

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01307 COA**

NATHANIEL E. WALKER

APPELLANT

v.

**PINES TRAILER LIMITED PARTNERSHIP AND
AMERICAN MANUFACTURERS MUTUAL
INSURANCE COMPANY**

APPELLEES

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

DATE OF JUDGMENT:	9/14/96
TRIAL JUDGE:	HON. WARREN ASHLEY HINES
COURT FROM WHICH APPEALED:	WASHINGTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ALBERT B. SMITH III
ATTORNEY FOR APPELLEES:	ANDREW N. ALEXANDER
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	REVERSED ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION FULL COMMISSION.
DISPOSITION:	REVERSED AND REMANDED - 2/10/98
MOTION FOR REHEARING FILED:	2/24/98
CERTIORARI FILED:	
MANDATE ISSUED:	4/28/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HERRING, J., FOR THE COURT:

This case involves an appeal from a decision of the Circuit Court of Washington County, Mississippi, which reversed an order of the Workers' Compensation Commission of the State of Mississippi. The Commission awarded Nathaniel E. Walker, the claimant and appellant herein, temporary total disability benefits and permanent partial disability benefits as a result of an injury which he sustained during the course of his employment. The circuit court reversed the decision of the Commission and Walker now appeals to this Court.

After reviewing the record and applicable law, we find that the circuit court committed reversible error. Thus, we reverse and remand this action to the Commission for further findings.

A. THE FACTS

Nathaniel Walker was injured on April 28, 1992, during the course and within the scope of his employment with Pines Trailer Limited Partnership. The injury occurred when Walker bumped his knee on a metal rail while he was inspecting trailers during the course of his duties. The record discloses that Walker reported the accident immediately to his supervisor. As a result of the accident, Walker suffered a dislocated kneecap. According to the deposition of Dr. Richard A. Knutson, an orthopedic surgeon, Walker continued to work full-time after the accident and participated in a regimen of conservative treatment and physical therapy for his injury. However, he was taken off work on August 25, 1992, by Dr. Walter A. Shelton and was first seen by Dr. Knutson on September 11, 1992. Dr. Knutson later performed knee surgery on September 29, 1992, to correct the recurrent dislocation of Walker's left patella, or kneecap, which had been unresponsive to conservative therapy. All parties have stipulated that Walker's knee injury was work related and compensable.

Following his surgery, Walker had a continued collection of fluid in his knee that was very persistent, and he was ordered to perform knee exercises under the supervision of Gene Snipes, a physical therapist. At some point during the course of his physical therapy exercises, Walker developed significant back pain. As a result, his physical therapy schedule was modified. The Appellant was later examined by a neurological surgeon, Dr. Earnest Cashion. Both physicians, Drs. Knutson and Cashion, were of the opinion that the back pain experienced by Walker resulted from degenerative bulging in the lumbar area and was caused by the physical therapy exercises engaged in by Walker as a result of his knee injury. A myelogram was performed on December 10, 1993, by Dr. Robert Oliver, and the result of that test indicated that Walker had a mild central bulging disc at L5-S1. On October 14, 1994, Dr. Knutson assigned Walker a permanent eighteen percent (18%) impairment to his body as a whole as a result of the back injury, and a four percent (4%) permanent disability to the body as a whole in regard to his knee injury. The record indicates that Walker had no previous history of knee or back problems

EMPLOYMENT SUBSEQUENT TO INJURY

As stated, Walker's injury occurred on April 28, 1992, but he continued to work with a leg brace while undergoing outpatient treatment for his knee problem. Thereafter, he was taken off work by his physician on August 25, 1992, when his kneecap would not stabilize in its normal position. Knee surgery was performed on September 29, 1992, to correct the chronic dislocation of the kneecap. Dr. Knutson released Walker for work with no restrictions on March 25, 1993. Walker testified that prior to that time he attempted to return to light duty at Pines Trailer on several occasions but was unable to do the work assigned to him. Ultimately, he voluntarily discontinued his employment with Pines Trailer, without notice, because there were no light duties for him to perform there. He was terminated by Pines Trailer some time around April 1, 1993. Thereafter, he worked at a series of jobs, most of which he voluntarily quit, as follows:

- (1) He worked for Baxter's Cleaning Service for approximately two weeks for \$4.25 per hour during March, 1993, while he was still on the employment rolls of Pines Trailer. Walker considered the work at Baxter's Cleaning Service to be light duty compared to his work at Pines

Trailer, although it involved frequent stooping, reaching, and bending. He stated that reoccurring physical problems caused him to leave Baxter's and seek other employment.

(2) The Appellant left Baxter's and went to work for McDonald's Restaurant in March, 1993, earning \$5.50 per hour. He was eventually promoted to shift manager. This work included cooking, sweeping, cleaning, and some lifting, as well as meeting the public. Walker testified that he had great difficulty performing this job because of his physical problems, but he performed his duties because he needed to work. He also encountered harassment from jealous co-workers who took offense to the fact that he was promoted to shift manager, even though he did not and could not perform many of the jobs performed by other employees. As a result of the stressful environment and reoccurring problems with his knee and back, Walker voluntarily terminated his employment with McDonald's in August, 1993. He remained unemployed from August to December, 1993.

(3) Walker was employed by the Cotton Club Casino from December, 1993, until February 28, 1994, with an hourly pay of \$6.00.⁽¹⁾

(4) From the Cotton Club, he went on to work as a floor attendant for the Las Vegas Casino, where he worked for the sum of \$8.50 per hour. It is noteworthy that prior to his injury, Walker's salary at Pines Trailer was \$7.50 per hour. His duties at Las Vegas casino included filling slot machines with coins, monitoring "change persons" in the slot machine area, and paying off jackpots. Walker was terminated by Las Vegas Casino on August 21, 1994, because he failed to show up for work without advising his employer. However, Walker stated that he left voluntarily, due to increased back pain, to return to the Cotton Club Casino, for a salary of \$5.50 per hour.

(5) Two weeks following his return to the Cotton Club Casino, Walker, along with a huge number of other employees, was laid off. It is noteworthy that Monica Williams, a shift supervisor at the Cotton Club, testified that Walker was laid off because of his inability to do the required work due to his back pain. After a brief period, Walker was asked to return to the Cotton Club, but declined to do so, stating that he had no transportation to or from work and that he was unwilling to pay cab fare.

JOB PROSPECTS IN THE FUTURE

Several witnesses presented cumulative testimony that Walker was unable to lift objects or to perform other types of manual labor. According to the vocational assessment report of Latrice J. Graves, a rehabilitation consultant of Southern Rehab Resources, Inc., Walker was thirty-two years old when he injured his knee, was 5'9" in height, and weighed 125 pounds. He received his GED at age twenty-four, held a certificate as a nursing assistant, and served on active duty in the U.S. Army from 1980-83, when he received an honorable discharge. She stated that based upon Walker's education, previous work skills, and also because of his restriction to sedentary work (according to the opinion of Dr. Cashion), he should be referred to the Department of Rehabilitation Services for vocational testing and evaluation for on-the-job training for some sort of clerical work. She estimated that Walker might be able to perform clerical duties at an entry level rate of pay of \$5 per hour, but such jobs would not readily be available to Walker without further training.

**DECISION OF THE ADMINISTRATIVE JUDGE AND THE WORKERS'
COMPENSATION COMMISSION**

The administrative judge made the following findings of fact on August 15, 1995:

1. Claimant was temporarily totally disabled as a result of his knee injury from April 28, 1992 through March 25, 1993, the date of his release by Dr. Knutson, the claimant's primary treating physician, and the date herein relied upon as the date of maximum medical improvement of the claimant as it relates to his knee.
2. Claimant suffered a further injury to his back after participating in a medically directed course of physical therapy for his knee injury which created a subsequent period of temporary total disability to the claimant commencing on March 26, 1993 and concluding on October 14, 1994, the date herein relied upon as the date of maximum medical improvement related to the claimant's compensable back injury.
3. It is determined herein that the resultant back injury suffered by the claimant was a natural consequence flowing from the initial admitted work related injury. This conclusion is based on the medical testimony of Drs. Knutson and Cashion which supports this claim as well as the absence of any independent intervening cause attributable to the claimant's own intentional conduct. *Medart Division of Jackes-Evans Mfg. v. Adams*, 344 So. 2d 141 (Miss. 1977).
4. Taking into consideration the injuries herein, the claimant has suffered a permanent partial medical impairment to the body as a whole which translates into a loss of wage-earning capacity for this individual. The subsequent back condition removes this cause from a scheduled member designation and transforms same into a body as a whole classification. The assignment by Dr. Knutson of an 18% medical impairment to the body as a whole was considered as well as all efforts by the claimant post injuries to secure gainful employment. Clearly the claimant is capable of working, but the injuries have impacted somewhat his future earning potential. To what degree this future earnings has been impacted is debatable, and would appear somewhat minimal in light of the jobs claimant undertook post injury, and voluntarily quit and/or refused. However, lay and medical testimony combine to create a situation wherein compensability must lie.

Thereafter the administrative judge granted Walker the following relief:

1. Temporary total disability benefits in the amount of \$172.68 from April 28, 1992 through October 14, 1994 with proper credit to be given for any wages, monies or benefits previously paid to the claimant during this time period;
2. Permanent partial disability benefits in the amount of \$59.34 and continuing for the maximum statutory period as outlined in Mississippi Code Annotated, Section 71-3-17(25) (1972);
3. Penalties and interest, if applicable, pursuant to Mississippi Code Annotated, Section 71-3-37(5)(1972);
4. Provide medical services and supplies as the nature of the claimant's injury requires and the

process of his recovery therefrom pursuant to Mississippi Code Annotated, Section 71-3-15 (1972).

In making this award, the judge was apparently mindful of the stipulation of the parties that Walker's average weekly wage was \$259.00. Thus, she arrived at the sum of \$172.68 as the award for temporary total disability, consistent with Mississippi Code Annotated § 71-3-17(a) (Rev. 1990), by calculating two-thirds of Walker's average weekly wage of \$259. The sum of \$59.34 as permanent partial disability benefits was apparently arrived at pursuant to Mississippi Code Annotated § 71-3-17(c)(25)(Rev. 1990), by concluding that Walker's current wage earning capacity at the time of the hearing was \$5 per hour, or \$200 per week (assuming a forty hour work week). Although the administrative judge made no explanation as to how she arrived at the award for permanent partial disability other than by making reference to Section 71-3-17(c)(25), it is probable that she substantially awarded the difference between Walker's average weekly wage of \$259 and his current wage earning capacity of \$200 per week.

The Workers' Compensation Commission affirmed the decision of the administrative law judge by order of the Full Commission on January 12, 1996. Pines Trailer appealed this decision, citing a lack of substantial evidence to support the Commission's decision. The Circuit Court of Washington County agreed with Pines and reversed, stating that Walker "demonstrated no loss of wage earning capacity as a result of his on the job injury" and that Walker "has at no time during his post-injury employment ever left a job because of his on the job injury at Pines Trailer." The circuit court concluded that there was not substantial evidence to support the Mississippi Workers' Compensation Commission's order. Walker now asks us to reinstate the Commission's order.

B. THE ISSUES

I. WAS IT ERROR FOR THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI TO FIND THAT THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBSTANTIAL EVIDENCE TO SUPPORT ITS AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS FROM MARCH 26, 1993, THROUGH OCTOBER 14, 1994.

II. WAS IT ERROR FOR THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI TO FIND THAT THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBSTANTIAL EVIDENCE TO SUPPORT ITS AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS IN THE AMOUNT OF \$59.34 AND CONTINUING FOR THE MAXIMUM PERIOD AS OUTLINED IN MISS. CODE ANN. § 71-3-17(25).

C. ANALYSIS

It is well settled in Mississippi that the Workers' Compensation Commission is the ultimate finder of fact in cases of this type, and its findings are subject to normal deferential standards of review. *Natchez Equip. Co., Inc. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993). The findings of the Workers' Compensation Commission will only be reversed by an appellate court where such findings are clearly erroneous and contrary to the overwhelming weight of the evidence. *Ray v. Mississippi State Bd. of*

Health, 598 So. 2d 760, 764 (Miss. 1992). "If the findings are supported by substantial evidence, then they are beyond the power of this Court to disturb." *Id.* Section 71-3-51 of the Mississippi Code of 1972 (Rev. 1995) addresses the matter of judicial review of the findings of the Commission by a circuit court. Section 71-3-51 states:

The circuit court shall review all questions of law and fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the commission should have entered.

In *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991), the Mississippi Supreme Court stated:

We have repeatedly read this statute to establish the Circuit Court's function as that of an intermediate court of appeals. More to the point, we have held repeatedly that the Circuit Courts must defer in their review to the findings of the Commission.

In a very real sense, all of this is nothing other than a workers' compensation variant on accepted limitations upon the scope of judicial review of administrative agency decisions, i.e., that the courts may interfere only where the agency action is seen as arbitrary or capricious. Arbitrariness and caprice are in substantial part a function of the presence *vel non* of credible evidence supporting the agency decision. Where we find such evidence, we have no more authority to interfere with the decisions of the Commission than we do in a case of any other administrative body.

(citations omitted). In keeping with this standard, we will reverse the decision and findings of the Commission only where the rulings of the Commission are not supported by substantial evidence.

In the case *sub judice*, the circuit court ruled that the decisions of the administrative law judge and the Commission were not supported by substantial evidence. We disagree. As stated above, a circuit court does not sit as an additional fact finder, and its sole function in relation to the facts of a case is to determine whether the Commission's decision is based on substantial evidence. This is so even if the circuit court would have ruled differently if it had heard the case originally. In other words, an appellate court should not "reweigh" the facts or substitute its own judgment for that of the administrative agency. *Sprouse v. Mississippi Employment Sec. Comm'n*, 639 So. 2d 901, 902 (Miss. 1994). *See also Mississippi Public Serv. Comm'n v. Merchants Truck Line, Inc.*, 598 So. 2d 778, 782 (Miss. 1992).

We will now turn to the two issues presented by Walker on appeal with the above stated standard of review in mind. The two issues will be discussed together since they overlap in their scope.

I. WAS IT ERROR FOR THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI TO FIND THAT THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBSTANTIAL EVIDENCE TO SUPPORT ITS AWARD OF TEMPORARY TOTAL DISABILITY BENEFITS FROM MARCH 26, 1993 THROUGH OCTOBER 14, 1994?

II. WAS IT ERROR FOR THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI TO FIND THAT THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBSTANTIAL EVIDENCE TO SUPPORT ITS AWARD OF PERMANENT PARTIAL DISABILITY BENEFITS IN THE AMOUNT OF \$59.34 AND CONTINUING FOR THE MAXIMUM PERIOD AS OUTLINED IN MISS. CODE ANN. § 71-3-17(25)?

On both issues, Walker simply argues that the Commission's order was supported by substantial evidence and that the circuit court exceeded its scope of review in reversing when it reversed the decision of the Commission and administrative judge. Pines Trailer counters by pointing out that Walker was working and earning full wages during the period which the Commission found him to be disabled. Indeed, at one point he was earning more money than he had been earning prior to his injury. Thus, Pines Trailer asserts that Walker suffered no loss of wage earning capacity. The Appellee also asserts that Walker would have been working for the entire time period of his "disability" had he not voluntarily quit work or been terminated by his employer. More specifically, Pines Trailer cites *Wilcher v. D.D. Ballard Contr. Co.*, **187 So. 2d 308 (Miss. 1966)** for the proposition that post injury earnings which are equal to or in excess of pre-injury earnings give rise to a presumption that the claimant has not suffered a loss in wage earning capacity. *Wilcher*, **187 So. 2d at 310**. However, this presumption can be overcome by a showing that, *inter alia*, post injury earnings are unreliable due to the temporary and unpredictable nature of such earnings, or by a showing that the claimant's increase in pay is attributable to his own increase in maturity in training. *Id.* **at 311**. The Commission gave no specific reason for its decision to award temporary total and permanent partial benefits to Walker. However, we must assume that it took into consideration the fact that Walker made up to \$8.50 per hour working for Las Vegas Casino when he only made \$7.50 per hour at the time of his injury. We must also assume that the Commission concluded that the presumption of no loss of wage-earning capacity was factually overcome by the fact that Walker's increased wages were temporary or otherwise unreliable because of his knee and back problems. "Where there are no specific findings of fact, this Court will assume that the trial court made determinations of fact sufficient to support its judgment." *Century 21 Deep South Prop., Ltd. v. Corson*, **612 So. 2d 359, 367 (Miss. 1992)**. Thus, we defer to the Commission in its decision to adopt the findings of Latricia Graves, who estimated Walker's wage earning capacity at the time of the hearing to be only \$5 per hour.

Pines Trailer also relies on *Wilcher* to support its argument that Walker is prohibited from receiving any temporary disability benefits because he returned to full-time employment after the injury. *Id.* **at 311**. However, the administrative law judge considered this fact and only awarded benefits to Walker for the time in which he was actually out of work, and allowed Pines Trailer a credit for any benefits or wages paid to Walker during the time of his temporary total disability. Thus, we find that Pines Trailer was adequately protected from duplication of payment or benefits by the Commission's order.

As stated above, an appellate court should not reverse the findings of the Commission that are supported by substantial evidence. The circuit court ruled that Walker "at no time during his post-injury employment left a job because of his on the job injury at Pines Trailer nor has he shown a loss of wage earning capacity." We disagree. A review of the record reveals that the Commission's finding that Walker did suffer a loss of earning capacity is supported by undisputed evidence that both his original knee injury and the ensuing back injury were work related. This conclusion by the

Commission is supported by the testimony of Dr. Knutson and Dr. Cashion. Dr. Knutson further testified that he expected Walker to have back problems in the future. Walker testified that he could not adequately perform the duties of any of his post injury jobs, and that this failure to do so played at least some part in his departure from each job. Walker further stated that he remained at work, despite the pain he was suffering, because he had to provide for his family. Moreover, Dr. Knutson's diagnosis of Walker's physical condition was consistent with Walker's claim that he was unable to perform various work duties which involved manual labor. In addition, Latricia Graves, the rehabilitation consultant, estimated Walker's earning capacity after further training to be only \$5 per hour, as opposed to the \$7.50 per hour which he was making at the time of his injury. Thus, we rule that the evidence presented by Walker, while certainly not overwhelming, was substantial. Furthermore, Pines Trailer put on no proof which indicated that Walker suffered no injury or that he could, in fact, perform the duties of his job at Pines Trailer.

This is a close case that could have been decided in favor of either party. However, since the Commission's order was neither clearly erroneous, nor against the overwhelming weight of the evidence, and because the decision of the Commission was not lacking in substantial evidence, we must defer to the findings of the Commission in accord with the Mississippi Supreme Court's guidelines. Thus, we reverse and reinstate the order of the Workers' Compensation Commission with one exception. We do note one apparent plain error in the Commission's order which has to do with its calculation of permanent partial disability benefits which were awarded pursuant to Miss. Code Ann. § 71-3-17(c)(25). This Court may notice plain error not identified or specified by the appellant. **See Rule 28(a)(3)**. Furthermore, "[m]anifest errors in calculation are subject to modification by this Court." *Shearer v. Shearer*, 540 So. 2d 9, 11 (Miss. 1989). Under Section 71-3-17(c)(25), the proper award of permanent partial disability benefits is to be arrived at by taking two thirds (or sixty six and two thirds percent) of the difference between the average weekly wage of the claimant before the injury, and his post injury wage-earning capacity. As stated above, the administrative judge awarded Walker \$59.34, the apparent difference between Walker's pre-injury average weekly wage and his post-injury wage earning capacity. It is apparent that the Commission did not calculate two-thirds of the difference between Walker's pre-injury average weekly wage (\$259), and his post-injury wage earning capacity as required by Section 71-3-17(c)(25). Instead, the Commission appears to have awarded Walker one hundred percent (100%) of the difference between those two figures. Thus, we not only reverse the ruling of the circuit court but also remand this proceeding to the Commission to recalculate the correct amount of permanent partial disability benefits to which Walker is entitled pursuant to Miss. Code Ann. § 71-3-17(c)(25).

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS REVERSED AND REMANDED TO THE COMMISSION FOR ACTIONS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEES.

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

1. In December of 1993, Walker also saw Dr. Solomon who stated in his records that Walker might be suffering from a ruptured disc in the lumbar region of his back.