee returns to work and receives the same or greater earnings as those prior to his injury, there is created a rebuttable presumption that he has suffered no loss in his wage-earning capacity." *Omnova*, 44 So. 3d at 941 (¶17). In the prior appeal in this case, the Supreme Court clearly held that *Omnova*'s presumption applies to the facts of this case. *Mitchell*, 202 So. 3d at 610 (¶8) (stating that "Mitchell's case is no different" from *Omnova*).

¶25. Thus, the Supreme Court gave the Commission one clear task on remand: apply the *Omnova* presumption. However, rather than simply complying with the Supreme Court's mandate, the Commission attempted to minimize the significance of *Omnova*'s presumption based on a factual assertion that is clearly erroneous and contrary to the record. As noted above, the Commission found as follows:

> We find that the evidence as a whole rebuts the presumption that [Mitchell] sustained no permanent disability *due to her brief return to an accommodated position before reaching maximum medical improvement*.
>
> . . . .

> . . . We clarify that [Mitchell] successfully rebutted the presumption that she is entitled to no permanent disability *as a result of her brief return to accommodated employment*.

(Emphasis added.)

¶26. The record does not support the Commission's finding that Mitchell returned to "an accommodated position" or "accommodated employment." To the contrary, as discussed above, Mitchell testified that she received a full release to return to work, that she performed all of her same job duties, and that she was not assigned "light duty" work or given any accommodations. She even resumed working fourteen-hour days. The AJ made this very point in her initial (2014) opinion.[7] The Supreme Court similarly observed, "Six weeks following the fall, Mitchell returned to work at the same position, and she carried out the same job duties as prior to the accident." *Mitchell*, 202 So. 3d at 609 (¶2). As Mitchell said, "[n]othing changed about what [she] was expected to do" when she returned to work at Hudspeth after her injury. Indeed, in the present appeal, Mitchell does not attempt to defend the Commission's erroneous statements of fact.

¶27. Moreover, it is unreasonable to say that Mitchell made only a "brief return" to her job at Hudspeth. As discussed above, Mitchell returned to work at Hudspeth full-time and with no accommodations for over seven months. Her employment came to an end only because she was terminated for cause for refusing to see a patient.

¶28. Thus, the Commission made erroneous factual findings that were directly relevant to

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[7] The AJ stated: "[*Mitchell*] *testified that she returned to Dr. Morris to obtain a release, obtained one and returned to the same job at Hudspeth with no changes*." (Emphasis by the AJ.)

the one issue that the Supreme Court instructed the Commission to address on remand. Indeed, the Commission itself clearly tied its mistaken view of the facts to its resolution of that critical issue. The apparent impact of the Commission's errors was to minimize the *Omnova* presumption and the Supreme Court's mandate. These errors would require us to reverse and remand the case again. However, for the reasons explained below, we conclude that the decision must be reversed and rendered.

II. Mitchell failed to present substantial evidence to rebut the *Omnova* presumption.

¶29. In the prior appeal in this case, the Supreme Court emphasized that the Workers' Compensation Act "defines 'disability' as '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.'" *Mitchell*, 202 So. 3d at 610 (¶6) (emphasis by the Supreme Court) (quoting Miss. Code Ann. § 71-3-3(i) (Rev. 2011)). Therefore, "to be due compensation . . . , the employee's work-related injury—and not some other cause—must affect the employee's ability earn the wages which the employee was receiving at the time of injury in the same or other employment." *Id.* An employee's inability to earn the same wages *for some other reason* is not a compensable disability under the Act.

¶30. Applying this concept, the Supreme Court has long held that when "an injured employee returns to work and receives the same or greater earnings as those prior to his injury, there is created a rebuttable presumption that he has suffered no loss in his wage-earning capacity." *Omnova*, 44 So. 3d at 941 (¶17) (emphasis omitted) (quoting *Agee v. Bay*

Springs Forest Prods. Inc., 419 So. 2d 188, 189 (Miss. 1982)); *accord, e.g.*, *Russell v. S.E. Utils. Serv. Co.*, 230 Miss. 272, 282, 92 So. 2d 544, 547 (1957). The Supreme Court has also held that this presumption

> may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.

Omnova, 44 So. 3d at 941 (¶17) (quoting *Russell*, 230 Miss. at 282, 92 So. 2d at 547). This list is not exhaustive or exclusive. The employee may rebut the presumption with any evidence showing that post-injury earnings are not a reliable indicator of wage-earning capacity. *Id.* at 941 n.12.

¶31. In the first appeal in this case, the Supreme Court clearly held that *Omnova*'s presumption applies to the facts of Mitchell's case:

> Mitchell's case is no different [than *Omnova*]. Mitchell indisputably sustained an injury at work. But after she sustained the injury, she returned to work in the same position at the same or higher rate of pay. She continued to work in that position for more than seven months after the injury until she was terminated for cause. So as in *Omnova*, a rebuttable presumption arose that Mitchell "suffered no loss in [her] wage-earning capacity."

Mitchell, 202 So. 3d at 610 (¶8). Therefore, Mitchell bore the burden of presenting substantial evidence to rebut the presumption and prove that she sustained a loss of wage-earning capacity because of her injury. *See Omnova*, 44 So. 3d at 940-41 (¶¶16-17).

¶32. We conclude that Mitchell failed to present substantial evidence to meet her burden.

To begin with, Mitchell's own testimony substantially undermined her claim. Mitchell testified that when she returned to work at Hudspeth, she performed the same duties with the same hours and expectations and without accommodation. Mitchell also testified that she was physically able to do her job and that she would have continued at the job but for her termination.[8] There was no evidence that Mitchell was paid the same or greater wages out of "sympathy" or due to longer hours or a general increase in wages. *Omnova*, 44 So. 3d at 941 (¶17). Nor were Mitchell's post-injury earnings of a "temporary [or] unpredictable character." *Id.* She was paid consistent wages for seven months until she was terminated for reasons unrelated to her injury. In summary, the evidence was that Mitchell was paid the same or greater wages as before her injury precisely because she was capably performing the same job with the same duties. This makes Mitchell's post-injury earnings a reliable indicator of her wage-earning capacity.

¶33. Moreover, Mitchell testified that she conducted only a limited job search after her termination at Hudspeth. She applied for only four jobs, three by online application. She

[8] We recognize that Mitchell contradicted her original testimony when—over Hudspeth's objection—the AJ permitted her to testify again on remand. At the April 2017 hearing on remand, Mitchell testified that she was "positive" that she could not do her job at Hudspeth. Mitchell's attorney then asked her, "In fairness to [Hudspeth], . . . is the reason that you feel like you can't do the job at Hudspeth or other jobs you've done in the past, is because of your back injury or because of other problems you have or both?" Mitchell answered, "It's entirely my back." The AJ accepted this testimony as a "proffer," stating that she would "address it in [her] order." However, neither the AJ nor the Commission specifically addressed this testimony, so it is unclear whether either considered it. In any event, we agree with Hudspeth that the Supreme Court remanded the case for one reason: for "the Commission to apply the correct legal standard." *Mitchell*, 202 So. 3d at 609 (¶1); *see also id.* at 610 (¶8) ("[W]e reverse and remand for new findings applying the correct legal standard."). The case was not remanded to reopen the record for additional testimony six and a half years after Mitchell's injury.

testified that, "of course, the first question" on a job application is "why you left your last job." She agreed that the reasons for her termination from Hudspeth may have impacted her ability to find a new job. Indeed, that seems likely. However, this obstacle to finding a new job has nothing to do with Mitchell's injury.

¶34. Mitchell also testified that it is now "between difficult and impossible" for her to find a nursing job because she has only an ADN, and most employers now require or prefer a more advanced degree, a BSN. However, this issue also has nothing to do with Mitchell's injury. It has to do with her qualifications. Neither Mitchell's for-cause termination from Hudspeth nor her lack of a more advanced degree relate to any incapacity to earn wages "*because of injury*." Miss. Code Ann. § 71-3-3(i) (emphasis added). Rather, this evidence all shows that Mitchell's employment at Hudspeth was terminated and that she remains unemployed *for other reasons*. This evidence *confirms* the presumption that Mitchell did not sustain a loss of wage-earning capacity.

¶35. The Commission's finding that Mitchell had rebutted the presumption of no loss of wage-earning capacity relied on her functional capacity evaluation (FCE). The FCE was not conducted until February 2013. As discussed above, Mitchell returned to work full-time and without accommodation in November 2011 and was terminated for cause in June 2012. In November 2012, Dr. Winkelmann wrote that Mitchell was "at MMI" with a "3% partial impairment to the body as a whole." Finally, a physical therapist, Angela Cason, conducted the FCE in February 2013. Cason's "Recommendations" were as follows: "Return to work is indicated with lifting restrictions . . . . This client would do well to limit prolonged

standing, forward bending, stairs, ladder, lifting, carrying and prolonged ambulation to occasionally." Cason's "Synopsis/Summary" stated as follows:

> Based on the information gathered from this evaluation, this client is capable of performing work at a Sedentary level, as defined by the U.S. Department of Labor in the Dictionary of Occupational Titles. However, based on this FCE I would recommend that this client not lift weight greater than 20 lbs and 15 lbs overhead. . . . [W]ork ability should be able to be sustained on a day to day basis. Physical problems other than referred diagnosis contribute to limitations in return to work abilities (lymphedema right [upper extremity]).

¶36. This FCE is not substantial evidence sufficient to overcome (a) *Omnova*'s presumption that Mitchell suffered no loss of wage-earning capacity and (b) the substantial additional evidence showing that Mitchell was terminated at Hudspeth and was unable to find a new job for reasons unrelated to her injury. Mitchell did not offer any testimony or other medical evidence to connect her September 2011 injury to the findings and opinions in the February 2013 FCE. This is significant in this case because we know that Mitchell did, in fact, perform her job at Hudspeth without accommodation from November 2011 to June 2012. The FCE is not credible or substantial evidence to the extent that it conflicts with Mitchell's own testimony and the uncontradicted evidence that Mitchell's injury did not prevent her from doing her job at Hudspeth. The absence of other evidence is also significant in that the FCE itself notes that "[p]hysical problems other than [the injury at issue] contribute to limitations in [Mitchell's] return to work abilities."

¶37. The Commission is the fact-finder in workers' compensation cases, and its decisions are entitled to deference. However, the Commission's findings cannot be affirmed if they are "clearly erroneous and contrary to the overwhelming weight of the evidence." *Fought*,

523 So. 2d at 317. The Commission's decision is "clearly erroneous" and will be reversed "if, on the entire record, the reviewing court is left with a firm and definite conviction that a mistake has been made by the Commission in its findings of fact." *Delta Drilling Co. v. Cannette*, 489 So. 2d 1378, 1381 (Miss. 1986). "This is so even though there may be some slight evidence . . . to support" the Commission's findings. *Id.* In this case, "the totality of the evidence in the record leaves us with the firm and definite conviction that the Commission was mistaken" when it found that Mitchell met her burden of rebutting the presumption that she sustained no loss of wage-earning capacity. *Id.* Therefore, we reverse and render the judgment of the Commission.

CONCLUSION

¶38. The Commission's decision is reversed and rendered because it is clearly erroneous and is not supported by substantial evidence. Mitchell failed to present substantial evidence to rebut the presumption that she sustained no loss of wage-earning capacity. Therefore, her claim for permanent disability compensation should be dismissed with prejudice.

¶39. **REVERSED AND RENDERED.**

BARNES, C.J., LAWRENCE, McCARTY AND C. WILSON, JJ., CONCUR. CARLTON, P.J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GREENLEE, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, TINDELL AND McDONALD, JJ.

GREENLEE, J., DISSENTING:

¶40. The majority believes that the Commission erroneously applied the law and failed to follow the Mississippi Supreme Court's mandate. Furthermore, the majority asserts that Mitchell did not present substantial evidence to rebut that mandated presumption. I

respectfully disagree and dissent.

¶41. In *Hudspeth Regional Center v. Mitchell*, 202 So. 3d 609 (Miss. 2016), the court wrote:

> Mitchell indisputably sustained an injury at work. But after she sustained the injury, she returned to work in the same position at the same or higher rate of pay. She continued to work in that position for more than seven months after the injury until she was terminated for cause. So as in *Omnova*,[9] a rebuttable presumption arose that Mitchell "suffered no loss in [her] wage-earning capacity." The [AJ] committed legal error by failing to recognize this presumption.

Id. at 610 (¶8).

¶42. On remand, the Commission clearly applied the presumption of no loss of wage-earning capacity:

> "Regarding loss of wage-earning capacity, Mississippi law provides a rebuttable presumption that a claimant fails to suffer a loss of wage-earning capacity or permanent disability if that claimant returns to her same or similar employment and earns the same or higher wages following medical treatment and release." *Lovett v. Delta Reg'l Med. Ctr.*, 157 So. 3d 90, 95 (Miss. Ct. App. 2014). "A rebuttable presumption of no loss of wage-earning capacity arises when the claimant's post-injury wages are equal to or exceed his pre[-]injury wages." *Gregg v. Natchez Trace Elec. Power Ass'n*, 64 So. 3d 473, 476 (¶12) (Miss. 2011). . . .
>
> . . . .
>
> Here, the Commission finds that the Claimant has sufficiently presented evidence to rebut the presumption that she is entitled to no permanent disability as a result of her injury. Claimant is sixty-five (65) years old with twenty (20) years of work experience in the field of nursing. Claimant participated in a Functional Capacity Evaluation that determined she had permanent restrictions limiting her lifting to no greater than 20 pounds; limiting her from prolonged standing, bending climbing, lifting, carrying, or prolonged ambulation to more than an occasional basis; and placed Claimant

[9] *Omnova Sols. Inc. v. Lipa*, 44 So. 3d 935 (Miss. 2010).

> in the sedentary category of employment. Claimant testified of continuing complaints of pain and functional ability. We find that the evidence as a whole rebuts the presumption that Claimant sustained no permanent disability due to her brief return to an accommodated position before reaching maximum medical improvement.

¶43. The Commission did not explicitly cite *Omnova*, but the Commission did apply the proper presumption required by the Mississippi Supreme Court. And the Commission found that Mitchell rebutted that presumption. And while the majority takes issue with the Commission's statement that they "find that the evidence as a whole rebuts the presumption that Claimant sustained no permanent disability due to her brief return to an accommodated position before reaching maximum medical improvement," factual misstatements may be harmless error. That is the case here. "Absent an error of law, where substantial credible evidence supports the Commission's decision, this Court . . . may not interfere." *Flowers v. Crown Cork & Seal USA Inc.*, 167 So. 3d 188, 191 (¶10) (Miss. 2014).

¶44. The order indicates that the Commission based its decision on substantial evidence, including a Functional Capacity Evaluation. "Under the substantial evidence rule, we are further bound from rendering a different decision than that reached by the Full Commission even though the evidence presented may lead us to conclude otherwise had we been sitting as the ultimate finder of fact." *Attala Cty. Nursing Ctr. v. Moore*, 760 So. 2d 784, 787-88 (¶8) (Miss. Ct. App. 2000).

¶45. I differ from the majority's finding that the Commission applied the proper presumption of no loss of wage-earning capacity. I further differ in the finding that Mitchell did present substantial evidence, as the Commission found, to rebut the proper presumption

of no loss of wage-earning capacity. We should, therefore, affirm the Commission's decision.

WESTBROOKS, TINDELL AND McDONALD, JJ., JOIN THIS OPINION.