

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CC-00571 COA**

**CITY OF MOSS POINT AND MISSISSIPPI  
MUNICIPAL WORKERS' COMPENSATION  
GROUP**

**APPELLANTS**

**v.**

**JIMMY J. WHITE**

**APPELLEE**

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

DATE OF JUDGMENT:	05/03/96
TRIAL JUDGE:	HON. BILL JONES
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	MICHAEL J. MCELHANEY, JR. JACKYE L. CHAPMAN
ATTORNEY FOR APPELLEE:	MARK W. DAVIS
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION DECISION AFFIRMED
DISPOSITION:	AFFIRMED - 01/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE THOMAS, P.J., COLEMAN, DIAZ, AND KING, JJ.

KING, J., FOR THE COURT:

The City of Moss Point and the Mississippi Municipal Workers' Compensation Group, employer and insurance carrier, respectively, appeal from a judgment of the Jackson County Circuit Court affirming a Workers' Compensation Commission decision. The Commission granted permanent total disability benefits to Jimmie White, a former employee of the City of Moss Point. The City of Moss Point and the Mississippi Municipal Workers' Compensation Group, appellants, contend that there was insufficient evidence to support the Commission's finding that White sustained a one hundred percent loss of wage earning capacity. Finding that substantial evidence supports the Commission's

determination, we affirm.

## FACTS

White was employed by the City of Moss Point for twenty-six years. He worked in several different capacities, among them as a backhoe operator, gas pump changer, heavy equipment operator and station operator. On October 15, 1992, while working as a station operator, White injured his lower back when maneuvering a brake drum weighing over one hundred pounds. On November 25, 1992, Dr. McCloskey, a neurosurgeon, examined White and after viewing x-rays, determined that he had suffered a ruptured disc and required surgery. On December 14, 1992, Dr. McCloskey performed a lumbar laminectomy on White.

Dr. McCloskey saw White several times after his surgery: January 25, 1993, July 7, 1993, September 1, 1993, March 10, 1994, and April 6, 1994. At the January 1993 and July 1993 visits, White reported that his back and leg pain had improved. After White completed months of physical therapy, Dr. McCloskey released White to return to work on July 12, 1993, requiring him to perform only light duty work with a lift limitation of twenty pounds. He released White at maximum medical improvement with a five percent permanent physical impairment.

When White returned to the City of Moss Point in July, he worked as a station manager which required him to supervise other employees, drive around to check sewer pumps and water wells, and conduct some electrical repairs. White testified that he experienced continued back and leg pain as he conducted oil checks and electrical repairs to the pumps. As he often got in and out of the car to do the oil checks and repairs, his back pain increased. While working as a station operator, he sustained other injuries and aggravation to his back and leg as well; he pulled his back while checking a sewage pump, stepped into a hole while checking a pump, and finally could not bend over while trying to wire a motor. He returned to work after each occurrence. However, after February 18, 1994, White told Jack McCorvey, his immediate supervisor, that he would not be back until his back got better.

At the September 1993, March 1994, and April 1994 visits with Dr. McCloskey, White began to report continued pain in his legs and back when bending, stooping, prolonged sitting, and prolonged standing. At some point, he began to drag his left foot and walk with a cane. At the April 1994 visit, Dr. McCloskey noted that White had substantial disability and thereby increased White's permanent physical impairment to ten percent. He recommended that a functional capacity evaluation be done. The evaluation suggested that White limit his lifting to twenty pounds occasionally and ten pounds more frequently. Dr. McCloskey released White again to return to work on April 21, 1994.

In February 1995, Dr. McCloskey viewed a tape which depicted the duties of a station manager. It was his opinion that the work depicted in the video was limited and White should have been able to perform these duties. However, he later stated that these duties were not of the same intensity as described by White. Dr. McCloskey ultimately recommended that White should avoid work activities that involved getting in and out of a car on a regular basis and checking sewage and water pumps that involved bending and stooping. Dr. McCloskey suggested that White could perform some type of work, even getting out of a car occasionally, but the work should not include lifting and bending. He opined that janitorial positions requiring sweeping, mopping, repetitive bending and stooping may even present a problem for White.

After White's last visit to Dr. McCloskey, the City of Moss Point sent White a letter dated May 27, 1994, stating that he could return to work as a station officer where he would again supervise pump station employees, drive the city vehicle, and make some electrical repairs. The City of Moss Point claimed that it also had a janitorial position available in the event the station manager position was too strenuous for White. However, due to continued back and leg problems, White never returned to work.

On July 13, 1994, White filed a petition to controvert against the City of Moss Point and the Mississippi Municipal Workers' Compensation Group alleging that compensation was still due for unpaid medicals and compensation not received. A hearing was held and the administrative law judge granted reasonable and necessary medical services and supplies incurred. The judge determined that White's impairment, "considered in light of his age, education, work experience and restrictions", established that he sustained a one hundred percent loss of wage-earning capacity. The appellants appealed this decision to the Full Commission and the circuit court. The Commission and circuit court both affirmed the finding of one hundred percent loss of wage earning capacity. Appellants now appeal the circuit court's judgment.

### **Standard of Review**

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. *Morris v. Lansdell's Frame Co.*, 547 So.2d 782, 784 (Miss.1989)(quoting *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss.1988)).

### **Discussion**

The City of Moss Point and the Mississippi Municipal Workers' Compensation Group contend that the evidence does not support the Workers' Compensation Commission's finding of a one hundred percent loss of wage-earning capacity. We disagree. In determining loss of wage earning capacity, we consider factors such as "the amount of education and training which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances". *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 167 (Miss.1991). This "determination should be made only after considering the evidence as a whole." *Id.*

In determining White's loss of wage earning capacity, we consider these factors and circumstances in the case at bar. First, at the time of the administrative hearing on April 16, 1995, White was fifty one years old. Second, he completed the fifth grade, could not read and write well, and did not have simple mathematical skills like multiplying or dividing.

Third, White testified that he often performed some type of bending and driving which contributed to his back and leg disability. After his first injury, he attempted to return to work three times to perform duties as a station operator but continued to experience pain in his legs and back. After White's final release from Dr. McCloskey, the City of Moss Point again offered him the position as station operator with limited duties of driving and making small electrical repairs. However, these primary duties appear to be similar to those which contributed to his back and leg disability. The

appellants argue that White has only a ten percent permanent disability, and should therefore be able to perform some job duties. However, "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 statute." **Dunn, Mississippi Workmen's Compensation, §86 at 102-103 (3d ed. 1982)** (quoted in *McGowan*, 586 So.2d at 166; *Piggly Wiggly v. Houston*, 464 So.2d 510, 512 (Miss.1985)). We infer from the Commission's ruling of permanent disability that White could no longer perform the duties of a station manager without aggravating his disability.

Fourth, White applied for several other employment positions but was not hired. The appellants contend that White did not prove a reasonable effort to find other employment. However, after review of White's deposition, we find that although White was not sure of some of the names of persons with whom he spoke about obtaining a job, he made continued efforts to speak with owners, supervisors, and employees at various businesses regarding available employment. The City of Moss Point argues that it had a janitorial position available which met the restrictions set by Dr. McCloskey. However, the record does not reveal that this job was actually offered to White.

Although some evidence in the record suggests that White could have returned to work, substantial evidence supports the determination that White sustained a disability which resulted in the loss of wage earning capacity. The record reveals that although some of the witnesses on behalf of the appellants stated that White's job duties as station manager were limited after he returned to work, these witnesses also indicated that there were occasions when White still had to perform duties which required some limited bending and driving. Jimmy Miles, White's head supervisor, stated that he had to remind White to refrain from exerting himself beyond the doctor's restrictions. Yet, he also indicated that a station operator's duties involved some bending and driving. Dr. McClosky suggested that White could perform some type of work, but he also indicated that continuous driving might aggravate White's problems. This Court does not weigh one witness's testimony over another's. We, as well as the circuit court, exceed our jurisdictional boundaries when we invade the province of the Commission and decide which witnesses or which part of their testimony the Commission should or should not believe. *Hamilton Mfg. Co. v. Kern*, 242 So. 2d 441, 444 (Miss.1970). Considering White's age, limited skills, continued back and leg problems, his potential return to the same position as station manager, failed efforts to find other employment, and testimony of all of the witnesses, we find that substantial evidence supports the Commission's finding of one hundred percent loss of wage earning capacity. We affirm the circuit court's judgment.

**THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

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