

IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00998 COA

JAMES E. MONTGOMERY

APPELLANT

v.

COOPER TIRE & RUBBER COMPANY

APPELLEE

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

TRIAL JUDGE: HON. THOMAS J. GARDNER, III

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ANTHONY DEAL

ATTORNEYS FOR APPELLEE:

GARY L. CARNATHAN

JACK JAY McCRACKEN

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: MWCC TEMPORARY TOTAL DISABILITY & MEDICAL
BENEFITS AWARD AFFIRMED, MWCC NOMINAL PERMANENT PARTIAL DISABILITY
BENEFITS AWARD REVERSED WITH DENIAL OF ANY PERMANENT PARTIAL
DISABILITY BENEFITS

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

SOUTHWICK, J., FOR THE COURT:

The Lee County Circuit Court affirmed the Workers' Compensation Commission's award of temporary total disability and medical benefits to James Montgomery to compensate him for a back injury he suffered while working at Cooper Tire & Rubber Company. However, the circuit court reversed the commission's award of nominal permanent partial disability benefits—denying those benefits altogether. Montgomery appeals the decision of the circuit court on the permanent disability issue. In addition, he contends that Cooper Tire's appeal to the circuit court from the commission should have been dismissed for want of prosecution. We decide the procedural issue against Montgomery. At the same time, we conclude that the circuit court exceeded its authority in reversing the commission's permanent disability award. Accordingly, we reverse that part of the circuit court's decision.

FACTS

Montgomery was employed by Cooper Tire lifting tires and servicing tire-making machines. Montgomery's background was one of limited education and work experience. In November, 1991, Montgomery injured his back but recovered and returned to work. In April, 1992, Montgomery re-injured his back, resulting in a ruptured disc. Surgery was performed and Montgomery was returned to work on November 24, 1992, with some restrictions and an assigned percentage of disability. Montgomery was restricted from lifting more than one hundred pounds, but allowed to lift from fifty to one hundred pounds occasionally. He was permitted to lift fifty pound weights frequently. Medical impairment ratings assigned to the body as a whole ranged from five to ten percent. Montgomery resumed his employment with Cooper Tire following his recovery and earned the same wages he had earned prior to his injury. Because of his disability, however, Montgomery testified that he was unable to obtain more lucrative positions within the company. In addition, there was evidence that because of a change in production the position Montgomery returned to involved lighter work.

DISCUSSION

1. Procedural Issue

We first address Montgomery's contention that the trial court should have dismissed Cooper Tire's appeal of the commission's decision. We conclude that the trial court did not abuse its discretion in hearing and deciding the appeal, despite the passage of several months before the court entered its order and despite Cooper Tire's failure to file any pleadings other than a notice of appeal setting out the issues before the court.

Montgomery urges that Cooper Tire's appeal to the circuit court should have been dismissed under rule 4.03 of the Uniform Circuit Court Rules which provides:

After the record is filed in [the circuit court], if no action is taken by the appellant and none of the requirements of the above [rules] have been complied with, after sixty (60) days the appeal may be dismissed and the judgment of the lower [tribunal] reentered.

U.C.C.R. 4.03. The rules require that a brief and assignment of error be submitted to the circuit court

with a request, if any, for oral argument within thirty days after the filing of the record with the court clerk. U.C.C.R. 4.01. It is true that rule 4.01 *requires* that such practice be followed. However, the requirement of rule 4.01 is not a requirement of dismissal. The gateway to dismissal of an appeal in the circuit court is rule 4.03. That rule affords ample discretion to the trial court to leave that gateway closed. *Martin v. City of Waynesboro*, 559 So. 2d 1024, 1026-27 (Miss. 1990). Rule 4.03, not rule 4.01, gives the trial court the keys to dismissal.

Simply filing a notice of appeal is not the best advocacy and is contrary to the Circuit Court Rules. Nevertheless, it was not an abuse of discretion for the trial court to deny Montgomery's motion to dismiss.

2. *Nominal Permanent Partial Disability Award*

The heart of this appeal concerns whether the circuit court was correct in reversing the commission's award of nominal disability benefits in favor of denying Montgomery all permanent disability benefits. The circuit court's reversal appears to have been based on the notion that since Montgomery returned to work with Cooper Tire at the same or greater rate of pay, he had suffered no loss of wage-earning capacity as a consequence of his work injury. We cannot agree. Under Mississippi workers' compensation law, there is a presumption that a claimant has suffered no loss of wage-earning capacity when he continues to earn the same or a greater income following his injury as that earned prior to the injury. *International Paper v. Kelley*, 562 So. 2d 1298, 1303 (Miss. 1990) (citations omitted). The presumption is, however, rebuttable "by showing a number of surrounding facts and circumstances that the worker's post-injury wages alone are not necessarily decisive [of the issue of permanent disability]." *Id.* (citations omitted). This case is one in which the presumption does arise, but the commission's conclusion that its was rebutted is not contrary to the substantial evidence.

A review of the record demonstrates the commission's award of nominal disability benefits is supported—even with Montgomery's return to work without a loss of present wage earning. Montgomery did not have full lumbar flexion or extension. His back surgery restricted him from repetitive lifting that might put dangerous stresses on his back. In addition, he never went back to work under his prior normal duties and evidence was not presented demonstrating that Montgomery could have performed his job as it existed prior to his injury. These physical restrictions are coupled with Montgomery's minimal education and his work experience which was limited to heavy manual labor.

The commission is required to examine the entirety of the evidence in determining whether there is a loss of wage earning *capacity* in any instance and it is not required to accept only evidence of no *present* wage loss on the issue of disability. *DeLaughter v. South Central Tractor Parts*, 642 So. 2d 375, 379 (Miss. 1994). Of course, there may be cases in which the commission is justified in concluding that, based on present wage earning alone and the presumption it creates, there has been no loss of wage earning capacity. *See, e.g., Lanterman v. Roadway Express, Inc.*, 605 So. 2d 1340, 1347 (Miss. 1992). However, the commission is likewise empowered to weigh the evidence of an absence of present wage earning loss in view of the other evidence and conclude that some disability compensation is appropriate. *See Benoist Elevator Co. v. Mitchell*, 485 So. 2d 1068, 1070 (Miss. 1986). Where, as here, that decision is not contrary to the substantial evidence, it cannot be reversed

by the circuit court.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT DENYING DISMISSAL OF THE APPEAL IS AFFIRMED AND THE JUDGMENT DENYING PERMANENT PARTIAL DISABILITY BENEFITS IS REVERSED AND THE ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REINSTATED. THE COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

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