

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00311 COA

GERTRUDE WIGINTON APPELLANT

v.

SOUTH CENTRAL REGIONAL MEDICAL

CENTER AND THE VIRGINIA INSURANCE

RECIPROCAL APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: LARRY O. NORRIS

ATTORNEY FOR APPELLEES: EUGENE M. HARLOW

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: BENEFITS AWARDED

MANDATE ISSUED: 6/24/97

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

SOUTHWICK, P.J., FOR THE COURT:

Gertrude Wiginton appeals the decision of the Circuit Court of Jones County. The court upheld the Mississippi Workers' Compensation Commission's finding that as a result of a back injury suffered by Wiginton while employed as an LPN at South Central Regional Medical Center, she sustained a permanent partial impairment to her body as a whole of ten percent, and was, therefore, entitled to a minimum award of benefits, i.e., \$25 per week for a period of 450 weeks. On appeal Wiginton argues that the court erred in limiting her award of benefits to her percentage of medical impairment, and,

secondly, in failing to award a total loss of wage earning capacity. South Central Regional Medical Center and the Virginia Insurance Reciprocal (referred to here jointly as South Central Medical) cross appeal arguing that Wiginton's first issue should be stricken because it was not argued or otherwise brought up in the lower court, and that there was no finding that Wiginton had a loss of wage earning capacity. That would mean that the Commission was in error in awarding permanent disability benefits without such a finding.

We affirm. By separate order we deny South Central Medical's motion to strike.

FACTS

Gertrude Wiginton was an LPN at South Central Regional Medical Center when she injured her back lifting a patient in July of 1991. As a result of this injury, Wiginton underwent a cervical fusion under the care of Dr. Ralph T. Wicker. Wiginton was released from Dr. Wicker's care in September of 1991. Wiginton was restricted from prolonged heavy lifting and prolonged hyperextension of the neck. She tried to resume work at a local doctor's office, but found that she was no longer able to perform LPN work. Wiginton returned to South Regional Medical Center to request her old job, but was advised that she could not return to work as an LPN under the restrictions assessed by Dr. Wicker. The hospital offered to interview Wiginton for the position of monitor technician. Wiginton canceled this interview stating that she could not work as a monitor technician because that job would require her to sit at a monitor for twelve hours and this could not be done in her medical condition. There was testimony by hospital personnel that the hospital was willing to modify the monitor technician job if necessary, including allowing Wiginton to get up and move around rather than sit in one place all day. Furthermore, the monitor technician job would have paid at the same rate as an LPN position.

The administrative judge, based on Dr. Wicker's estimate, found that Wiginton suffered ten percent permanent medical impairment and permanent work restrictions. However, he also found that Wiginton's impairment did not result in a loss of wage earning capacity because the hospital had offered to pay Wiginton her pre-injury salary if she would take the position of monitor technician. The full commission affirmed except in one significant particular: the Commission found that Wiginton was entitled to a minimum award of benefits at \$25 per week for a period of 450 weeks.

DISCUSSION

The Supreme Court recently restated the standard of review of appeals from the Workers' Compensation Commission:

This Court reviews the decision of the Workers' Compensation Commission within a limited scope, as it considers only whether there is substantial evidence to support the findings of the Workers' Compensation Commission. The findings of the Commission will be reversed by an appellate court only if the findings are clearly erroneous and contrary to the overwhelming weight of the evidence. If the findings are supported by substantial evidence, then they are beyond the power of this Court to disturb.

Hardin's Bakery v. Taylor, 631 So. 2d 201, 204 (1994) (citations omitted). With this standard in mind, we examine the parties' issues.

1. Direct Appeal - Was there substantial evidence of total loss of wage earning capacity?

Wiginton argues that there was substantial evidence presented to support her argument that she suffered a total loss of wage earning capacity. The Commission was presented with evidence from several doctors regarding Wiginton's health. We have already summarized that evidence. Dr. Wicker, who performed surgery on Wiginton, found that she suffered ten percent permanent medical impairment to the body as a whole with restrictions to avoid prolonged heavy lifting and prolonged hyperextension of the neck.

Wiginton argues that she is no longer able to perform as an LPN and is totally disabled. The supreme court has stated that "[a]n employee is entitled to compensation to the extent that he has been incapacitated to earn wages." *Marshall Durbin, Inc. v. Hall*, 490 So. 2d 877, 880 (Miss. 1986). That an injured employee retains substantial functional abilities in no way undercuts the conclusion that he may be totally occupationally disabled. *Id.* (citing *Dunn, Mississippi Workmens' Compensation* 74, p.88 (3d ed.1982)). There was no evidence presented to support Wiginton's argument that she was totally disabled. The only two jobs she claimed she was unable to perform were that of an LPN and monitor technician.

The supreme court has said the commission should determine the extent of a person's disability based on the evidence as a whole. *Lucedale Veneer Co. v. Keel*, 223 Miss. 821 (Miss. 1955); *Modern Laundry, Inc. v. Williams*, 224 Miss. 174 (Miss. 1955). *Dunn* summarizes the case law by saying, "[I]f the injury prevents the employee from resuming his former trade, work or employment, this alone is not the test of disability to earn wages or the test of the degree of such disability, but the definition relates to loss of capacity in 'the same *or other employment*. . . [an employee] must seek employment in another or different trade to earn his wages." *Dunn's Mississippi Workers' Compensation* 72, p.84 (3d ed. 1990) (emphasis added).

We will not disturb the Commission's finding that Wiginton did not suffer total loss of wage earning capacity. This issue on direct appeal is affirmed. Wiginton's issue of whether the Commission erred in awarding minimum benefits we will discuss on cross-appeal.

2. Cross Appeal - Was the Order of the Full Commission supported by substantial evidence?

To make out a prima facie case of disability, the claimant has the burden of proof, after which the burden shifts to the employer to rebut or refute the claimant's evidence. *Sardis Luggage Co. v. Wilson*, 374 So. 2d 826, 828 (Miss. 1979), quoting *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638 (Miss. 1978).

In finding that Wiginton was entitled to permanent partial disability benefits, the findings of fact and law of the Full Commission, which was affirmed by the circuit court, said that the "claimant has a permanent partial impairment to the body as a whole of ten percent (10%), therefore the claimant is entitled to a minimum award of benefits as per the March 1991 injury at \$25.00 per week for a period of 450 weeks."

Maximum and minimum recovery for disability is set by statute:

Compensation for disability or in death cases shall not exceed sixty-six and two-thirds percent (66 2/3%) of the average weekly wage for the state per week, nor shall it be less than Twenty-five Dollars (\$25.00) per week except in partial dependency cases and in partial disability cases.

Miss. Code Ann. 71-3-13 (1) (Supp. 1972).

In order for a claimant to be awarded permanent partial disability for loss of wage-earning capacity, "he must first prove that he has sought other employment and was unsuccessful in acquiring a position, the employment being 'in another or different trade to earn his wages.' *Sardis Luggage*, 374 So. 2d 826, 828 (Miss. 1979), quoting *Thompson v. Wells-Lamont Corporation*, 362 So. 2d 638 (Miss. 1978). In other words, physical limitations that do not lead to loss of wage-earning capacity are not compensable.

The administrative judge found that Wiginton suffered ten percent permanent medical impairment and permanent work restrictions, but that this impairment did not result in a loss of wage-earning capacity. The reason was that the hospital had offered to pay Wiginton her pre-injury salary if she would take the position of monitor technician. The Full Commission disagreed, and held that Wiginton's restrictions would not allow her to perform the monitor position. As the Commission stated, "[T]he claimant did not in fact have to accept a job she could not perform nor was she required to 'try it out' when by the defense's own admission the job required" constant sitting. The Commission further noted that "although the claimant had an option to stand, the constant monitoring of the machines in reality required the employee to remain in a fixed position and thus go beyond the restrictions placed upon her by her treating physician." The Commission affirmed the administrative judge except as to this issue. The sole support for the administrative judge's finding that there had been no loss of wage earning capacity was that the television monitoring position was for the same pay and that Wiginton could perform the job. Once that support was knocked out from the earlier decision, the natural result would be to find a loss of wage earning capacity. The Commission, however, neglected to make the statement "there was a loss of wage earning capacity." The supreme court reversed one award of benefits when the Commission relied solely on the medical impairment proof, without any finding *nor even any evidence* that there was a loss of wage earning capacity. *Compere's Nursing Home v. Bidby*, 243 So. 2d 412, 413 (Miss. 1971).

The Workers' Compensation Commission, like other administrative agencies, is only required to enter findings of "ultimate facts." *Fortune Furniture Mfg. Co., Inc. v. Sullivan*, 279 So. 2d 644, 647 (Miss. 1973). The better practice is to make findings, so a court does not have to "ferret out sufficient evidence from the record" to uphold the commission. *Fortune Furniture*, 279 So. 2d at 647. There was a substantial set of findings and conclusions, however, and the only omission was stating whether the commission found a loss of wage earning capacity. The "ultimate fact" here is Wiginton's entitlement to minimum benefits, and that and many other facts were found. Considering that the supreme court has never made reversal the penalty for the absence of findings of fact from an administrative agency, we examine whether the finding was necessarily implied.

The administrative judge found a ten percent medical impairment, but awarded no benefits because he explicitly found no loss of wage earning capacity. The Commission rejected the factual basis supporting the finding that there was no loss of wage earning capacity, and proceeded to award

minimum benefits. The Commission's evaluation of facts and evidence section of the order stated that the claimant's testimony revealed that she was unable to perform her duties as an LPN, and that the physical restrictions outlined by the treating physician were cumulative and precluded her from taking the monitor technician position offered to her at the same rate of pay as she made as an LPN. The administrative judge's opinion could not have been clearer that he found no such loss, and therefore no benefits were permitted. The only reasonable interpretation of the Commission's order, since they rejected the pertinence of the monitor position, is that they concluded the opposite. Thus we hold that the Commission must have found a loss of wage earning capacity.

We next turn to whether there was substantial evidence to support such a finding. South Central Medical rightly argues that part of the necessary evidence is that the claimant has sought other employment. *Sardis Luggage*, 374 So. 2d at 828. There was testimony, though not particularly compelling, that Wiginton went to the unemployment office and filled out an application. She tried a LPN position at a doctor's office briefly. South Central Medical rejected her application for a LPN position, finding that she was no longer physically qualified. She was offered the television monitor position, but the Commission determined that Wiginton was not obligated to "try out" a job for which the Commission found her unable to perform.

That evidence is substantial enough for the Commission to conclude that Wiginton had made efforts to find other employment.

THE JUDGMENT OF THE CIRCUIT COURT OF JONES COUNTY IS AFFIRMED ON DIRECT AND CROSS-APPEALS. COSTS ARE ASSESSED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEES.

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