

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00320 COA

RILEY E. ELLIS

APPELLANT

v.

B E & K, INC., A SELF-INSURED

APPELLEE

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

TRIAL JUDGE: HON. ISADORE W. PATRICK, JR.

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

FRANK J. CAMPBELL

ATTORNEY FOR APPELLEE:

LELAND S. SMITH, III

NATURE OF THE CASE: CIVIL: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: CIRCUIT COURT AFFIRMED COMMISSION'S FINDINGS
OF TEN PERCENT (10%) PERMANENT PARTIAL DISABILITY

BEFORE BRIDGES, P.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Riley E. Ellis seeks review of an order affirming the Workers' Compensation Commission's determination of his entitlement to disability benefits. The commission found a ten percent permanent industrial disability and awarded compensation commensurate with that degree of disability. We find that substantial evidence supports the commission's decision and affirm.

FACTS

Ellis was employed by B E & K, Inc. as an iron worker. He filed a workers' compensation claim for a back injury which occurred on December 21, 1992. Ellis continued to work without consulting a doctor through December 30, 1992, when he saw an emergency room doctor. The doctor took x-rays of Ellis' back, gave him some pain pills, and placed him on light duty. Ellis saw several doctors after this visit to the emergency room. The one doctor who actually treated Ellis found that Ellis may have sustained a mild disc herniation in the industrial accident. He indicated that Ellis should not climb, stoop, bend or work at height, which activities were among his duties as an iron worker, and that he believed the accident caused Ellis a five percent permanent partial anatomical disability.

Ellis worked on light duty for several weeks following his accident at his usual rate of pay. However, Ellis stopped working when B E & K's safety supervisor sent Ellis home early because he was sleepy due to the medication he was taking. Ellis stated that he interpreted this action as an act of termination, while the supervisor testified that he only sent Ellis home until his condition improved. Although a company official wrote a letter dated March 11, 1993 to Ellis stating that he could return to work on modified duties, Ellis did not accept the offer. Ellis stated that the reason he did not accept the offer was that he did not think B E & K was sincere because he thought that B E & K had already terminated him once before. Although he did not accept B E & K's offer, Ellis testified that he unsuccessfully sought various types of lower-income non-iron worker positions. The administrative judge found that Ellis was restricted in working as an iron worker though there were some positions in that occupation which Ellis could do, as well as meaningful work in other occupations. After considering the factors pertaining to Ellis' earning capacity, the administrative judge further found that Ellis had a ten percent industrial disability. The full commission affirmed the administrative judge's order, and the Circuit Court of Warren County subsequently affirmed the commission's order.

DISCUSSION

We note at the outset that we are bound by the Workers' Compensation Commission's findings and orders which are supported by substantial evidence. This standard holds true, even if the evidence would convince this Court otherwise, were we the fact finder. *DeLaughter v. South Cent. Tractor Parts*, 642 So. 2d 375, 377 (Miss. 1994). We must therefore determine whether substantial evidence supports the commission's determination of Ellis' disability.

Disability is defined as the incapacity to earn wages that the employee was receiving at the time of the injury in the same or other employment. Miss. Code Ann. § 71-3-3(i) (1972); *DeLaughter*, 642 So. 2d at 379 (citation omitted). To establish industrial disability, the burden is on the claimant to prove both (1) medical impairment, and (2) that the medical impairment resulted in a loss of wage-earning capacity. *DeLaughter*, 642 So. 2d at 379; see Miss. Code Ann. §§ 71-3-3(i), 71-3-17(c)(25) (1972). Several factors are relevant in the determination of loss of wage earning capacity. Among these factors are the amount of claimant's training and education, his inability to work, his failure to be

hired elsewhere, the continuance of pain, and any other related circumstances. *DeLaughter*, 642 So. 2d at 379; *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 166 (Miss. 1991). Therefore, "determination should be made only after considering the evidence as a whole." *Delaughter*, 642 So. 2d at 379 (citation omitted).

A claimant makes a *prima facie* case by meeting his initial burden of showing that he sought and was unable to obtain work in similar or other jobs. "Once he has made a *prima facie* case, the burden shifts to the employer to show that his efforts were not reasonable or constituted a mere sham." *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869-70 (Miss. 1994) (citations omitted).

In his effort to obtain employment, Ellis testified that he asked various individuals for jobs including driving a truck, raking leaves, cleaning, and working in waste management. In addition to these specific requests, Ellis testified that he asked two other people for "any type of job." Ellis thus met his initial burden and made a *prima facie* case. The burden then shifted to B E & K to prove whether Riley's efforts were reasonable. In determining whether a claimant has made reasonable efforts to obtain employment, courts consider factors similar to those employed to determine loss of wage earning capacity, including: the economic and industrial aspects of the local community, his background, education, training, work skills, jobs available in the community and surrounding area, and the nature of the disability. *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991).

We conclude that Ellis' efforts to obtain employment were not reasonable to support an award of total disability, but agree with the commission that the evidence when reviewed as a whole, supports a finding of ten percent permanent industrial disability. Based on the medical testimony presented, the nature of Ellis' back injury can best be described as questionable. One of Ellis' doctors indicated that Ellis should have reached maximum medical recovery no later than April 5, 1993, while another testified that Ellis could have returned to work on light duty as of March 25, 1993. The commission's decision finds further support in the x-ray interpretations that Ellis was "normal," the treating doctor's finding that Ellis may have sustained a mild disc herniation in the accident, the doctors' findings that Ellis' complaints were inconsistent and ambiguous as to the location of his pain, and the doctors' testimony that Ellis greatly exaggerated his condition. In addition, one doctor indicated that Ellis did not have a significant back problem and that his complaints may have been psychological in nature. Additional support is found in Ellis' testimony regarding the severity of his pain, his five-percent anatomical disability rating, his unenthusiastic attitude about returning to work, and the restrictions which Ellis' doctor placed on him from engaging in his primary vocation as an iron worker.

Under our limited scope of review and considering the evidence as a whole, we find substantial evidence to support the commission's affirmance of the administrative judge's finding of ten percent permanent industrial disability.

**THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS AFFIRMED.
COSTS ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING,
McMILLIN, AND PAYNE, JJ., CONCUR.**

