IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2014-WC-01730-COA

HUDSPETH REGIONAL CENTER AND MISSISSIPPI STATE AGENCIES SELF-INSURED WORKERS' COMPENSATION TRUST — **APPELLANTS**

v.

LINDA MITCHELL — **APPELLEE**

DATE OF JUDGMENT:	11/20/2014
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANTS:	JOSEPH T. WILKINS III
ATTORNEY FOR APPELLEE:	STEVEN HISER FUNDERBURG
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIBUNAL DISPOSITION:	AFFIRMED JUDGEMENT OF ADMINISTRATIVE JUDGE
DISPOSITION:	AFFIRMED - 10/06/2015
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ISHEE, J., FOR THE COURT:

¶1. On September 24, 2011, Linda Mitchell sustained a back injury while working for Mississippi State Hudspeth Regional Center (Hudspeth). Mitchell continued working for Hudspeth until she was terminated for cause in June 2012. She did not appeal her termination. On October 19, 2012, Mitchell filed a petition to controvert before the Mississippi Workers' Compensation Commission in which she alleged disability due to injuries she suffered on September 24, 2011, during the course and scope of her employment on September 24, 2011. The administrative judge (AJ) awarded Mitchell permanent

disability benefits along with medical benefits and penalties. The AJ's order was affirmed by the Commission. Aggrieved, Hudspeth appeals.

FACTS

¶2. Mitchell began working for Hudspeth in 2003 as a full-time registered nurse supervisor. She was a supervisor for the second shift, which ran from 3 until 11 p.m. However, Mitchell was allowed to complete her forty-hour work week in three days, so she would arrive at work at 10:30 a.m. two days a week and at 10:15 a.m. one day a week and work fourteen-hour days.

¶3. The first time Mitchell suffered an injury at work was in 2009. Mitchell bent down in front of a refrigerator in the medication room to make sure it was stocked with cold drinks. While she was bent over, she felt like she had been "switched . . . on [her] lower back." Even though she did not really think that she was hurt, Mitchell filled out an accident report in accordance with hospital policy. The next morning at 4 a.m., she woke up "with severe, severe slamming pain." Mitchell was treated by Dr. Michael Winklemann with injections, and stated that she felt better by the time she left his office. Mitchell did not have any permanent problems after that and was able to return to work.

¶4. On September 24, 2011, Mitchell fell and sustained a more serious back injury. While pulling the medication cart into a patient's room, she stepped on a slippery substance on the floor and fell, hitting her buttocks and then her head. She went straight to the emergency room at Baptist Hospital and was told to follow up with Dr. Morris the following Monday. Mitchell saw a number of doctors before being released by Dr. Morris to return to work on

November 6, 2011.

¶5. Once she returned to her position at Hudspeth, she resumed the same job duties she had prior to her fall. Although she admitted she was struggling, she testified that she "felt like [she] was doing [her] job properly." She further testified that the fall "completely changed [her] life" and that she no longer has a social life. Mitchell reached maximum medical improvement (MMI) on November 6, 2012, with a 3% permanent partial impairment to the body as a whole.

¶6. On May 5, 2012, Mitchell was working and had been assigned to cover two units at Hudspeth. One night just as she walked back into the clinic, her phone rang. It was a lady calling from Dogwood Cottage, one of the two cottages she supervised at Hudspeth, asking her to come look at a patient who she believed had ringworm. Mitchell told the lady that she had just left Dogwood Cottage and that someone would look at it the next day. Mitchell defended her action by stating that since it was a Saturday night without doctors on site she knew she could not do anything without a doctor's order, and she did not want to call a doctor at that hour on a weekend. Mitchell later admitted, however, that she "should have gone back to the building, and [she] didn't."

¶7. On June 22, 2012, Mitchell received a letter stating that she was being terminated for cause. The letter cited her refusal to return to Dogwood Cottage on May 5, 2012, and it also stated that Mitchell had been "rude and unprofessional in [her] conversation" on the telephone the evening she was asked to return to Dogwood Cottage. As further support of her termination, the letter cited disciplinary actions that had been taken against Mitchell for

excessive tardiness in 2004, 2006, 2007, 2008, and 2009; for failure to obtain her annual TB test in February 2009; for failure to provide medical documentation for sick days she took during holiday periods in 2004, 2006, and 2009; for wrongfully parking in a reserved parking space in 2004; and for failure to chart multiple incidents that occurred in 2003, 2005, 2006, 2007, and 2008. Mitchell testified that she did not appeal the termination because she did not have $100 to pay for the costs of the appeal.

¶8. In February 2013, Mitchell's treating physician, Dr. Winkelmann, had Mitchell undergo a two-day functional-capacity evaluation (FCE) with a physical therapist, Angela Cason. After performing the FCE, Cason found that Mitchell "is capable of performing physical work at a [s]edentary level . . . [;] [h]owever, based on [the] FCE, [she] would recommend that [Mitchell] not lift weight greater than 20 lbs and 15 lbs overhead." Mitchell testified that based on the imposed restrictions, she would have been able to continue her duties as a supervisor at Hudspeth, but she would not be able to go back to floor nursing.

¶9. After being terminated by Hudspeth, Mitchell searched for other employment. She applied for positions at Behavioral Health, St. Dominic's Hospital, and River Oaks Hospital. She also talked to a supervisor at Central Mississippi Medical Center (CMMC), but she was not offered any of the positions for which she had applied. Mitchell testified that she would return to Hudspeth if there were any positions available and that "[she] loved it out there." Mitchell now draws Social Security benefits, and she receives some money from the Public Employees' Retirement System of Mississippi (PERS). She also applied with PERS for her disability.

¶10. In addition to her injury, Mitchell was diagnosed with breast cancer in April 2010. She underwent a right mastectomy in May 2010, and began chemotherapy and radiation following her recovery. The following year she had a lumpectomy on her left breast. At the time of the hearing in November 2013, Mitchell was still taking the chemo pill, Femara, once daily. She testified that she was cancer-free, but stated that she still suffered from lymphedema from time to time as a result of having her lymph nodes removed.

¶11. Following a hearing on April 24, 2014, the AJ issued an opinion in which she found Mitchell to have suffered a "permanent medical impairment because of her September 24, 2011 injury." In addition to the weight-lifting restrictions, Dr. Winkelmann also recommended that Mitchell limit standing for extended periods of time, bending forward, and climbing stairs and ladders. The AJ referenced Mitchell's testimony that she had "bounced back" from her 2009 back injury, and the AJ found that the permanent medical impairment was a result of Mitchell's fall in 2011. Based on the foregoing, the AJ found that Mitchell was entitled to receive the following:

> 1. Permanent disability benefits at the rate of $427.20 per week for 450 weeks beginning November 6, 2012[,] with proper credit for compensation paid by [e]mployer/[c]arrier during that period;
>
> 2. All medical services and supplies required by the nature of her injury and the process of her recovery as provided in [Mississippi Code Annotated] [s]ection 71-3-15 (Rev. 2011) and the [m]edical [f]ee [s]chedule; and
>
> 3. A 10% penalty on any untimely paid installments of compensation pursuant to [Mississippi Code Annotated] [s]ection 71-3-37(5) (Rev. 2000).

¶12. Hudspeth appealed the AJ's order to the Commission, and the full Commission

affirmed the order on November 20, 2014. Aggrieved, Hudspeth appeals.

STANDARD OF REVIEW

¶13. When reviewing the decisions of the Commission, this Court employs a limited standard of review. *Miss. Loggers Self Insured Fund Inc. v. Andy Kaiser Logging*, 992 So. 2d 649, 654 (¶15) (Miss. Ct. App. 2008) (citing *Raytheon Aerospace Support Servs. v. Miller*, 861 So. 2d 330, 335 (¶9) (Miss. 2003)). "The Commission sits as the finder of fact, and it is the ultimate judge of the credibility of the witnesses." *Id*. (citing *Barber Seafood Inc. v. Smith*, 911 So. 2d 454, 461 (¶27) (Miss. 2005)). We will not reverse absent a finding that "the Commission erred as a matter of law or made findings of fact contrary to the overwhelming weight of the evidence." *Smith v. Johnston Tombigbee Furniture Mfg. Co.*, 43 So. 3d 1159, 1164 (¶15) (Miss. Ct. App. 2010) (citations omitted). "If the Commission's order is supported by substantial evidence, this Court is bound by the Commission's determination, even if the evidence would convince us otherwise if we were the fact-finder." *Forrest Gen. Hosp. v. Humphrey*, 136 So. 3d 468, 471 (¶14) (Miss. Ct. App. 2014) (citation omitted). However, the Commission's application of the law is reviewed de novo. *Miss. Loggers*, 992 So. 2d at 654 (¶15).

DISCUSSION

1. Whether the Commission's decision is based upon substantial evidence.

¶14. Hudspeth argues that the Commission's findings were not based upon substantial evidence. The Mississippi Supreme Court has defined "substantial evidence" in the following manner:

> Substantial evidence means something more than a "mere scintilla" of evidence, and that it does not rise to the level of a preponderance of the evidence. It may be said that it means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.

Eaton Corp. v. Brown, 130 So. 3d 1131, 1136 (¶23) (Miss. Ct. App. 2013) (quoting *Short v. Wilson Meat House LLC*, 36 So. 3d 1247, 1250 (¶17) (Miss. 2010)).

¶15. Upon review of the record, we find that there is substantial evidence to support the Commission's finding that Mitchell suffered a permanent medical impairment as a result of her fall on September 24, 2011. Mitchell was treated by Dr. Winkelmann, who found that she reached MMI on November 6, 2012, with a 3% permanent partial impairment to her body. In addition, the FCE she underwent in February 2013 imposed numerous limitations on Mitchell's ability to perform any job. Accordingly, this issue is without merit.

2. Whether Mitchell suffered a total loss of wage-earning capacity entitling her to benefits representing a 100% loss.

¶16. In order to recover workers' compensation benefits, the claimant must prove, by preponderance of the evidence, "(1) an accidental injury [occurred], (2) arising out of and in the course of employment, and (3) a causal connection [exists] between the injury and the death or claimed disability." *F&F Constr. v. Holloway*, 981 So. 2d 329, 332 (¶11) (Miss. Ct. App. 2008) (quoting *Hedge v. Leggett & Platt Inc.*, 641 So. 2d 9, 13 (Miss. 1994)). "But, once the claimant makes out a prima facie case of disability, the burden of proof shifts to the employer." *Id*.

¶17. "[T]he workers' compensation rules examine . . . the likelihood that the marketplace

would provide someone in the claimant's physical condition with the same wages as [s]he had been making before the injury." *Kitchens v. Jerry Vowell Logging*, 874 So. 2d 456, 468 (¶44) (Miss. Ct. App. 2004). "If the claimant has been rehired at wages at least as high as before the injury, there is a rebuttable presumption that there is no loss of wage-earning capacity." *Id*. (citing *Agee v. Bay Springs Forest Prods. Inc.*, 419 So. 2d 188, 189 (Miss. 1982)). However, a claimant establishes a prima facie case of disability when she is able to show that "because of the work-related injury, [s]he cannot secure work in the same or other jobs at pre-injury pay." *Univ. of Miss. Med. Ctr. v. Smith*, 909 So. 2d 1209, 1220 (¶38) (Miss. Ct. App. 2005) (citing *Ga. Pac. Corp. v. Taplin*, 586 So. 2d 823, 827 (Miss. 1991)). "An employer may rebut the claimant's prima facie case of disability by showing that the claimant's effort to find employment was unreasonable or constituted a mere sham." *Id*.

¶18. As stated above, Mitchell established that she was injured at work and that her injury caused her to suffer a 3% permanent medical impairment rating to her body. In addition, the FCE imposed permanent work restrictions on the physical work she was able to do and the amount of weight she was able to lift. Due to these restrictions, Mitchell was no longer able to perform the duties of a floor nurse, and despite her applications to different hospitals, she was not able to find other employment. We find nothing in the record offered from Hudspeth to rebut this presumption. As such, we agree with the findings of the Commission. This issue is without merit.

3. Whether Mitchell performed an adequate job search.

¶19. After being terminated by Hudspeth, Mitchell applied for jobs at St. Dominic's

Hospital, River Oaks Hospital, CMMC, and Behavioral Health. When asked what type of employment she was seeking, Mitchell responded that she "wasn't specifying what kind, just whatever [she] could get." However, despite her efforts, Mitchell did not receive any call backs. Hudspeth argues that Mitchell failed to prove that she had made a reasonable search.

¶20. "When a claimant has suffered only a permanent partial disability, 'the claimant bears the burden of making a prima facie showing that he has sought and been unable to find work in the same or other employment.'" *Pike Cnty. Bd. of Sup'rs v. Varnado*, 912 So. 2d 477, 482 (¶28) (Miss. Ct. App. 2005) (quoting *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1226 (Miss. 1997)). "If the claimant reports back to work at his current employer but the employer refuses to hire him, the claimant has established a prima facie case of total disability." *Id.* At that point, the employer then bears the burden of proving that the claimant suffered no loss of wage-earning capacity or that the claimant only suffered a partial disability. *Id.*

¶21. Mitchell was terminated on June 22, 2012, but she did not reach MMI until November 6, 2012. The FCE then revealed permanent work restrictions on February 6, 2013; specifically, that Mitchell could only perform physical work at a sedentary level, and that she was no longer able to lift anything greater than twenty pounds, or fifteen pounds overhead. Mitchell submitted job applications to local hospitals, but her search was unsuccessful. Although Hudspeth argues that Mitchell only searched for "high[-]paying jobs rather than seeking employment as a [r]egistered [n]urse in other nursing positions which paid less," Mitchell asserts that is not true. Mitchell testified that based on the limitations resulting from

her accident, she was no longer able to work as a floor nurse. She testified that she had applied at four facilities for "whatever [work] she could get," but she had not received any call backs. Based on the foregoing, we find that Mitchell's job search was, in fact, adequate.

4. Whether the AJ's finding that Mitchell was disabled constituted reversible error.

¶22. Finally, Hudspeth argues that the medical proof was insufficient to find Mitchell was disabled, and that in doing so, the AJ committed reversible error. Mississippi Code Annotated section 71-3-3 (Rev. 2011) defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings."

¶23. Again, we look to the appropriate standard of review in this case and find that the findings were supported by substantial evidence. Based on the limitations prescribed by Dr. Winkelmann and the FCE as a result of her fall, Mitchell was limited in which job duties she was able to perform. As a result, she was unable to find other employment and earn the wages that she had received at the time of her injury. We therefore agree with the finding of the Commission that Mitchell is disabled. This issue is also without merit.

¶24. **THE JUDGMENT OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

LEE, C.J., IRVING, P.J., BARNES AND JAMES, JJ., CONCUR. WILSON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY GRIFFIS, P.J., CARLTON, MAXWELL AND FAIR, JJ.

WILSON, J., DISSENTING:

¶25. The Workers' Compensation Law provides compensation to an injured worker for a "disability" resulting from a work-related injury, Miss. Code. Ann. § 71-3-7 (Supp. 2015), and it defines "disability" as an "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or other employment." Miss. Code. Ann. § 71-3-3(i) (Rev. 2011) (emphasis added). Thus, to be compensable, the injury and resulting disability must be the *reason for* a loss of wage-earning capacity. If an injured employee is unable to "earn the same wages [she] was receiving at the time of the injury" (*id.*) *for some other reason*, then there is no compensable "disability" under the Workers' Compensation Law. *Omnova Solutions Inc. v. Lipa*, 44 So. 3d 935, 940-41 (¶16) (Miss. 2010); *see also, e.g.*, *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 176-77 (2009) (discussing the "ordinary meaning" of the phrase "because of"). The employee bears the burden of proving her loss of wage-earning capacity is "because of" her injury and disability. *Omnova Solutions*, 44 So. 3d at 941 (¶16).

¶26. Because the injury and disability are compensable only if they are the reason for an employee's loss of wage-earning capacity, the Mississippi Supreme Court has declared that it is

> a well-settled rule of law . . . that in determining wage-earning capacity in the situation where *an injured employee returns to work and receives the same or greater earnings as those prior to his injury*, there is created a *rebuttable presumption that he has suffered no loss in his wage-earning capacity*.

Id. at 941 (¶17) (quoting *Agee v. Bay Springs Forest Prods. Inc.*, 419 So. 2d 188, 189 (Miss. 1982)) (emphasis in *Omnova Solutions*). The Court has explained that this presumption

> may be rebutted by evidence independently showing incapacity or explaining

> away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.

Omnova Solutions, 44 So. 3d at 941 (¶17) (quoting *Russell v. Se. Utils. Serv. Co.*, 230 Miss. 272, 282, 92 So. 2d 544, 547 (1957)).

¶27. The presumption applies in this case because there is no dispute that Mitchell returned to the same job at Hudspeth, without restriction or accommodation, and was paid the same or greater earnings as before her injury. Mitchell herself testified that the job's duties and her employer's expectations of her were the same as before the injury, that she was able to do the job, and that she would still be doing the job today if she had not been fired.

¶28. However, seven and a half months after resuming her normal work at the same or a greater rate of pay, Mitchell was fired. She was fired for cause because she refused to examine a patient at the request of a supervisor of one of the residential cottages on Hudspeth's campus. Mitchell told the supervisor "she had just left the cottage" and "would not be coming back" that night. Mitchell said that the patient could wait until the next morning to be seen. As a result, another nurse had to be called to examine the patient. Hudspeth also found that Mitchell was "rude and unprofessional in [her] conversation" with the supervisor who had requested the examination. Mitchell admitted that she should have gone back to the cottage to check on the patient. Mitchell was advised of her rights, as a state employee, to appeal her termination, but she failed to do so. Instead, she waited several

months and then sought workers' compensation benefits.

¶29. Before the Commission, Mitchell expressly argued that her termination was unfair, and she implied that the stated reason for her firing was pretextual. She emphasized that her termination notice listed numerous disciplinary actions for excessive tardiness, unexcused absences, or errors or omissions in charting medications or other incidents, all of which pre-dated her injury. However, these arguments are irrelevant to her workers' compensation claim. If she wanted to pursue these arguments, she should have appealed her termination, as she had every right to do for a fee of $100. Because Mitchell knowingly failed to avail herself of that right, the agency's stated reason for terminating her—which is entirely understandable and reasonable on its face—should not be subject to question. *See Wright v. White*, 693 So. 2d 898, 902 (Miss. 1997) ("[F]or state law purposes the statutory method of administrative appeal and judicial review provided by the state civil service statute is the exclusive remedy for grievances related to state employment . . . .");[1] *see also Miss. Dep't of Corr. v. McClee*, 677 So. 2d 732, 735 (Miss. 1996) (holding that even if a state employee's termination is properly appealed, the employee "bears the burden of persuasion that the alleged conduct did not occur"); *Miss. Dep't of Corr. v. Smith*, 883 So. 2d 124, 126 (¶1) (Miss. Ct. App. 2004) (recognizing that an agency's decision to terminate an employee is presumed correct). The alleged unfairness of a state employee's termination cannot be made

[1] In *East Mississippi State Hospital v. Callens*, 892 So. 2d 800 (Miss. 2004), the Supreme Court overruled *Wright* in part, but only to the "limited extent" that it "could be interpreted as a denial" of an employee's "right to assert appropriate § 1983 claims against state officials in their personal or individual capacities." *Callens*, 892 So. 2d at 822 (¶55).

into a workers' compensation claim.

¶30. Because Mitchell "return[ed] to work and receive[d] the same or greater earnings as those prior to [her] injury," the administrative judge and Commission should have applied "a rebuttable presumption that [she] has suffered no loss in his wage-earning capacity." *Omnova Solutions*, 44 So. 3d at 941 (¶17) (emphasis omitted). They did not, and this failure was reversible error. *Id.* at 942 (¶20). Further, Mitchell failed to present evidence that would "explain[] away the post-injury earnings as an unreliable basis for estimating capacity." *Id.* at 941 (¶17). Indeed, her insistence that her termination was unfair—and that she should still be working at the same job at Hudspeth—only serves to underscore that she has not experienced an "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or other employment." Miss. Code. Ann. § 71-3-3(i) (emphasis added). Mitchell herself insists that she is physically capable of returning to the same employment.

¶31. On the evidence presented to the Commission, it is apparent that Mitchell is unable to earn the same wages that she once did not "because of," by reason of, or on account of her injury or any disability but rather because she was terminated by Hudspeth for cause. Again, Mitchell admitted that she was able to do the job at Hudspeth and would return today if she were given that opportunity. Accordingly, she is no longer earning the same wages in precisely the same employment *only* because she was terminated for cause. Mitchell further testified that her limited, post-termination job search has been made more difficult because "the first question" a job application typically asks is "why you left your last job." This is

undoubtedly true, and being fired from one nursing job for refusing to examine a patient and unprofessional conduct certainly could make finding similar employment more difficult. Finally, Mitchell testified that it was now difficult or impossible for her to find similar employment because she has only an associate degree in nursing (ADN), and many employers require or prefer a bachelor of science in nursing (BSN). As with her for-cause termination, this sort of "incapacity" has nothing to do with her injury; it has to do with her qualifications. In short, Mitchell did not merely fail to rebut the presumption that she has suffered no compensable disability—the evidence before the Commission confirmed what should have been presumed.

¶32. The majority does not apply the presumption discussed in *Omnova Solutions* but instead applies a presumption *in favor of* a loss of wage-earning capacity, arising from either Mitchell's unsuccessful, post-termination job search, or perhaps Mitchell's professed willingness to return to Hudspeth. However, the former presumption applies only if the claimant first "show[s] that, because of the work-related injury, he cannot secure work in the same or other jobs at pre-injury pay." *Univ. of Miss. Med. Ctr. v. Smith*, 909 So. 2d 1209, 1220 (¶38) (Miss. Ct. App. 2005). It does not apply in this case because Mitchell *did* "secure work in the same . . . job[] at pre-injury pay." *Id.*

¶33. The latter presumption is also inapplicable. It arises if "the claimant, having reached maximum medical recovery, reports back to the employer for work, and the employer refuses to reinstate or rehire him[.]" *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1226 (Miss. 1997). Seizing on the phrase "having reached maximum medical recovery," Mitchell

makes the clever argument that she is entitled to this presumption because—even though Hudspeth *did* reinstate her after her injury—her doctor did not certify maximum medical improvement until *after* Hudspeth had fired her, and she is now willing to return at Hudspeth. However, as Professor Bradley and Administrative Judge Thompson explain in the section of their treatise on this issue:

> [T]here is little to recommend a mechanical use of a phrase (after ["maximum medical recovery" or "mmr"]) from one case when the phrase has no substantive value in addressing the matter at hand. *The reason for the presumption when a worker tries to return to the same employer after mmr is that only then might the employer's decision on whether to re-hire be a good indicator of employability.*

John R. Bradley & Linda R. Thompson, *Mississippi Workers' Compensation Law* § 5:26 n.3 (2015) (emphasis added). The rationale for the presumption simply does not apply to a case such as this one, in which the claimant reports back to work without restriction, the employer reinstates her, and she is able to perform the job. That set of facts constitutes "a good indicator of employability"—not the employee's subsequent termination for cause. Mitchell's too-literal reading of *Hale* does not entitle her to a presumption of disability.

¶34. In summary, this case is subject to the "well-settled rule of law" that "where an injured employee returns to work and receives the same or greater earnings as those prior to [her] injury, there is . . . a rebuttable presumption that [she] has suffered no loss in his wage-earning capacity." *Omnova Solutions*, 44 So. 3d at 941 (¶17). Mitchell presented no evidence that her actual reinstatement by Hudspeth was "an unreliable basis" for this presumption. *Id.* Nor did she present sufficient evidence to overcome the presumption. Rather, the evidence shows that her loss of wages is due to her for-cause termination.

Accordingly, because Mitchell failed to establish a loss of wage-earning capacity, I would reverse and render the judgment of the Commission. At the very least, the Commission's decision should be reversed and remanded for further proceedings because it failed to apply the appropriate presumption, *id.* at 942 (¶20), and because we *know* that Mitchell's loss of wage-earning capacity is due *at least in part* to her termination, not her injury. Accordingly, she certainly cannot establish a *total* disability.[2] Because the Court instead affirms the Commission's decision, I respectfully dissent.

GRIFFIS, P.J., CARLTON, MAXWELL AND FAIR, JJ., JOIN THIS OPINION.

[2] *See City of Laurel v. Guy*, 58 So. 3d 1223, 1227 (¶18) (Miss. Ct. App. 2011) ("[W]hile a worker who is earning post-injury wages may nonetheless be entitled to an industrial loss greater than his medical loss, he cannot be compensated for a total loss." (citing *Meridian Prof'l Baseball Club v. Jensen*, 828 So. 2d 740 (Miss. 2002)).