

SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BETTYE LOGAN

APPELLANT

V.

NO. 2015-WC-01760-COA

KLAUSSNER FURNITURE CORPORATION  
D/B/A/ BRUCE FURNITURE INDUSTRIES AND  
AMERICAN CASUALTY COMPANY OF READING, PA

APPELLEE

# BRIEF OF APPELLANT

On Appeal from the  
Mississippi Workers' Compensation Commission

Oral Argument is Requested

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**CERTIFICATE OF INTERESTED PERSONS**

Court of Appeals #2015-WC-01760-COA

Bettye Logan

Appellant

v.

Klaussner Furniture Corporation and American Casualty Company  
Of Reading, PA

Appellee

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Court of Appeals may evaluate possible disqualification or recusal.

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Haley W. McIngvale, II, attorney for Appellant

Klaussner Furniture Corporation, Appellee

American Casualty Company of Reading, PA, Appellee

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This the 12<sup>th</sup> day of January, 2016.

/s/ Roy O. Parker

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ORAL ARGUMENT

Due to the complexities of this case, oral argument is requested.

## STATEMENT OF ISSUES

- I. Whether the Administrative Judge's opinion and subsequent confirmation by the Workers' Compensation Commission was arbitrary, capricious, and contrary to the instruction of the Court of Appeals.
- II. Whether the Administrative Judge and Workers' Compensation Commission erred in failing to treat this as a loss of wage earning capacity case due to the industrial loss of use to Bettye's left lower extremity, making her totally occupationally disabled, entitling her to 100% permanent total disability.

## STATEMENT OF THE CASE

### *Nature of the Case*

On March 6, 2012, Bettye Logan appealed from a ruling by the full Commission to the Supreme Court of Mississippi regarding her ability to work. After hearing evidence by lay witness, vocational experts, and medical evidence, the Court of Appeals found the evidence established that Bettye had suffered a permanent partial or total disability. The Court of Appeals also found that, at the very least, Bettye should have been assessed a loss of wage earning capacity. The Court of Appeals then reversed and remanded the matter back to the Commission for a determination of the appropriate award of compensation. However, despite the order by the Court of Appeals, the Administrative Judge and the Commission, who affirmed the Administrative Judge's opinion on remand, failed to award Bettye permanent total disability or permanent partial disability with a loss of wage earning capacity.

### Course of Proceedings and Disposition of Case in Lower Court

Bettye previously appealed this case to the Supreme Court of Mississippi on March 6, 2012. The Supreme Court assigned the case to the Court of Appeals who handed down an opinion on June 6, 2013. In that decision, The Court of Appeals found that the evidence presented supported a finding of permanent partial or total disability. (RE-8, ¶22). Furthermore, the Court of Appeals also found that, due to the fact that the only jobs found that would be available to Bettye made substantially less than the \$14 per hour Bettye made pre-injury, Bettye should have at least been assessed a loss of wage earning capacity. (RE-8, ¶21). Because the Court of Appeals found that the evidence supported a finding of permanent partial or total disability, they ruled that the Commission had erred by finding Bettye had not suffered a permanent disability. (RE-8, ¶22).

In coming to this decision, the court looked to all the evidence presented at trial, beginning with the lay testimony presented by Bettye and her daughter, Ginnie Graham. The Court found that their testimony “establish[ed] that Logan continues to have significant problems with her leg.” (RE-7, ¶20). Specifically, their testimony showed that Bettye was unable to complete various daily tasks, was unable to sit upright for more than a few hours, and that after sitting for two to three hours Bettye’s leg would begin to swell and go numb. (RE-7, ¶20). The court found this “clearly hinders her ability to continue working even in sedentary positions.” (RE-7, ¶20).

Furthermore, the court found that the vocational specialists’ testimony also supported Bettye’s claim of permanent partial or total disability. (RE-7-8, ¶21). Bettye’s expert, C. Lamar Crocker, testified that Bettye had a 100% loss in the labor market. (RE-8, ¶21). The opposing expert, Jennifer Oubre, testified Bettye could still find gainful employment, but the court found this unpersuasive. (RE-8, ¶21). This was due to the fact that Oubre never spoke with Bettye or

Ginnie before the hearing, basing her opinion solely on Bettye's medical records, which the court found to be a significant factor. (RE-8, ¶21). This is because, under direct examination, Oubre stated that if Bettye and Ginnie's testimony were true, it would change her opinion. (RE-8, ¶21).

Moreover, Bettye was earning \$14 per hour at her job at the time of the injury and the positions Oubre found that would be available to Bettye earned approximately \$7.25 to \$8.50 per hour. Furthermore, the alternate position Bettye had been offered by Klaussner paid less than the \$14 pay rate Bettye was receiving pre-injury. (RE-8, ¶21). This, the court found, meant that Bettye should have been assessed, at the very least, a loss of wage-earning capacity. (RE-8, ¶21).

Finally, the court found that the medical evidence showed Bettye has a 4% permanent medical impairment. (RE-8, ¶22). More importantly, several of Bettye's evaluators found that she had permanent work restrictions and that one, Dr. Kim Stimpson, an orthopedist, never removed Bettye from her light-duty work restrictions. (RE-8, ¶22). While the Cornerstone Rehabilitation Services Functional Capacity Evaluation (FCE) found she could perform light-duty work, the Hill Rehabilitation Services FCE found Bettye was only qualified for sedentary positions where she could sit constantly and elevate her leg, making both FCE's relatively consistent with each other in stating that Bettye does have limitations in performing certain work-related tasks, making her disabled. (RE-8, ¶22). Because all the medical evidence points to Bettye having a disability, the Administrative Judge and the Full Commission should have then used other evidence, such as lay testimony, to determine the extent of the disability, which the Court of Appeals did. In light of the lay and expert testimony, as well as the medical evidence, the court found Bettye suffered a permanent partial or total disability and reversed and remanded the case for a determination of the appropriate award of compensation. (RE-8, ¶22).

On September 3, 2013, Klaussner filed a motion for rehearing which was denied. Klaussner then filed a petition for writ of certiorari to the Supreme Court of the State of



Mississippi which was also denied. The Mandate was issued by the Court of Appeals on January 6, 2014. Some 15 months later, the Administrative Judge then rendered her opinion on remand, dated April 8, 2015. In the Administrative Judge's opinion, Bettye had "suffered a 60% loss of industrial use to her left lower extremity." (RE-47-48). In the Administrative Judge's opinion, she stated the finding that Bettye had "suffered a 100% loss of industrial use to her left lower extremity would be contrary to the medical evidence." (RE-48).

In coming to this decision, the Administrative Judge relied heavily on the opinions of only Dr. Kim Stimpson and Dr. Cooper Terry. (RE-16). Furthermore, the Administrative Judge failed to consider the FCE performed by Hill Rehabilitation Services. (RE-16). For these reasons, the Administrative Judge awarded Bettye a compensation rate of \$373.30 per week for a period of 105 weeks, representing a 60% loss of use for industrial purposes as to the left lower extremity. (RE-16, #1). This was in direct contradiction to the order on remand of the Court of Appeals.

Bettye then filed a Petition for Review by the Full Commission on April 23, 2015 and a hearing was held before the full Commission on August 3, 2015. In their order dated October 23, 2015, the Commission affirmed the Administrative Judge's order on remand as to the compensability of Claimant's injuries and the award of 60% impairment to the left lower extremity. (RE-240, Conclusion). Bettye then filed a Notice of Appeal to the Mississippi Supreme Court dated November 17, 2015.

### *Statement of Facts Relevant to the Issues Presented*

#### **I. Whether the Administrative Judge's opinion and subsequent confirmation by the Workers' Compensation Commission was against the overwhelming weight**

**of the evidence and arbitrary, capricious, and contrary to the instruction of the  
Court of Appeals.**

The Administrative Judge's opinion on remand was against the overwhelming weight of the evidence, arbitrary, capricious, and contrary to the instruction of the Court of Appeals. (RE-8, ¶22). In her opinion on remand, the Administrative Judge failed to consider all evidence relevant to a determination of finding Bettye had suffered a permanent disability due to her admitted work place injury. (RE-47-49). Moreover, the Administrative Judge failed to render a decision consistent with the opinion handed down by the Court of Appeals. (RE-48, #1). The Administrative Judge did not award Bettye permanent total disability nor did the Administrative Judge assess a loss of wage earning capacity in her decision to award Bettye permanent partial disability. (RE-48, #1). Additionally, the Full Commission erred in affirming the decision made by the Administrative Judge and then blatantly, and knowingly, misstated the record in regard to the cross examination of Ms. Oubre. (RE-238, last paragraph).

In her opinion on remand, the Administrative Judge only cites to the opinions of two physicians who opined Bettye could find "some form of work," (RE-48), but the evidence presented shows that Bettye cannot find, nor is she suited to, work in her previous occupation or other employment opportunities suited to her age, education, background, training, and present disabilities. The Administrative Judge relied on Dr. Stimpson's statement that he "probably" would have returned Bettye to unrestricted duty, even though he had not seen or examined Bettye since August 24, 2004. (RE-48). The Administrative Judge relied on this speculative evidence and did not review any other evidence necessary to make an accurate determination of Bettye's overall disability.

Applicable law states that "the long-standing rule of the courts is that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purposes of the statute."

*Janie Stewart v. Singing River Hospital System*, 928 So.2d 176, 186 (Miss.App. 2005); citing *Marshall Durbin Co. v. Warren*, 633 So.2d 1006, 1010 (Miss. 1983); *Clements v. Welling Truck Service*, 739 So.2d 476, 481 (Miss.App. 1999). When assessing whether a claimant is totally disabled, medical findings are not the sole basis for the determination. *Greenwood Utilities v. Charles Williams*, 801 So.2d 783, 791-792 (Miss.App. 2001); citing *Dunn, Mississippi Workmen's Compensation, Law and Practice Rules and Forms*, 68, 70 (3<sup>rd</sup> ed. 1982).

The Administrative Judge and Commission are “required to consider all of the testimony and all of the pertinent factors, including physical or functional disability from the medical viewpoint and any demonstrated impairment of the claimant’s capacity to secure and retain employment and perform the work which he is qualified to do.” *Id.* Additionally, the Court of Appeals, in reviewing all the evidence relevant to Bettye’s disability and loss of wage earning capacity, specifically stated that “at the very least, Logan should have been assessed a loss of wage-earning capacity.” (RE-8, ¶21). Neither the Administrative Judge nor the Full Commission assessed Bettye a loss of wage earning capacity.

In this line, neither the Administrative Judge nor the Full Commission took care to follow the directions laid out in the opinion of the Court of Appeals. It has been determined by the Supreme Court of Mississippi that “the Commission is a quasijudicial body” and that the Supreme Court has “appellate jurisdiction...over direct appeals from the Commission.” *Johnson v. Sysco Food Services*, 86 So.3d 242, 245-247, (Miss. 2012). Furthermore, the Court stated that they “assign...cases[s] to the Court of Appeals for decision.” *Id.* at 247, citation added. This gives the Court of Appeals the authority to hear and render decisions on workers’ compensation cases. The decisions rendered by the Court of Appeals are binding as the “Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court.” Miss. Code Ann. § 9-4-3.

**II. Whether the Administrative Judge and Workers' Compensation Commission erred in failing to treat this as a loss of wage earning capacity due to the industrial loss of use to Bettye's left lower extremity, making her totally occupationally disabled, entitling her to 100% permanent total disability.**

Under Mississippi law, "Disability" means 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." *University of Mississippi Medical Center*, 909 So.2d 1209, 1218 (Miss.App. 2005), citing Miss. Code Ann. § 71-3-3(i). The concept of disability comprises a physical injury coupled with a loss of wage earning capacity. *University of Mississippi Medical Center* at 1218; citing *I. Taitel & Son v. Twiner*, 247 Miss. 785, 792, 157 So.2d 44, 46 (Miss. 1963). Whether a claimant is disabled is determined by comparing the claimant's pre-injury wages with the claimant's post-injury capacity to earn wages. *University of Mississippi Medical Center* at 1218; citing *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 137, 61 So.2d 789, 792 (1953).

Bettye and her daughter Ginnie Graham testified that standing and walking for short periods of time caused Bettye much pain and that Bettye was unable to be gainfully employed (RE-89, lines 20-25; RE-122, line 20-RE-127, line 6). While the medical evidence available to determine a claimant's incapacity and extent thereof must support a claim of disability, the claimant does not have to prove a claim of disability based entirely on medical evidence. *University of Mississippi Medical Center*, at 1218; citing *Hall of Miss., Inc. v. Green*, 467 So.2d 935 (Miss. 1985).

Lay testimony about the effect of the injury on the claimant's ability to work may be considered to supplement medical estimates of the claimant's functional or industrial disability. *University of Mississippi Medical Center* at 1222, citing *Modern Laundry, Inc. v. Williams*, 224

Miss. 174, 197-80, 79 So.2d 829, 832 (1955). The Commission must determine the fact and extent of disability by examining the evidence as a whole. *University of Mississippi Medical Center* at 1220; citing *Delaughter v. South Cent. Tractor Parts*, 642 So.2d 375, 379 (Miss. 1994). There are a number of factors to be considered in determining a loss of wage earning capacity to include “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 circumstance.” *University of Mississippi Medical Center* at 1220; citing *McGowan v. Orleans Furniture Inc.*, 586 So.2d 163, 167 (Miss. 1991) (citing *Malone & Hyde of Tupelo v. Kent*, 250 Miss. 879, 882, 168 So.2d 526, 527 (1964).

Bettye and her daughter Ginnie Graham testified in much detail that Bettye was physically unable to be gainfully employed in her usual occupation or any occupation, and none of their testimony is disputed by any credible witness. The undisputed testimony of a claimant which is not so unreasonable as to be unbelievable, given the factual setting of the claim, generally ought to be accepted as true. *University of Mississippi Medical Center* at 1222; citing *White v. Superior Products, Inc.*, 515 So.2d 924, 927 (Miss. 1987). “Where an employee suffers an injury covered by the schedule in Miss. Code Ann. § 71-3-17(c) and where that injury results in a permanent loss of wage earning capacity within Miss. Code Ann. § 71-3-17(a), the latter section controls exclusively and the employee is not limited to the number of weeks of compensation described in Miss. Code Ann. § 71-3-17(c)’s schedule.” *Good Earth Development, Inc. v. James A. Rogers*, 800 So.2d 1164, 1169 (Miss.App.2001).

Bettye is physically and permanently incapable of performing the usual job she performed pre-injury, or any other comparable job for which she has been trained to do. “Generally, predicated an award on medical or functional disability rather than upon a determination of the extent of loss of industrial use or impairment of claimant’s wage earning

capacity is error.” *Smith v. Jackson Construction Company*, 607 So.2d 1119, 1126 (Miss. 1992), citing *Piggly Wiggly v. Houston*, 464 So.2d 510, 512 (Miss.1985).

In assessing a loss of wage earning capacity, courts have stated that “if a claimant is permanently and totally occupationally disabled, he should be entitled to compensation for a permanent total occupational disability, not a permanent partial disability.” *Good Earth Development*, at 1169; citing *Smith v. Jackson Construction Company*, 607 So.2d 1119, 1127 (Miss. 1992). This is because it logically follows that if a person, after adjusting to their disability, is still totally occupationally disabled, then they are not permanently partially disabled and the schedule found in Miss. Code Ann. § 71-3-17(c) cannot control. *Smith*, at 1128. As the court stated in *Smith*, supra, “Any other result is a travesty of justice which denies an employee injured in the course of his employment the compensation he is lawfully entitled to receive.” *Id.*

Furthermore, the Court of Appeals found that Ms. Oubre “admitted that if the testimony of Logan and Graham were true, she would change her opinion. This is significant because Oubre never spoke with Logan regarding her continuing medical problems when making her initial assessment.” (RE-8, ¶21). Additionally, the Court of Appeals noted that Bettye was earning \$14 per hour at her job prior to the injury and that the positions Ms. Oubre found “available” for Bettye earned between \$7.25 and \$8.50 per hour. (RE-8, ¶21). Also, the job Klaussner offered Bettye post- injury paid less than the \$14 per hour she was previously earning. (RE-8, ¶21). In light of this, the Court of Appeals found that “at the very least, Logan should have been assessed a loss of wage-earning capacity.” (RE-8, ¶21).

## *SUMMARY OF THE ARGUMENT*

Bettye Logan suffered an industrial loss of use of her left leg leading to a 100% occupational disability. Because Bettye is 100% occupationally disabled, the chart used to determine disability in Miss. Code Ann. § 71-3-17(c) does not control and Bettye is not limited to neither 105 weeks for a 60% disability nor the 175 weeks listed in the chart. Bettye is entitled to a maximum of 450 weeks for a 100% total occupational disability.

Bettye should have been assessed a loss of wage earning capacity due to the lack of education, training, disability, and availability of any jobs she would be qualified to perform. This is because, although she has reached Maximum Medical Recovery with a 4% permanent medical impairment, she still experiences significant problems with her leg, requiring her to maintain a sedentary position as often as possible with a chance to elevate her leg when needed. Furthermore, her daughter, Ginnie, has to help Bettye with many of her daily tasks around the house. Indeed, Bettye cannot shop for groceries without having to rely heavily on the shopping cart or sit down because her leg will swell, go numb, and hurt if she stays on it too much.

Moreover, the Court of Appeals found that all the evidence, viewed in its entirety, pointed to Bettye requiring permanent partial or permanent total disability. Additionally, in light of the factors mentioned above, when viewed in their entirety, Bettye should have been assessed a loss of wage earning capacity. The Commission failed to then render a judgment consistent with the Court of Appeals' mandate because the Commission failed to award Bettye permanent total disability. Nor did the Commission award Bettye permanent partial disability to include an assessment of a loss of wage earning capacity from the continued pain and disability caused by her work place injury.

## ARGUMENT

### **I. Whether the Administrative Judge's opinion and subsequent confirmation by the Workers' Compensation Commission was arbitrary, capricious, and contrary to the instruction of the Court of Appeals.**

The Workers' Compensation Commission failed to consider all relevant evidence, including the opinion handed down from the Court of Appeals, in affirming the Administrative Judge's decision.

In her opinion on remand, the Administrative Judge stated Bettye "has suffered a 60% loss of industrial use to her left lower extremity" and further states that "finding that claimant has suffered a 100% loss of industrial use to her left lower extremity would be contrary to the medical evidence." (RE-48). The Administrative Judge only cites to the opinions of two physicians who opined Bettye could find "some form of work," (RE-16), but the evidence presented shows that Bettye cannot find, nor is she suited to, work in her previous occupation, or "some form of work." Moreover, the Administrative Judge relied on Dr. Stimpson's statement that he "probably" would have returned Bettye to unrestricted duty. (RE-16).

It is well settled in Mississippi that "the long-standing rule of the courts is that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purposes of the statute." *Janie Stewart v. Singing River Hospital System*, 928 So.2d 176, 186 (Miss.App. 2005), citing *Marshall Durbin Co. v. Warren*, 633 So.2d 1006, 1010 (Miss. 1983); *Clements v. Welling Truck Service*, 739 So.2d 476, 481 (Miss.App. 1999). What Dr. Stimpson "probably" would have done is speculative at best and contrary to the actions he actually took. Dr. Stimpson placed Bettye on restricted duty and never removed this restriction.



Moreover, assessments based solely on medical evidence do not conform to current, established, Mississippi law. When assessing whether a claimant is totally disabled, medical findings are not the sole basis for the determination. *Greenwood Utilities v. Charles Williams*, 801 So.2d 783, 791-792 (Miss.App. 2001); citing *Dunn, Mississippi Workmen's Compensation, Law and Practice Rules and Forms*, 68, 70 (3<sup>rd</sup> ed. 1982). The Administrative Judge and Commission are "required to consider all of the testimony and all of the pertinent factors, including physical or functional disability from the medical viewpoint and any demonstrated impairment of the claimant's capacity to secure and retain employment and perform the work which he is qualified to do." *Greenwood Utilities*, at 791-792.

The Administrative Judge did not consider Bettye and Ginnie's testimony, either Functional Capacity Evaluation (FCE), nor was the testimony of either of the expert witnesses cited in determining Bettye had suffered a 60% loss of industrial use to her left lower extremity. Furthermore, the Administrative Judge arbitrarily assigned a 60% loss of industrial use to her leg without ever mentioning the factors considered in assessing this 60% loss other than the very brief mention of the doctors' opinions. This number was arbitrarily and capriciously assigned.

Additionally, the Commission did not consider the evidence as a whole, but instead stated that the case "pivots on the weight to be assigned competing FCE's and varying medical opinions." (RE-34, #1, ¶2). The decision does not hinge on the weight to be assigned the FCE's but relies just as much on all the evidence available, including: "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 circumstance." *University of Mississippi Medical Center*, at 1218; citing *McGowan v. Orleans Furniture Inc.*, 586 So.2d 163, 167 (Miss. 1991); citing *Malone & Hyde of Tupelo v. Kent*, 250 Miss. 879, 882, 168 So.2d 526, 527 (1964).

Additionally, the Court of Appeals, in reviewing all the evidence relevant to Bettye's disability and loss of wage earning capacity, specifically stated that "at the very least, Logan should have been assessed a loss of wage-earning capacity." (RE-8, ¶21). By not assessing Bettye a loss of wage earning capacity in her opinion on remand, the Administrative Judge failed to render a decision consistent with the opinion handed down by the Court of Appeals. This was ultimately affirmed by the Commission who, as the finder of facts, had a duty to consider all the evidence, which they failed to do.

In a recent case, the Supreme Court of Mississippi found that "the Commission is a quasijudicial body" and that the Supreme Court has "appellate jurisdiction...over direct appeals from the Commission." *Johnson v. Sysco Food Services*, 86 So.3d 242, 245-247, (Miss. 2012). Furthermore, the Court went on to state that they then "assign...cases[s] to the Court of Appeals for decision." *Id.* at 247, citation added. This gives the Court of Appeals the authority to hear and render decisions on workers' compensation cases. The decisions rendered by the Court of Appeals are binding as the "Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court." Miss. Code Ann. § 9-4-3. By not issuing an opinion consistent with the opinion rendered by the Court of Appeals, the Administrative Judge, and especially the Full Commission, did not follow the applicable case law and statutes set forth in Mississippi.

Finally, the decision rendered by the full Commission blatantly and knowingly misstated what Ms. Oubre said on cross-examination. In their opinion, the Commission claimed that during cross-examination, Ms. Oubre stated that "she would possibly alter her vocational opinion due to the testimony concerning Claimant's current difficulty performing daily functions, Ms. Oubre did not testify that her vocational opinion would change to the point that Claimant possessed a

total loss of wage earning capacity.” (RE-238, last paragraph). The actual conversation on cross-examination was as follows:

“Q. And that’s part of it. And you didn’t consider – you heard her testify here today that she couldn’t do all these things. Her leg swells. She couldn’t even grocery shop or – without having to sit down and lean on the cart that she was pushing. Did you consider any of these things that she and her daughter talked about today?

A. I have not talked to her or heard her testimony until today.

Q. And you heard her daughter’s testimony.

A. Yes.

Q. That would change your opinion about the situation then, wouldn’t it?

A. If her testimony is true, then, yes, I would have to consider those.

Q. Do you have any reason to doubt that her testimony is not true?

A. No, sir.

Q. Do you have any reason to doubt that her daughter, Jennifer – I mean, Ginnie’s testimony is not true?

A. No, sir.

Q. So assuming its true, that would change your opinion, wouldn’t it?

A. Yes sir.”

(RE-157, lines 12-29, RE-158, lines 9-14). Clearly, Ms. Oubre did not just admit she would consider those factors as the Commission stated, but went far beyond that in stating that she would change her opinion as to whether Bettye was employable.

Furthermore, this is a direct contradiction to the findings of the Court of Appeals which found “this is significant because Oubre never spoke with Logan regarding her continuing medical problems when making her assessment.” (RE-8, ¶21). Additionally, the Commission

did not just err in stating that Ms. Oubre would consider these factors but also erred in not placing the same significance on Ms. Oubre's admission that the Court of Appeals placed on it. By admitting that she would change her opinion, Ms. Oubre's testimony is no longer contradictory to Mr. Crocker's in that Bettye is 100% occupationally disabled.

**II. Whether the Administrative Judge and Workers' Compensation Commission erred in failing to treat this as a loss of wage earning capacity due to the industrial loss of use to Bettye's left lower extremity, making her totally occupationally disabled, entitling her to 100% permanent total disability.**

Bettye has suffered a total loss of industrial use of her left lower extremity making her 100% occupationally disabled under current Mississippi law. Although she still has some limited use in her leg, she consistently experiences pain and swelling requiring her to maintain a seated position with an opportunity to elevate her leg. This has been corroborated by her daughter, Ginnie, as well as Bettye's own testimony with neither testimony being disputed. The Administrative Judge, as well as the Full Commission, failed to give this adequate consideration in determining an award of permanent partial or total disability. Furthermore, the Administrative Judge and Full Commission erred in not assessing a loss of wage earning capacity in light of the above stated evidence.

Under Mississippi law, "'Disability' means 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." *University of Mississippi Medical Center*, 909 So.2d 1209, 1218 (Miss.App. 2005); citing Miss. Code Ann. § 71-3-3(i). The concept of disability comprises a physical injury coupled with a loss of wage earning capacity. *University of Mississippi Medical Center*, at 1218; citing *I. Taitel & Son v.*

*Twiner*, 247 Miss. 785, 792, 157 So.2d 44, 46 (Miss. 1963). Whether a claimant is disabled is determined by comparing the claimant's pre-injury wages with the claimant's post-injury capacity to earn wages. *University of Mississippi Medical Center*, at 1218; citing *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 137, 61 So.2d 789, 792 (1953).

Additionally, while the medical evidence available to determine a claimant's incapacity and extent must support a claim of disability, the claimant does not have to prove a claim of disability based entirely on medical evidence. *University of Mississippi Medical Center*, at 1218; citing *Hall of Miss., Inc. v. Green*, 467 So.2d 935 (Miss. 1985). The Commission must determine the fact and extent of disability by examining the evidence as a whole. *University of Mississippi Medical Center*, at 1220; citing *Delaughter v. South Cent. Tractor Parts*, 642 So.2d 375, 379 (Miss. 1994). There are a number of factors to be considered in determining a loss of wage earning capacity, to include "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 circumstance." *University of Mississippi Medical Center*, at 1218; citing *McGowan v. Orleans Furniture Inc.*, 586 So.2d 163, 167 (Miss. 1991); citing *Malone & Hyde of Tupelo v. Kent*, 250 Miss. 879, 882, 168 So.2d 526, 527 (1964).

Moreover, in assessing a loss of wage earning capacity, courts have stated that "if a claimant is permanently and totally occupationally disabled, he should be entitled to compensation for a permanent total occupational disability, not a permanent partial disability." *Good Earth Development, Inc.*, at 1169; citing *Smith v. Jackson Construction Company*, 607 So.2d 1119, 1127 (Miss. 1992). This is because it logically follows that if a person, after adjusting to their disability, is still totally occupationally disabled, then they are not permanently partially disabled and the schedule found in Miss. Code Ann. § 71-3-17(c) cannot control. *Smith*, at 1128. As the court stated in *Smith*, supra, "Any other result is a travesty of justice which

denies an employee injured in the course of his employment the compensation he is lawfully entitled to receive.”

Finally, the Mississippi Supreme Court articulated the difference between a medical disability and an industrial disability stating that "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." *Ard v. Marshall Durbin Companies, Inc.*, 818 So.2d 1240 (Miss.App. 2002); citing *Robinson v. Packard Electric Division, General Motors Corp.*, 523 So.2d 329, 331(Miss.1988). In determining industrial disability, “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. 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.” *Ard*, at 324-325; citing *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 166 (Miss.1991); citing *Piggly Wiggly v. Houston*, 464 So.2d 510, 512 (Miss.1985).

In the Administrative Judge’s amended opinion on remand, she makes no reference to the lay testimony of Bettye and Ginnie. She also fails to take into account any of the expert witness testimony of either Dr. Crocker or Ms. Oubre. The Administrative Judge simply points to the medical evidence stating that “finding that claimant has suffered a 100% loss of industrial use to her left lower extremity would be contrary to the medical evidence” while going on to note only the opinions of two physicians. (RE-16). By not considering any factors other than the medical evidence, the Administrative Judge did not follow the substantial amount of case law in regard to

disability established in Mississippi nor did the Administrative Judge's opinion on remand conform to the ruling handed down by the Court of Appeals.

Additionally, the Commission erred in failing to give any other evidence due consideration, other than the medical evidence. The commission gave a cursory mention in its analysis that they considered the medical and vocational proof, but failed to mention any other evidence. (RE-239, last paragraph).

Rendering a decision based only on medical evidence and opinion is not only contradictory to applicable law, but also conflicts with the opinion of the Court of Appeals. When looking to the facts in the previous appeal, the Court of Appeals noted that:

“the lay testimony by Logan and Graham establish that Logan continues to have significant problems with her leg. She is unable to complete various daily tasks and is unable to sit upright for more than a few hours. Both Logan and Graham testified that after sitting for two to three hours, Logan's leg begins to swell and go numb. This clearly hinders her ability to continue working in even sedentary positions, which the doctors and vocational experts opined would be her only options for employment opportunities.”

(RE-7, ¶20). The Commission should have looked at all the evidence because the concept of disability comprises a physical injury coupled with a loss of wage earning capacity. *University of Mississippi Medical Center*, at 1218; citing *I. Taitel & Son v. Twiner*, 247 Miss. 785, 792, 157 So.2d 44, 46 (Miss. 1963).

For the Commission to have rendered a decision consistent with the opinion handed down from the Court of Appeals, they would have been required to award Bettye compensation for a 100% permanent total disability. To follow the order of the Court of Appeals in regard to permanent partial disability, the Commission should have assessed a loss of wage earning

capacity due to the industrial loss of a scheduled member meaning the pay chart does not control and Bettye is entitled to the 450 weeks of compensation for permanent total disability.

Likewise, the Administrative Judge and Commission failed to treat this as a loss of wage earning capacity due to the lack of weight given any evidence outside medical records and medical testimony. Bettye was earning \$14 per hour at her job at the time of the injury and Klaussner's expert, Ms. Oubre, only found positions earning approximately \$7.25 to \$8.50 per hour. (RE-8, ¶21). Additionally, the position Klaussner offered her after her injury paid less than the \$14 per hour Bettye earned pre-injury. (RE-8, ¶21). This coupled with the Bettye's expert, Mr. Crocker, and Ms. Oubre's admission on cross-examination, that she would change her opinion of Bettye being employable, was enough for the Court of Appeals to state Bettye should have been assessed a loss of wage earning capacity at the very least. (RE-8, ¶21).

However, this is not the only evidence that Bettye should have been assessed a loss of wage earning capacity. The medical evidence shows Bettye suffered a 4% permanent medical impairment and at least one physician never removed her from light-duty work restrictions. (RE-8, ¶22). Moreover, Bettye is sixty-two years old, has a 10<sup>th</sup> grade education with a GED, no special training, and the only jobs she has ever done are: waitress, placing golf balls in machine to be painted, putting sheerlock in a box, a sander for a furniture company, inspector for a furniture company, and a cutter and spreader when she was injured. All of these factors should have been considered in determining loss of wage earning capacity. *University of Mississippi Medical Center*, at 1218; citing *McGowan v. Orleans Furniture Inc.*, 586 So.2d 163, 167 (Miss. 1991); citing *Malone & Hyde of Tupelo v. Kent*, 250 Miss. 879, 882, 168 So.2d 526, 527 (1964).

Likewise, Ms. Oubre, in claiming Bettye was employable, did not consider any of the factors commonly used to assess loss of wage earning capacity and disability outside of medical



evidence when she first determined Bettye was employable. When cross-examined, the following exchange took place:

“Q. Did you tell the employers the disability she had, permanent nerve damage to her right – her left foot?

A. No, sir.

Q. So all your jobs you’re saying she could do, you didn’t give the opportunity – you didn’t ask the employer would you hire her based on that and could she do the job; is that right?

A. I just asked what the requirements of the jobs were.

Q. You didn’t take that into consideration, about whether she could do these jobs you’re talking about; is that right?

A. No, sir.”

(RE-154, lines 20-27, RE-157, lines 1-4). This is significant because, in addition to only finding jobs that paid a significantly less amount, Ms. Ourbe only compared the job requirements to the medical records. She did not take into account the continuing pain and swelling Bettye suffered on a daily basis requiring her to maintain a sedentary position with a chance to elevate her leg, nor did she notify the employers of the disability to find out if they would in fact be willing to hire Bettye.

It is clear from all the evidence presented that Bettye is not qualified to work at her pre-injury place of employment, nor is she qualified to work at any of the jobs found by Ms. Oubre. Moreover, even if one of the employers found by Ms. Oubre were able to provide some form of work to accommodate Bettye’s significant disability, she would suffer a substantial decrease in hourly pay.

In light of the factors mentioned above, Bettye should have been assessed a loss of wage earning capacity, as noted in the opinion rendered by the Court of Appeals, suffering an industrial loss of use of a scheduled member making her totally occupationally disabled. Both the Administrative Judge and the Commission failed to assess Bettye a loss of wage earning capacity despite the testimony of Bettye and her daughter, Ginnie. Their lay testimony is also supported by Bettye's expert witness, Mr. Crocker. Additionally, if the record of the cross-examination of Ms. Oubre is accurately shown, her position is consistent with Mr. Crocker's. That being that there are no jobs available to Bettye which she is qualified to do that earn the \$14 per hour pay rate she had prior to the work place injury. Furthermore, there are no jobs available she may be deemed able to work, even for a substantial decrease in pay. For these reasons she is permanently and totally occupationally disabled.

### CONCLUSION

Bettye Logan was injured at work when she fell and broke both bones in the lower part of her left leg. As a result of her treatment, she now has permanent nerve damage to her left leg. As a result of her on-the-job injury, she has suffered an industrial loss of use of her left leg. This industrial loss, combined with a loss of wage earning capacity, goes beyond the 4% permanent impairment she was assessed leading to a 100% permanent occupational disability. Because Bettye is 100% permanently disabled the chart in Miss. Code Ann. § 71-3-17(c) will not be applicable and Bettye should receive 450 weeks of workers' compensation at a pay rate of \$331.06 per week.

Bettye should be assessed the loss of wage earning capacity because she was making \$14.00 per hour prior to her injury and there are no jobs available that meet the same hourly pay

rate. Moreover, Bettye is disabled from performing even the sedentary positions experts testified were available. Due to the work place injury, Bettye is now drawing Social Security disability benefits.

Furthermore, this case has already been heard on appeal once by the Court of Appeals. In that appeal, the Court stated that Bettye should be assessed a loss of wage earning capacity at the very least. The Commission failed to render a decision consistent with the mandate from the Court of Appeals by failing to assess a loss of wage earning capacity and by not awarding permanent partial or total disability. Moreover, the Administrative Judge kept the case for 15 months before rendering her opinion on remand that was inconsistent with the Court of Appeals mandate. For these reasons Bettye prays for relief in the form of an award of 100% occupational disability as well as any penalties and interest the court deems applicable to the case.

This the 12<sup>th</sup> day of January, 2016.

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## CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Brief of Appellant with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Ms. Kathy Gillis, Clerk  
Court of Appeals of the State of Mississippi  
P.O. Box 249  
Jackson, MS 39205-0249

Amy Lee Topik, Esq.  
Markow Walker, P.A.  
P.O. Box 13669  
Jackson, MS 39236-3669

Further, I hereby certify that I have mailed by U.S. Postal Service, the document to the following non-MEC participants:

Mississippi Workers' Compensation Commission  
P.O. Box 5300  
Jackson, MS 39296-5300

This the 12<sup>th</sup> day of January, 2016.

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## **Mississippi Statutes**

### **Title 9. COURTS**

#### **Chapter 4. COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

*Current through 2015 Regular Session*

#### **§ 9-4-3. Jurisdiction of court; issuance of decisions**

- (1) The Court of Appeals shall have the power to determine or otherwise dispose of any appeal or other proceeding assigned to it by the Supreme Court.  
The jurisdiction of the Court of Appeals is limited to those matters which have been assigned to it by the Supreme Court.

The Supreme Court shall prescribe rules for the assignment of matters to the Court of Appeals. These rules may provide for the selective assignment of individual cases and may provide for the assignment of cases according to subject matter or other general criteria. However, the Supreme Court shall retain appeals in cases imposing the death penalty, or cases involving utility rates, annexations, bond issues, election contests, or a statute held unconstitutional by the lower court.

- (2) Decisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by writ of certiorari. The Supreme Court may grant certiorari review only by the affirmative vote of four (4) of its members. At any time before final decision by the Court of Appeals, the Supreme Court may, by order, transfer to the Supreme Court any case pending before the Court of Appeals.
- (3) The Court of Appeals shall have jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition or any other process when this may be necessary in any case assigned to it by the Supreme Court.
- (4) The Court of Appeals shall issue a decision in every case heard before the Court of Appeals within two hundred seventy (270) days after the final briefs have been filed with the court.
- (5) The Supreme Court shall issue a decision in every case within its original jurisdiction, including all direct and post-conviction collateral relief appeals or applications in cases imposing the death penalty, within two hundred seventy (270) days after the final briefs have been filed with the court. The Supreme Court shall issue a decision in every case received on certiorari from the Court of Appeals within one hundred eighty (180) days after the final briefs have been filed with the court.

**Cite as Miss. Code § 9-4-3**

**Source:** Laws, 1993, ch. 518, § 2, eff. 7/13/1993 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the enactment of this section); Laws, 1996, ch. 492, § 1; Laws, 1998, ch. 588, § 2, eff. 7/1/1998.

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§ 71-3-3. Definitions.

**Mississippi Statutes**

**Title 71. LABOR AND INDUSTRY**

**Chapter 3. WORKERS' COMPENSATION**

**GENERAL PROVISIONS**

*Current through 2015 Regular Session*

**§ 71-3-3. Definitions**

Unless the context otherwise requires, the definitions which follow govern the construction and meaning of the terms used in this chapter:

- (a) "Person" includes an individual, firm, voluntary association or a corporation.
- (b) "Injury" means accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results. An untoward event or events shall not be presumed to have arisen out of and in the course of employment, except in the case of an employee found dead in the course of employment. This definition includes injuries to artificial members, and also includes an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job, and disability or death due to exposure to ionizing radiation from any process in employment involving the use of or direct contact with radium or radioactive substances with the use of or direct exposure to roentgen (X-rays) or ionizing radiation. In radiation cases only, the date of disablement shall be treated as the date of the accident. Occupational diseases, or the aggravation thereof, are excluded from the term "injury," provided that, except as otherwise specified, all provisions of this chapter apply equally to occupational diseases as well as injury.
- (c) "Death," when mentioned as a basis for the right to compensation, means only death resulting from such an injury.
- (d) "Employee" means any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied, provided that there shall be excluded therefrom all independent contractors and especially any individual performing service in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by the individual at a fixed price, the

individual's compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to the individual, whether or not the individual is guaranteed a minimum amount of compensation for such service or is entitled to be credited with the unsold newspapers or magazines returned. A student of an educational institution who, as a part of such educational institution's curriculum, is receiving practical training at any facility, who is under the active and direct supervision of the personnel of the facility and/or an instructor of the educational institution, and who is not receiving wages as a consequence of participation in such practical training shall not be considered an employee of such facility on account of participation in such practical training.

- (e) "Employer," except when otherwise expressly stated, includes a person, partnership, association, corporation and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation.
- (f) "Carrier" means any person authorized in accordance with the provisions of this chapter to insure under this chapter and includes self-insurers.
- (g) "Self-insurer" is an employer who has been authorized under the provisions of this chapter to carry his own liability on his covered employees without insuring in a stock or mutual carrier.
- (h) "Commission" means the Workers' Compensation Commission.
- (i) "Disability" means 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.
- (j) "Compensation" means the money allowance payable to an injured worker or his dependents as provided in this chapter, and includes funeral benefits provided therein.
- (k) "Wages" includes the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, and also the reasonable value of board, rent, housing, lodging or similar advantage received from the employer and gratuities received in the course of employment from others than the employer. The term "wages" shall not include practical training received by students of an educational institution as a part of such educational institution's curriculum.
- (l) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in the place of a parent for at least one (1) year prior to the time of injury and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married



brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother" and "sister" include only persons who are under eighteen (18) years of age, and also persons who, though eighteen (18) years of age or over, are wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability, and also a child eighteen (18) years of age or older, until his twenty-third birthday, who is dependent upon the deceased and is pursuing a full-time education.

- (m) "Parent" includes stepparents and parents by adoption, parents-in-law or any person who for more than three (3) years prior to the death of the deceased employee stood in the place of a parent to him, or her, if dependent on the injured employee.
- (n) The term "surviving spouse" includes the decedent's legal wife or husband, living with him or her or dependent for support upon him or her at the time of death or living apart for justifiable cause or by reason of desertion at such time, provided, however, such separation had not existed for more than three (3) years without an award for separate maintenance or alimony or the filing of a suit for separate maintenance or alimony in the proper court in this state. The term "surviving spouse" shall likewise include one not a legal wife or husband but who had entered into a ceremonial marriage with the decedent at least one (1) year prior to death and who, on the date of the decedent's death, stood in the relationship of a wife or husband, provided there was no living legal spouse who had protected her or his rights for support by affirmative action as hereinabove required. The term "surviving spouse" as contemplated in this chapter shall not apply to any person who has, since his or her separation from decedent, entered into a ceremonial marriage or lived in open adultery with another.
- (o) The term "adoption" or "adopted" means legal adoption prior to the time of the injury.
- (p) The singular includes the plural and the masculine includes the feminine and neuter.
- (q) It is expressly provided, agreed and understood in determining beneficiaries under this section that a surviving spouse suffering a mental or physical handicap and children under the age of eighteen (18) years are presumed to be dependent.
- (r) "Independent contractor" means any individual, firm or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workers independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses, one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.
- (s) "Average weekly wage for the state" means an amount determined by the commission as of October 1 of each year based upon wage and employment statistics reported to the commission by the Mississippi Employment Security Commission. Such amount shall be

based upon data for the preceding twelve-month period and shall be effective from and after January 1 of the following year.

**Cite as Miss. Code § 71-3-3**

**Source:** Codes, 1942, § 6998-02; Laws, 1948, ch. 354, § 2; Laws, 1950, ch. 412, § 1; Laws, 1956, ch. 344; Laws, 1960, ch. 276; Laws, 1962, ch. 473; Laws, 1968, ch. 559, § 2; Laws, 1980, ch. 475, § 1; reenacted, Laws, 1982, ch. 473, § 2; Laws, 1984, ch. 499, § 1; Laws, 1988, ch. 446, § 1; reenacted without change, Laws, 1990, ch. 405, § 2; Laws, 1991, ch. 495, § 1, eff. 7/1/1991.

§ 71-3-17. Compensation for disability.

**Mississippi Statutes**

**Title 71. LABOR AND INDUSTRY**

**Chapter 3. WORKERS' COMPENSATION**

**GENERAL PROVISIONS**

*Current through 2015 Regular Session*

**§ 71-3-17. Compensation for disability**

Compensation for disability shall be paid to the employee as follows:

- (a) Permanent total disability: In case of total disability adjudged to be permanent, sixty-six and two-thirds percent (66-2/3%) of the average weekly wages of the injured employee, subject to the maximum limitations as to weekly benefits as set up in this chapter, shall be paid to the employee not to exceed four hundred fifty (450) weeks or an amount greater than the multiple of four hundred fifty (450) weeks times sixty-six and two-thirds percent (66-2/3%) of the average weekly wage for the state. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two (2) thereof shall constitute permanent total disability. In all other cases, permanent total disability shall be determined in accordance with the facts.
- (b) Temporary total disability: In case of disability, total in character but temporary in quality, sixty-six and two-thirds percent (66-2/3%) of the average weekly wages of the injured employee, subject to the maximum limitations as to weekly benefits as set up in this chapter, shall be paid to the employee during the continuance of such disability not to exceed four hundred fifty (450) weeks or an amount greater than the multiple of four hundred fifty (450) weeks times sixty-six and two-thirds percent (66-2/3%) of the average weekly wage for the state. Provided, however, if there arises a conflict in medical opinions of whether or not the claimant has reached maximum medical recovery and the claimant's benefits have been terminated by the carrier, then the claimant may demand an immediate hearing before the commissioner upon five (5) days' notice to the carrier for a determination by the commission of whether or not in fact the claimant has reached maximum recovery.
- (c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be sixty-six and two-thirds percent (66-2/3%) of the average weekly wages of the injured employee, subject to the maximum limitations as to weekly benefits as set up in this chapter, which shall be paid following compensation for temporary total disability paid in accordance with paragraph (b) of this section, and shall

be paid to the employee as follows:

Member Lost	Number Weeks Compensation
(1) Arm	200
(2) Leg	175
(3) Hand	150
(4) Foot	125
(5) Eye	100
(6) Thumb	60
(7) First finger	35
(8) Great toe	30
(9) Second finger	30
(10) Third finger	20
(11) Toe other than great toe	10
(12) Fourth finger	15
(13) Testicle, one	50
(14) Testicle, both	150
(15) Breast, female, one	50
(16) Breast, female, both	150
(17) Loss of hearing: Compensation for loss of hearing of one (1) ear, forty (40) weeks. Compensation for loss of hearing of both ears, one hundred fifty (150) weeks.	
(18) Phalanges: Compensation for loss of more than one (1) phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half ( 1/2) of the compensation for loss of the entire digit.	
(19) Amputated arm or leg: Compensation for an arm or leg, if amputated at or above wrist or ankle, shall be for the loss of the arm or leg.	
(20) Binocular vision or percent of vision: Compensation for loss of binocular vision or for eighty percent (80%) or more of the vision of an eye shall be the same as for loss of the eye.	
(21) Two (2) or more digits: Compensation for loss of two (2) or more digits, or one (1)	

or more phalanges of two (2) or more digits, of a hand or foot may be proportioned to the loss of the use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

- (22) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.
- (23) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.
- (24) Disfigurement: The commission, in its discretion, is authorized to award proper and equitable compensation for serious facial or head disfigurements not to exceed Five Thousand Dollars (\$ 5,000.00). No such award shall be made until a lapse of one (1) year from the date of the injury resulting in such disfigurement.
- (25) Other cases: In all other cases in this class of disability, the compensation shall be sixty-six and two-thirds percent (66-2/3%) of the difference between his average weekly wages, subject to the maximum limitations as to weekly benefits as set up in this chapter, and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the commission on its own motion or upon application of any party in interest. Such payments shall in no case be made for a longer period than four hundred fifty (450) weeks.
- (26) In any case in which there shall be a loss of, or loss of use of, more than one (1) member or parts of more than one (1) member set forth in subparagraphs (1) through (23) of this paragraph (c), not amounting to permanent total disability, the award of compensation shall be for the loss of, or loss of use of, each such member or parts thereof, which awards shall run consecutively, except that where the injury affects only two (2) or more digits of the same hand or foot, subparagraph (21) of this paragraph (c) shall apply.

**Cite as Miss. Code § 71-3-17**

**Source:** Codes, 1942, § 6998-09; Laws, 1948, ch. 354, § 8a-c; Laws, 1950, ch. 412, § 6; Laws, 1958, ch. 454, § 3; Laws, 1968, ch. 559, § 5; Laws, 1972, ch. 522, § 3; Laws, 1976, ch. 459, § 2; Laws, 1979, ch. 442, § 2; Laws, 1981, ch. 341, § 2; reenacted, Laws, 1982, ch. 473, § 9; Laws, 1984, ch. 402, § 2; Laws, 1988, ch. 446, § 3; reenacted without change, Laws, 1990, ch. 405, § 9; Laws, 2012, ch. 522, § 4, eff. 7/1/2012.