

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01360 COA**

BEVERLY W. MARCUM

APPELLANT

v.

WINN-DIXIE

APPELLEE

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

DATE OF JUDGMENT:	11/25/96
TRIAL JUDGE:	HON. KOSTA N. VLAHOS
COURT FROM WHICH APPEALED:	CIRCUIT COURT OF HANCOCK COUNTY
ATTORNEYS FOR APPELLANT:	JAMES K. WETZEL MARIANO J. BARVIE
ATTORNEYS FOR APPELLEE:	STEPHEN A. ANDERSON MARGARET MURDOCK
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	DISABILITY BENEFITS LIMITED TO PERMANENT TOTAL DISABILITY BENEFITS, EXCLUSIVE OF MEDICAL BENEFITS
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/9/97

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY

This workers' compensation claim had its inception in a work related accident sustained on June 11, 1989, by Beverly Marcum (claimant) within the course and scope of her employment with Winn-Dixie. Winn-Dixie filed its petition to controvert on January 3, 1990. Several months later on March 30, 1990, the claimant filed her petition to controvert. At the hearing before the administrative law judge, the employer admitted the accident, and the administrative law judge found that the claimant was one hundred percent totally and permanently disabled. Thereafter the claimant received benefits

in the sum of \$55.67 per week for the statutory period. The administrative law judge further found that Marcum had reached maximum medical recovery on November 19, 1991. Appealing that order, the claimant contended that she was entitled to an additional two hundred weeks of permanent partial disability benefits (to run consecutively) for the loss of use to her right arm. The Commission affirmed the order of the administrative law judge. Feeling aggrieved, the claimant appealed to the Circuit Court of Hancock County. The circuit court affirmed the Commission. Marcum now appeals the circuit court's affirmance of the Commission. We affirm the Commission's decision and the circuit court's affirmance.

FACTS

It goes uncontroverted that the claimant was injured while on the job June 11, 1989. She claims that she slipped, injuring her head, elbow, hip, and leg. She further testified that she lost consciousness for a brief period of time following contact with the floor. Other than being diabetic, she claims no other health problems. The claimant is a forty-three-year-old female with a sixth grade education with employment experience as a waitress and a deli worker.

Following the accident, the claimant visited Dr. David Handshoe, who prescribed physical therapy. Dr. Handshoe referred the claimant to Dr. Joe Jackson, who performed an EMG and nerve conduction study on Marcum and diagnosed her with a severe ulnar entrapment to the right arm. Thereafter, Dr. Handshoe referred the claimant to Dr. Harry Danielson, who performed a myelogram. This doctor diagnosed the claimant with a herniated disc at the C5/6 level. This diagnosis led to surgery on the claimant's neck. Later, on December 4, 1991, Dr. Danielson performed an ulnar nerve transposition on the claimant's right arm. As a result of this surgery, the claimant encountered some infection and was treated by Dr. Eric Wyble. Through his deposition, Dr. Wyble testified that the claimant had reached maximum medical improvement as of May 16, 1994. He assigned her a seventy-five percent permanent partial disability impairment to her right arm. The employer has stipulated that the claimant is permanently and totally disabled as a result of the cervical injury.

ARGUMENT AND DISCUSSION OF THE LAW

I. STANDARD OF REVIEW

The standard of review utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well settled. The Mississippi Supreme Court has stated that "[t]he findings and order of the Workers' Compensation Commission are binding on the Court so long as they are 'supported by substantial evidence.'" *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Mitchell Buick v. Cash*, 592 So. 2d 978, 980 (Miss. 1991)). An appellate court is bound even though the evidence would convince that court otherwise if it were instead the ultimate fact finder. *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994). This Court will reverse only where a Commission order is clearly erroneous and contrary to the weight of the credible evidence. *Vance*, 641 So. 2d at 1180; *see also Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). "This Court will overturn a [C]ommission decision only for an error of law . . . or an unsupportable finding of fact." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991) (citations omitted). Therefore, this Court will not overturn a Commission decision unless it finds that the Commission's decision was arbitrary and capricious. *Id.*; *see also Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991) (stating that where the court

finds credible evidence supporting a Commission decision, it cannot interfere with that decision any more than with a case from any other administrative body.) We believe that the administrative law judge and the Commission correctly applied the law. We do not believe that the administrative law judge or the Commission abused their discretion in the fact finding process. Thus, we uphold their decisions.

II. ANALYSIS OF THE ISSUE PRESENTED

I. WHETHER THE COMMISSION AND THE ADMINISTRATIVE LAW JUDGE AS A MATTER OF LAW CORRECTLY LIMITED THE CLAIMANT'S BENEFITS TO FOUR HUNDRED AND FIFTY WEEKS OF PERMANENT AND TOTAL DISABILITY.

The salient issue presented is whether the claimant should be allotted an additional two-hundred weeks of disability benefits as a supplement to the four hundred and fifty weeks of benefits previously assigned by the administrative law judge. It is the claimant's position that she suffered two separate and distinct injuries, one of which was to the cervical region of her anatomy and the other being to her right upper extremity, and that she is entitled to the additional stipend.

In support of her claim, Marcum cites *General Electric v. McKinnon*, 507 So.2d 363 (Miss. 1987) as authority, arguing that if a claimant is entitled to permanent partial disability benefits for the loss of a hand, a scheduled member, and permanent partial disability compensation for the back under the "other cases" provision of the statute, it follows that the claimant should be entitled to permanent total disability benefits for the loss of a hand, a scheduled member, and entitled to permanent total disability benefits for her neck under the "other cases" provision of the statute. The claimant's logic is misplaced. Under Mississippi Workers' Compensation law, a claimant can be totally injured and receive compensation, but for the claimant to assert that along with her permanent total disability benefits she is also entitled to permanent partial disability is an attempt to tack onto an injury additional benefits not envisioned by the Mississippi legislature. *See Baggett v. "M" System Trailer Co.*, 227 Miss. 691, 698, 86 So. 2d 874, 875 (Miss. 1956) (which states that a claimant cannot be more than totally disabled as a result of one accident where the claimant is found to be permanently and totally disabled). In other words, the workers' compensation laws are designed to compensate a worker for his or her loss of earning capacity. One cannot be compensated for more than a loss of one-hundred percent of one's earning capacity. *Brogdon v. Link-Belt Co.*, 298 So. 2d 697, 698 (Miss. 1974); *accord Morgan v. J.H. Campbell Constr. Co. & U.S.F.G. Company*, 229 Miss. 289, 296, 90 So. 2d 633, 665-68 (Miss. 1956). Stated differently, the claimant requests this Court to declare her more than totally disabled to the body as a whole. The claimant contends that her benefits for permanent total disability should be followed by a period of permanent partial disability and that said benefits should run consecutively. As mentioned above, case law does not support this. See **V. Dunn**, *Mississippi Workers' Compensation*, § 81 at 95 (3d ed. 1982) which more poignantly states:

[A]n award may be made for total disability to the body as a whole, in which event the allowance is all inclusive and covers all minor and secondary disabilities which may have resulted from the same accident. An allowance may not be made for the loss of scheduled members in addition to one for permanent total disability to the body as a whole.

As the law stands today, this Court will reverse an order of the Workers' Compensation Commission

only where such an order is clearly erroneous and contrary to the overwhelming weight of the evidence. *Myles v. Rockwell Int'l*, 445 So. 2d 528, 536 (Miss. 1983). With the law's having been observed in resolving this issue raised by the claimant, we will not go behind the fact finding body, "even though that evidence would not convince us were we the fact finders." *South Cent. Bell Co. v. Aden*, 474 So. 2d 584, 589-90 (Miss. 1985).

Concerning the issue of whether the claimant is entitled to an additional two hundred weeks of compensable benefits, we cannot find that the administrative law judge misapplied the law, or that she acted in an arbitrary capacity. When viewed in its entirety, the law and the evidence fail to establish a means of redressing this accident anymore than previously addressed.

III. CONCLUSION

The law does not support the findings that the claimant is entitled to additional benefits, other than the benefits allowed by the administrative law judge. Therefore, the findings of the administrative law judge and the Commission will be upheld.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.