

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-CC-01327 COA**

**MOSS CONSTRUCTION COMPANY, A MEMBER  
OF THE BCAM SELF INSURERS' FUND**

**APPELLANT**

**v.**

**LONNIE GENTRY**

**APPELLEE**

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

DATE OF JUDGMENT:	08/23/95
TRIAL JUDGE:	HON. ISADORE W. PATRICK JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PATRICK WOOTEN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: KENNETH WOMACK
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	REMANDED TO COMMISSION FOR DETERMINATION OF AMOUNT OF DISABILITY
DISPOSITION:	AFFIRMED - 2/10/98
MOTION FOR REHEARING FILED:	2/23/98
CERTIORARI FILED:	
MANDATE ISSUED:	5/12/98

BEFORE BRIDGES, C.J., PAYNE, AND SOUTHWICK, JJ.

BRIDGES, C.J., FOR THE COURT:

Lonnie Gentry was injured on the job on March 3, 1993. Subsequently, the administrative law judge found that Gentry had not proven a permanent occupational disability as a result of the work injury. The Mississippi Workers' Compensations Commission affirmed the order of the administrative law judge. On appeal, the Circuit Court of Warren County reversed the decision and remanded the case back to the Commission to determine the amount of occupational disability resulting from the 1993 injury to Gentry. From this decision, Moss Construction appeals to this Court.

On appeal, Moss raises the following:

**1. Whether the decision of the Mississippi Workers' Compensation Commission is supported by substantial evidence.**

Finding no error, this Court affirms the decision of the circuit court.

**FACTS**

From May 13, 1987, until April 19, 1994, Gentry worked constructing metal buildings and doing the metal frame work for big buildings for Moss Construction.

In 1980 Gentry had back surgery (L5-S1 fusion) by Dr. William Stewart to correct a back problem Gentry had apparently had since birth. At the time of the surgery, he was employed by Fordice Construction, also working with a crew assembling metal buildings. Gentry's supervisors at Fordice Construction were Johnny and Bob Moss, who later bought this part of the Fordice business. Following surgery, Gentry did not immediately return to work for the Moss brothers, but did return in 1983 or 1984 and stayed for about two years. After a dispute with his brother, who was also his foreman, Gentry left and worked at various jobs before returning in 1987. Gentry testified that he did not have any other job injuries except "maybe a pulled muscle" which caused him to miss work.

On March 3, 1993, Gentry and another Moss Construction employee were bolting rafters at a site in Port Gibson. After the bolts were inserted in a particular rafter, Gentry felt pain in his back. Gentry initially thought he had a pulled muscle and did not seek immediate medical attention. He did report the injury to the job foreman, his brother, Rector Gentry. Gentry stayed away from work for several days because of the injury.

Gentry initially sought medical treatment on March 15, 1993, at the Street Clinic in Vicksburg, where he was treated by Dr. David Thompson. Dr. Thompson treated Gentry conservatively for a lumbar strain and on June 8, 1993, Gentry was released to return to light duty work. After Dr. Thompson left the state, Dr. Wallace Weatherly undertook to treat Gentry. Gentry was discharged to return to work on October 14, 1993. Gentry returned to work at that time, but could only work about three days a week. Johnny Moss testified that the company "babied" Gentry during his employment with the company after the injury.

Gentry was later treated by Dr. William C. Porter, Jr., an orthopedic surgeon in Vicksburg, beginning on March 28, 1994. The MRI taken by Dr. Porter showed no significant changes from that done by Dr. Thompson a year earlier. Dr. Porter stated that there was nothing surgically that he could do for Gentry and told Gentry that he could work with the following restrictions:

- (1) avoid lifting anything that weighed more than 20-25 pounds;
- (2) avoid stooping and bending at the waist; and
- (3) use proper body mechanics.

Dr. Porter stated that these restrictions are permanent. Dr. Porter testified that the disc degeneration identified in Dr. Thompson's MRI pre-dated the work injury of March 3, 1993, and he stated that he

would probably have offered the same restrictions if he had treated Gentry prior to the date of his injury.

Gentry left his employment with Moss Construction Company in April 1994. Gentry applied for numerous jobs in the seven months after leaving Moss, but did not find employment. The employer offered no proof challenging the reasonableness of Gentry's job search.

## DISCUSSION

Moss Construction argues that Gentry failed to put forth substantial evidence to meet his burden and merit an award.

The law in this State is that the Commission is the ultimate fact finder and this Court will defer to the Commission's findings of fact unless the Commission commits prejudicial error. *Smith v. Jackson Const. Co.*, 607 So. 2d 1119, 1123-24 (Miss. 1992); *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1245 (Miss. 1991); Miss. Code Ann. § 71-3-51 (Rev 1995). On appeal, this Court reviews the law de novo, while according the interpretation of the Commission great weight and deference. *Natchez Equipment Co., Inc. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993), citing *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 675 (Miss. 1991). "So long as the Commission's decision contains no error of law and is based on substantial evidence, this Court will not disturb the findings." *Natchez Equipment Co.*, 623 So. 2d at 273-74. Because we recognize that the circuit court sits as an intermediate court of appeals, the circuit court must likewise limit its review. *See Smith*, 607 So. 2d at 1124.

The administrative law judge found in her ruling, which was affirmed without comment and thus became the ruling of the Commission:

Gentry has not proved permanent occupational disability as a result of the work injury. The medical evidence shows that he did not incur any permanent physical problems greater than [sic] what he already had as a result of the 1980 spine fusion, and he should not have been doing such heavy work as what he was doing in the construction business. He should be able to find a lighter job such as convenience store cashier or light assembly work earning approximately as much as he was earning on the date of the injury.

On appeal, the circuit court found:

The burden of proving both medical impairment and loss of wage earning capacity is on the Claimant. Miss. Code Ann. § 71-3-3(i), § 71-3-17(c)(25). The Claimant bears the burden of making a prima facie showing that he has sought and has been unable to find suitable employment. Disability is defined as incapacity because of injury to earn wages which the employee was earning at the time of injury in the same or other employment. *McNeese v. Cooper Tire and Rubber Company*. 627 So. 2d 321[, 325] (Miss. 1993). The term disability has been given two meanings in Workers Compensation practice, medical and industrial disability. Medical disability is equivalent of functional disability and relates to actual physical

impairment. Industrial disability is the functional or medical disability as it affects the Claimant's ability to perform the duties of employment. *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163 (Miss. 1991). Since disability is measured by loss of wage earnings, a conclusion that a claimant is disabled within the meaning of the code requires a finding that the claimant could not obtain similar paying jobs and that claimant's unemployment was due to the injury in question. *Georgia Pacific Corporation v. Taplin*, 586 So. 2d 823 (Miss. 1991).

...

The Administrative Law Judge seems to have based [her] decision that Lonnie Gentry has not sustained any permanent occupational disability upon the fact that both Dr. Weatherly and Dr. Porter stated that they would have assigned the (five) 5% permanent disability to the body as a whole prior to the injury of March 3, 1993. And there was no increase in medical permanent disability after March 3, 1993. The Administrative Law Judge however does not address the showing by the Claimant that he had suffered a greater occupational disability because he could no longer perform the substantial acts required of him on his job. There has been no contradiction to the evidence offered that the Claimant was in fact doing the work required of him prior to the March 2, 1993 injury and that subsequent to the injury Dr. Porter placed restrictions on the Claimant that would disqualify him from the work that he had been able to do prior to March 3, 1993.

The circuit court concluded that there was substantial evidence that the claimant sustained some percentage of occupational disability. The court could not find any evidence of comparable paying jobs or the availability of these jobs and noted that the employer had offered no proof of these jobs or their availability.

In this case, the disagreement between the Commission and the circuit court was not on the findings that were made but on the failure of the administrative law judge to address the difference between medical and industrial disability.

The supreme court explained the difference between a medical disability and an industrial disability in *Robinson v. Packard Elec. Div., General Motors Corp.*, 523 So.2d 329 (Miss.1988). "Generally, 'medical' disability is the equivalent of functional disability and relates to actual physical impairment. 'Industrial' disability is the functional or medical disability as it affects the claimant's ability to perform the duties of employment." *Id.* at 331.

Vardaman Dunn, a noted Mississippi authority on workers' compensation, said the following with regard to the difference:

The question in these cases is the degree of loss of use of the member for wage earning purposes, and this issue is for determination from the evidence as a whole, including medical estimates related either to the functional or industrial loss and the testimony of the claimant and other lay witnesses as to the effect of the injury upon the employee's ability to perform the duties required of him in his usual employment. In this connection, a partial loss of functional

use may result in total disability, and to reach this result it is not necessary that the employee be wholly incapacitated to perform any duty incident to his usual employment or business; but if he is prevented by his injury from doing the substantial acts required of him in his usual occupation, or if his resulting condition is such that common care and prudence require that he cease work, he is totally disabled within the meaning of the statute.

\* \* \*

Indeed, more estimates of the medical or functional loss may have little value when compared with lay testimony by the claimant that he suffers pain when attempting use of the member and that he has tried to work and is unable to perform the usual duties of his customary employment, and this is especially true when such testimony is corroborated by persons who have observed the claimant's attempt to work or who have refused to employ the claimant because of his apparent affliction.

***Piggy Wiggly v. Houston*, 464 So.2d 510, 512 (Miss.1985)** [quoting Dunn, Mississippi Workmen's Compensation 3rd Ed. S 86, p. 102, 103].

We find that the factual findings of the administrative law judge were erroneous in failing to recognize that because Gentry was unable to return to his former line of work that he was entitled to have the Commission consider the percentage of permanent total disability resulting. We affirm the circuit court's order remanding the case to the Commission for determining of the percentage of occupational disability.

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

**THOMAS, P.J., DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.  
SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY  
McMILLIN, P.J. AND COLEMAN, J.**

SOUTHWICK, J. DISSENTING:

With all deference to the majority, I would reinstate the decision of the Workers Compensation Commission. On barely-disputed facts, the Commission found that after recovery from the on-the-job injury that forms the basis of this claim, the claimant was in the same physical condition as he had been before the injury. If that factually is true, a decision I believe to be within the discretion of the Commission, there is no right to recovery.

It is undisputed that Gentry had physical problems before the injury of March 3, 1993. Both medical doctors who testified stated that Gentry returned to his previous physical condition. Dr. Porter stated

that "I really don't think it [the injury] changed anything in his back." He said "yes" to the question that the injury "did not result in any sort of permanent impairment or disability of Mr. Gentry?" Dr. Weatherly testified that Gentry had a pre-existing chronic lower back problem. Weatherly testified that after recovery from the injury Gentry "had no more impairment than he had on 3/2/93," the day before the injury.

Based on the testimony, the Commission adopted this administrative judge finding:

The medical evidence shows he did not incur any permanent physical problems greater than what he already had as a result of the 1980 spine fusion, and he should not have been doing such heavy work as what he was doing in the construction business.

The majority believes that Gentry must be found to have had a loss of wage earning capacity even if he had no medical disability. It holds "because Gentry was unable to return to his former line of work [ ] he was entitled to have the Commission consider the percentage of permanent total disability resulting." I disagree. Though the majority is correct that a percentage medical disability does not automatically equate to the same percentage industrial disability or loss of wage earning capacity, no authority is cited that supports a holding that a worker can have no permanent medical disability from an accident but still be entitled to an award for permanent industrial disability. The evidence tends to show, and the Commission found, that Gentry was doing work before the 1993 accident that he should not have been doing because of his back problems. In other words, there is substantial evidence to support the Commission's finding that Gentry after recovery was in the same condition after the injury as before.

What this likely means is that Gentry had an inappropriate job for his condition even before the accident occurred. What we are called upon to decide is whether the Commission was correct that the accident had no permanent effect on his medical condition or on his wage-earning capacity. We are not deciding whether his work status changed after the accident, but whether the accident was the reason for a change in his work status.

At most Gentry's failure to continue at this job shows that his physical limitations finally were addressed. That has never been the basis for finding a loss of wage earning *capacity*. The Commission was within in its discretion in finding that his capacity was unaffected.

**McMILLIN, P.J. AND COLEMAN, J., JOIN THIS SEPARATE OPINION.**