

# Workers' Compensation

**1. Claimant was appropriately denied additional medical treatment and indemnity benefits because he failed to dispute the substantial medical evidence provided by his treating physician, IME, and EME. He also failed to show that his loss of wages was the result of his work-related injury**

*Duren v. Effex Mgmt. Sols. LLC*

**Affirmed - 2021-WC-00337-COA (June 7, 2022)**

Opinion by Presiding Justice Carlton  
Mississippi Workers' Compensation Commission  
*Pro se* for Appellant  
Ginger Moore Robey for Appellee

**WORKERS' COMPENSATION - DISABILITY - DEFINITION** - Pursuant to Miss. Code Ann. § 71-3-3(i), disability is defined as 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.

**WORKERS' COMPENSATION - MAXIMUM MEDICAL RECOVERY - DETERMINATION** – Whether and when a claimant has reached maximum medical recovery are questions that are to be determined by the Commission based on testimony from both lay and medical witnesses.

## FACTS

In July 2014, J.W. Duren was working as a general laborer for the temporary staffing agency, Effex Management Solutions (“Effex”) when he fell from a table and injured his back. Four days after his injury, Duren sought treatment at the Mallory Health Center in Lexington, reporting back and leg pain. Duren was referred to Dr. Graham Calvert by Dana Roberts, and in September 2016, Dr. Calvert began treatment of Duren, when he then discovered a disc herniation in Duren’s back. Dr. Calvert recommended steroid injections and placed Duren on light work restriction. Duren returned to Dr. Calvert twice more during 2016, and due to continued pain as well as worsening of the herniations, Dr. Calvert performed a microdiscectomy in December 2016. In March 2017, Duren returned to Dr. Calvert and reported no pain, and then a few days later returned to work. Effex paid Duren temporary total disability benefits at the rate of \$332.37 per week from July 2016 through March 2017, when Dr. Calvert placed Duren at Maximum Medical Improvement (“MMI”) and released him to return to work without restrictions. After working for a few hours, Duren reported that he was in pain. Duren’s supervisor advised him to seek medical treatment. Duren returned to work the next day, but after working several hours, he advised his supervisor that he was again suffering pain. Duren did not show up for work the following two days, so Effex contacted Duren by telephone and terminated his employment. In April 2017, Duren filed a petition to controvert alleging that he suffered a work-related injury to his back, his left leg, and his body while working for Effex. Effex admitted that Duren suffered a compensable injury to his

back, and the parties stipulated that Duren had an average weekly wage of \$498.47 at the time of the injury. Soon after, Duren returned to Mallory Health Center complaining of pain and subsequently filed a motion to compel medical treatment. In July 2017, the Administrative Judge (“AJ”) ordered an Independent Medical Examination (“IME”) to be conducted by Dr. Blount. Dr. Blount evaluated Duren and issued his IME report. Dr. Blount agreed that Duren’s disc herniations were related to his fall at work and that Duren reached MMI in March 2017. In November 2017, the AJ denied the motion to compel medical treatment. Duren filed another motion to compel medical treatment, temporary disability benefits, and payment of medical bills. At the request of Effex, Dr. John Davis, a neurosurgeon, performed an Employer’s Medical Evaluation on Duren and opined that Duren’s disc herniation remained at MMI. Dr. Davis also testified that he agreed with Dr. Calvert’s treatment protocol. Dr. Davis recommended a post-surgery MRI of Duren’s lumbar spine, which Duren underwent, and after a review of this scan by both Dr. Calvert and Dr. Blount, neither could find anything to explain Duren’s complaints of pain. In January 2019, Duren filed a third motion to compel medical treatment, total temporary disability benefits, and payment of medical bills. In March 2019, the AJ denied the motion. After several more motions filed by Duren and an evidentiary hearing, the AJ entered a final order denying Duren’s claim for permanent partial disability and payment of additional temporary total disability benefits and medical expenses. The AJ acknowledged that Dr. Calvert returned Duren to work without any restrictions and that neither Dr. Blount nor Dr. Davis disagreed with Dr. Calvert’s assessment that Duren could return to full-duty work. The AJ found that Duren was only entitled to temporary total disability from the date of injury to the date of MMI but was entitled to continued and necessary treatment of the work injury. Duren appealed from the order of the AJ to the Mississippi Workers’ Compensation Commission (“Commission”), and the Commission affirmed and adopted the AJ’s final order. Duren appealed.

## **ISSUES**

Whether the Commission erred by (1) finding that Duren sustained no permanent partial disability or loss of wage-earning capacity; (2) failing to award Duren temporary total disability benefits from March 2017 until the present; (3) failing to hold the employer-carrier responsible for Duren’s treatment, medications, and mileage at Mallory Health Center; and (4) failing to enter and weigh all the evidence submitted by Duren, Dr. Blount, and Roberts, including a February 2020 IME report and addendum, a physical therapy report, Duren’s CT scan from January 2019, and his MRI from October 2018.

## **HOLDING**

(1) Because Duren could not show how his post-injury wages were unreliable, or that his later loss of wages resulted from his injury, the Commission’s decision denying permanent partial disability benefits was supported by substantial evidence. (2) Because the record showed that both Dr. Blount and Dr. Davis stated that they either agreed with or deferred to Dr. Calvert’s finding of MMI, and because the AJ stated that he gave little weight to another doctor’s opinions, the Commission’s determination that Duren reached MMI in March 2017 was supported by substantial evidence. (3) Because the Commission did not make any findings regarding physical therapy, because the record did not reflect that Duren requested payment for physical therapy or a referral to physical therapy, and because Roberts did not recommend physical therapy as a treatment for

Duren nor refer Duren to a physical therapist, the Commission's decision was supported by substantial evidence in the record and was not clearly erroneous. (4) Because the record does not contain any physical therapy report or Duren's actual CT scan and MRI, because Duren, as the claimant, bears the burden of proving that his work injury resulted in a permanent disability causing him to suffer a loss of wage-earning capacity and the disability must be supported by medical findings, because Duren had the opportunity to submit his physical therapy report and the actual CT scan and MRI at the evidentiary hearing before the AJ, and because the record reflects that he did not submit these documents, the Court of Appeals declined to further address the issue. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

**2. Claimant's attempt to reinstate his workers' compensation claim was prohibited because Claimant's motion to reinstate, filed two years after the claim's dismissal, initiated the one-year statute of limitations under Miss. Code Ann. § 71-3-53.**

*Darty v. Gulfport-Biloxi Reg'l Airport Auth.*

**Affirmed - 2021-WC-00986-COA (Aug. 9, 2022)**

Opinion by Presiding Judge Carlton  
Mississippi Workers' Compensation Commission  
Benjamin U. Bowden for Appellant  
Christopher Howell Murray & Kristi Rogers Brown for Appellees

**WORKERS' COMPENSATION – DISMISSAL ORDER – REJECTION OF CLAIM -**  
Where the claimant fails to meet a procedural deadline, a dismissal order constitutes the rejection of a claim

**WORKERS' COMPENSATION – DISMISSAL ORDER – CONTINUING JURISDICTION -** Pursuant to Miss. Code Ann. §71-3-53, upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation

**WORKERS' COMPENSATION - WORKERS' COMPENSATION ACT – STATUTE OF LIMITATIONS -** Pursuant to Miss. Code Ann. § 71-3-53, rejection of a claim triggers a one-year statute of limitations for review

**FACTS**

In 2010, Robert Darty Jr. suffered a compensable work injury and received workers' compensation disability benefits, medical services, and supplies from his employer, Gulfport-Biloxi Regional

Airport Authority (“Employer”), and its insurance carrier, Mississippi Municipal Workers’ Compensation Group (“Carrier”). Darty’s attorney filed a petition to controvert in June 2013. In August 2014, the Employer/Carrier filed a B-18 form providing that Darty’s benefits were suspended in February 2014, because Darty had been released at maximum medical improvement in May 2012. Throughout 2014 and 2015 the parties filed prehearing statements, medical reports, and motions as they worked towards a settlement agreement. Pursuant to Procedural Rule 2.7 of the Mississippi Workers’ Compensation Commission (“Commission”), a case status inquiry was issued and mailed to Darty’s attorney in January 2017. Darty failed to respond to the status inquiry, and on March 2, 2017, an administrative judge (“AJ”) ordered that Darty’s claim be dismissed, providing that the dismissal would become final unless a written request for review was filed within twenty days pursuant to Miss. Code Ann. § 71-3-47. The order further provided that the dismissal served as a “rejection of a claim” that triggered the one-year statute of limitations pursuant to Miss. Code Ann. § 71-3-53. No pleadings or documents were filed until October 2020, when Darty filed a motion to reinstate his claim. The Employer/Carrier responded and asserted that the Commission was without jurisdiction to reinstate the claim by operation of the one-year statute of limitations set forth in Miss. Code Ann. § 71-3-53. The AJ denied the motion, and Darty appealed the AJ’s order to the Commission. The Commission affirmed the denial of Darty’s motion to reinstate. Darty appealed.

### **ISSUE**

Whether the Commission erred in denying Darty’s motion to reinstate his claim.

### **HOLDING**

Because Darty’s failure to respond to the Procedural Rule 7 status request constituted a rejection of a claim that triggered a one-year statute of limitations under Miss. Code Ann. § 71-3-53, and because Darty failed to file a motion to reinstate his claim until two years after the statute of limitations had run, the Commission did not err in finding that Darty’s claim to reinstate was time-barred. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers’ Compensation Commission.

**3. After the Workers’ Compensation Commission approved Plaintiff’s settlement, he had effectively exhausted his administrative remedies and he was free to pursue a bad faith claim against the Employer/Carrier in circuit court.**

*Thornhill v. Walker-Hill Env’t*

**The Judgment of the Court of Appeals is Affirmed. The Judgment of the Marion County Circuit Court is Reversed, & The Case is Remanded - 2020-CT-01181-SCT (Aug. 25, 2022)**

En Banc Opinion by Presiding Justice Kitchens

Hon. Anthony Alan Mozingo (Marion County Circuit Court)

Raynetra Lashell Gustavis, Rogen K. Chhabra, & Darryl Moses Gibbs for Appellant

Olivia Yen Truong, Doris Theresa Bobadilla, & Nathan L. Burrow for Appellees

**TORTS – ADMINISTRATIVE REMEDIES – BAD-FAITH ACTIONS** - Claimants are required to exhaust their administrative remedies, or obtain a final judgment from the Workers' Compensation Commission prior to instituting a bad-faith action

**TORTS – EXHAUSTION OF REMEDIES - SETTLEMENT** - Administrative remedies are exhausted when a settlement claim is approved by the Commission and when nothing is left pending before the Commission

### **FACTS**

Jeremy Thornhill claimed he injured his back while working and sought workers' compensation benefits from his employer, Walker-Hill Environmental ("Employer"), and its insurance carrier, Zurich American Insurance Company of Illinois ("Carrier"). The Employer/Carrier denied his request on the grounds he had not sustained a compensable injury. Eventually, the parties came to a compromise settlement under Miss. Code Ann. § 71-3-29 and Thornhill submitted the settlement to the Workers' Compensation Commission ("Commission") for approval. After examining the application, the Commission approved the settlement and dismissed Thornhill's case with prejudice. Thornhill believed his administrative remedies were exhausted and then filed a complaint in trial court against the Employer/Carrier, asserting a bad faith claim. The Employer/Carrier filed a motion to dismiss, arguing Thornhill failed to exhaust his administrative remedies before the Commission because the Commission never determined Thornhill was entitled to workers' compensation benefits. The trial court granted the motion on the basis that it did not have jurisdiction. Thornhill appealed, and the Court of Appeals reversed and remanded the case, finding that Thornhill exhausted his administrative remedies and that the circuit court had jurisdiction to hear his bad faith claim. The Court of Appeals further determined that Thornhill's administrative remedies were exhausted because he settled his workers' compensation claim, the Commission approved the settlement, and nothing was pending before the Commission. The Employer/Carrier petitioned for writ of certiorari.

### **ISSUES**

Whether (1) the Commission's approval of a settlement constituted a finding that exhausts one's administrative remedies, thereby allowing a plaintiff to proceed with a bad faith claim; (2) the circuit court has jurisdiction to hear Thornhill's bad faith claim.

### **HOLDING**

(1) Because Thornhill's compromise settlement with the Employer/Carrier was approved and he had no further business with the Commission, he exhausted his administrative remedies and the circuit court committed reversible error by granting the motion to dismiss. (2) Because there were no issues left pending before the Commission, and because Thornhill's compromise settlement was approved by the Commission, the circuit court had jurisdiction to hear Thornhill's bad faith claim. Therefore, the Supreme Court affirmed the judgment of the Court of Appeals, reversed the judgment of the Marion County Circuit Court, and remanded the case.

**4. The Claimant in this workers' compensation claim got into an altercation with an employee of another contractor over music that was playing on the job site. Because the Claimant engaged in conduct intended to injure himself or another when he abandoned his employment to participate in a physical altercation, the leg injury he allegedly sustained was not compensable.**

*Hollis v. Acoustics, Inc.*

**Affirmed - 2021-WC-01261-COA (Sept. 27, 2022)**

Opinion by Judge Westbrook

Mississippi Workers' Compensation Commission

Marshall Jackson Goff for Appellant

Catherine Bryant Bell for Appellees

**WORKERS' COMPENSATION - AVAILABLE BENEFITS - COMPENSABLE INJURY** - Miss. Code Ann. § 71-3-7(1) provides that an employee is entitled to worker's compensation benefits upon disability or death of an employee from injury arising out of and in the course of employment, without regard to fault as to the cause of the injury

**WORKER'S COMPENSATION - RECOVERY - EXEMPTIONS** - Under Miss. Code Ann. § 71-3-7(4), if the claimant willfully engaged in conduct intended to injure himself or another, his actions are expressly exempt from recovery

## **FACTS**

Jonathan Hollis was employed by Acoustics, Inc. as an acoustical grid installer. In September 2019, Hollis was installing a grid at the Coahoma County Jail. Several Hi-Tek, a sprinkler installation company, employees, including Matthew Chandler Blanks and Conner Self, were also present at the site. Hollis testified that Blanks and Self were playing loud music. Hollis informed his supervisor, Beau Flemming, about the music but did not want to cause trouble by formally reporting the Hi-Tek employees. Self testified that Hollis stopped at their room and made racial slurs about the music. After lunch, Blanks and Hollis were the only workers in a room, and their accounts of an altercation differ. Hollis testified that he apologized to Blanks for reporting him. Hollis further stated that Blanks then cursed him out and Hollis pushed Blanks. Additionally, Hollis alleged that Blanks put him in a chokehold and Hollis attempted to hit Blanks with a hammer drill to escape. Blanks testified that Hollis used racial slurs again, and after Blanks descended a ladder, Hollis shoved Blanks and a fight commenced. Blanks testified that he did not put Hollis in a chokehold, but that Hollis did attempt to hit him with a hammer drill. All parties agreed that the altercation started because of the music, but neither Self nor Flemming witnessed the altercation. Hollis testified his leg was hurt, that he was unable to work for five months, required surgery, and that his injury resulted in a work restriction that significantly impacted his efficiency in installing acoustic grids. In November 2019, Hollis had surgery and he was released from the doctor's care in May 2020. Hollis filed a petition to controvert with the Mississippi Worker's Compensation Commission ("Commission"), and the administrative judge ruled that Hollis did not suffer a compensable work-related injury. Hollis appealed to the full Commission, which ruled that Hollis

did not suffer a compensable work-related injury and that he willfully engaged in conduct intended to injure himself or another, which were actions exempt from recovery. Hollis appealed.

### **ISSUE**

Whether the Commission erred in determining that Hollis did not sustain a compensable work-related injury.

### **HOLDING**

Because nothing in the record showed that Hollis's employment was a contributing cause to his injury, and because the Commission found that Hollis willfully engaged in conduct intended to injure himself or another when he abandoned his employment to participate in a physical altercation, the Commission's decision was supported by substantial credible evidence and was not arbitrary or capricious. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers' Compensation Commission.

**5. Counsel for the Employer and Carrier was deemed to have misled the MWCC after submitting a second report from a vocational rehabilitation expert which counsel for the Employer and Carrier request be drafted. The administrative judge imposed sanctions on the Employer, but the full commission amended its order to impose sanctions on the attorney for Employer and Carrier due to his lack of candor to the court.**

*Howard Indus., Inc. v. Hayes*

**On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2021-WC-00694-COA (Oct. 11, 2022)**

Opinion by Judge McDonald - Concurrence in Part & Dissent in Part by Presiding Judge Wilson  
Mississippi Workers' Compensation Commission

Robert P. Thompson & Laura Walsh Givens for Appellant/Cross-Appellee

Roger K. Doolittle & Floyd E. Doolittle for Appellee/Cross-Appellant

**Consolidated with:**

**On Direct Appeal: Affirmed. On Cross-Appeal: Affirmed - 2021-WC-00695-COA (Oct. 11, 2022)**

Mississippi Workers' Compensation Commission

Robert P. Thompson & Laura Walsh Givens for Appellant/Cross-Appellee

Roger K. Doolittle & Floyd E. Doolittle for Appellee/Cross-Appellant

**WORKERS' COMPENSATION - SANCTIONS - DELAY OF PROCEEDINGS** - Miss. Code Ann. §71-3-59(2) provides that if the full Commission determines that the proceedings in respect to a claim have been delayed without reasonable ground, the full commission shall require the delaying party or attorney advising such party to pay the reasonable expenses; sanctions are authorized when any claim or defense is asserted without substantial justification or when conduct by an attorney causes unnecessary delay or harassment

**WORKERS' COMPENSATION - SANCTIONS - MISREPRESENTATION** - Presenting truthful evidence and testimony to the Commission is so important an obligation that the worker's compensation statutes make it a crime to present false or misleading evidence in order to withhold benefits; sanctions are appropriate upon a finding of misrepresentation to the court and Miss. Code Ann. § 71-3-59(2) authorizes the Commission to impose sanctions on a party and/or its attorney

**WORKERS' COMPENSATION - BENEFITS - PERMANENT PARTIAL DISABILITY** - Miss. Code Ann. §71-3-7(1) provides that compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease; to be entitled to permanent partial disability payments for body-as-a whole injuries, a claimant must show that he has a permanent medical impairment rating or permanent work restrictions that result in a loss of wage-earning capacity

**WORKERS' COMPENSATION - BENEFITS - INDUSTRIAL LOSS OF USE** - Miss. Code Ann. §71-3-17(c)(26) provides for compensation when there has been either an anatomical loss of a body member or when there has been a vocational or industrial loss of use of a member

## **FACTS**

In 2007, Selina Hayes fell while working as a coal winder for Howard Industries and injured her head, neck, shoulders, and back. Hayes earned \$12.43 per hour at the time of the injury. Following this injury, Hayes received benefits from Howard Industries. In September 2008, Hayes's doctors approved her to return to work with some lifting restrictions. In 2015, Hayes was injured again while lifting an eight-gauge wire over her head and underwent surgery on her right shoulder. Hayes received worker's compensation payments while she was unable to work. In 2016, Hayes filed a petition to controvert with the Mississippi Workers' Compensation Commission ("MWCC") claiming that Howard Industries failed to pay permanent disability benefits for her second injury. Howard Industries denied Hayes's claims of temporary or permanent disability. However, Howard Industries' claims consultant, Larry Jackson, later sent the MWCC records of payments to Hayes, including records of payments for Hayes's temporary total disability and notice of their suspension. In 2017, Hayes's doctor cleared her to return to work with restrictions. Additionally, a physical therapist determined that Hayes could only work five days a week for a total of forty hours per week with no lifting above her shoulders and a twenty-pound weight limit. Upon Hayes's return, Howard Industries accommodated her by placing her in the role of coil winder trainer. In this role, Hayes earned less than other coil winder trainers because she was unable to work overtime. In 2019, Richard Yoder, Howard Industries' attorney, submitted a report from their proposed expert in vocational rehabilitation, Peter Mills. The vocational report showed that the role of coil winder trainer included twenty hours per week of overtime, meaning that Hayes's no-overtime restriction resulted in a loss of earnings. Three days later, Yoder filed an attachment to the report and a new summary form. Contrary to the first report, Yoder's new summary form did not show overtime, indicating that Hayes's no-overtime restriction did not result in any loss of earnings.



At an administrative hearing in 2019, Mills admitted that the attachment to his first report showed that coil winder trainers work approximately twenty hours per week of overtime. Although his written report stated that he had been retained to evaluate the coil winder trainer position in general, Mills stated that the first attachment to his report was a mistake, and that he only meant to evaluate Hayes's specific job. Mills stated that he changed the report because Yoder informed him that the information contained was incorrect. Hayes's attorney asked to recess the hearing so that he could get confirmation of overtime requirements from other coal winder trainers. The Administrative Judge ("AJ") agreed to recess the hearing. Hayes's attorney subpoenaed all wage records from other coil winder trainers at Howard Industries, as well as other company financial records. The AJ reset the recessed hearing four times, but in 2020, the recessed hearing reconvened. Hayes's supervisor testified to the accuracy of the coil winder trainers' twenty hours of overtime per week. Mills testified that Yoder had never told him to falsify a report and stated that his job was to analyze Hayes's position only, not the coil winder trainer position generally. Hayes's attorney moved for sanctions against Howard Industries, Yoder, and Mills, and requested that they pay his attorney's fees. He also argued that Mills's second report should have been stricken from the record. The AJ held that Hayes's wage-earning capacity was reduced from both her 2007 and 2015 injuries and found that her injuries resulted in a significant loss of access to jobs in her geographical area. The AJ stated that Hayes's current wages in her accommodated position were an unreliable indication of future wages outside Howard Industries. Further, the AJ concluded that Mills' second report contained material misrepresentations influenced by Yoder, stated that Mills' reports caused over a year of delay in the proceedings, and imposed a \$1,000 civil penalty against Howard Industries. The AJ also ordered Howard Industries to pay Hayes benefits consistent with the order and \$1,500 to Hayes for attorney's fees. In 2021, after Howard Industries filed a petition for review, the full MWCC affirmed the AJ's findings of Hayes's loss of wage-earning capacity and affirmed that Hayes sustained a thirty-eight percent loss of industrial use of her right arm from her injury in 2015. The MWCC affirmed the AJ's order to pay Hayes benefits but amended the award of permanent partial disability payments for the 2007 injury and the 2015 injury based on its own calculations. Further, the MWCC amended the award of sanctions and attorney's fees to require Yoder to pay the sanctions and fees because Yoder submitted the report and instructed Mills to change it. Howard Industries appealed, and Hayes cross-appealed.

## **ISSUES**

Whether (1) the evidence supported the award of sanctions and attorney's fees against Yoder, Howard Industries, or Mills; (2) the MWCC erred by not sanctioning Mills or Howard Industries; (3) the MWCC erred in finding that Hayes suffered a loss of wage earning capacity as a result of her 2007 injury, which entitled her to permanent partial-disability payments; and (4) the evidence supported the MWCC's finding of a thirty-eight percent industrial loss of use as a result of Hayes's 2015 injury.

## **HOLDING**

(1) Because Yoder had a duty of candor to the MWCC and the MWCC found that he misled them, because Mills admitted he only prepared the second report at Yoder's instruction with information Yoder provided, because the MWCC found that the misleading nature of Mill's testimony and the reports offered by Yoder caused unnecessary delay in the proceedings, the MWCC's decision was

supported by substantial evidence. (2) Because Hayes failed to cite any authority or present a proper argument of her issue on cross-appeal, the issue was procedurally barred; notwithstanding the procedural bar, because no proof was presented that Yoder acted on the instructions of Howard Industries that would have made the company liable under any theory of agency, and because Miss. Code Ann. §71-3-59(2) authorized the MWCC to impose sanctions on a party and its attorney, not against an expert witness, the MWCC did not err in directing that Yoder alone pay the sanctions and attorney's fees. (3) Because Hayes did not have the "necessary production job" protection in her coil winder position, because she presented un rebutted expert testimony to her loss of access to jobs both locally and nationally if she was terminated, because both of Hayes's vocational experts testified to factors relating to Hayes's loss of wage-earning capacity, and because all factors affecting loss of wage-earning capacity were considered, not just loss of earnings, the evidence as a whole supported the MWCC's finding that Hayes sustained a loss of wage-earning capacity for which she was entitled to permanent partial disability benefits. (4) Because Hayes's industrial loss of use percentage was higher than her medical impairment percentage, the MWCC did not err in finding a thirty-eight percent industrial loss of use. Therefore, on direct appeal, the Court of Appeals affirmed the decision of the Mississippi Workers' Compensation Commission. On cross-appeal, the Court of Appeals affirmed the decision of the Mississippi Workers' Compensation Commission.

**6. Although Employer and Carrier had paid Claimant medical and indemnity benefits for over a year, the Employer and Carrier were not estopped from raising an intoxication defense. Because Claimant's post-accident drug test – which Employer and Carrier did not receive until over a year after the accident – showed a positive result for marijuana, the very presence of marijuana in Claimant's system at the time of his accident was enough to violate Miss. Code Ann. § 71-3-121(1) thus making the claim not compensable.**

*Meek v. Cheyenne Steel, Inc.*

**Affirmed - 2021-WC-01219-COA (Oct. 11, 2022)**

Opinion by Judge Westbrook

Mississippi Workers' Compensation Commission

Christopher Hederi Neyland for Appellant

Matthew Jason Sumrall for Appellees

**WORKERS' COMPENSATION - PLEADINGS - AFFIRMATIVE DEFENSES** - Under Miss. Code Ann. § 71-3-37, an employer's failure to file to controvert the right to compensation does not prevent the employer from raising any defense when the claim is subsequently filed by the employee; the law does not require affirmative defenses to be raised until after an employer responds to a petition to controvert

**EMPLOYMENT LAW - DRUGS & ALCOHOL - TESTING** - Under Miss. Code Ann. § 71-7-27(2), any private employer who does not make an election to conduct drug and alcohol testing will be deemed to not be conducting an employee drug and alcohol testing policy or program pursuant to the provisions of Chapter 7 of the Mississippi Code, and in that event, the rights and

obligations of the employer and its employees are not subject to or affected by the provisions of the chapter

**WORKERS' COMPENSATION - PROXIMATE CAUSE - ILLEGAL DRUGS** - Under Miss. Code Ann. § 71-3-121(1), if an employee has a positive test indicating the presence, at the time of a work-related injury, of any drug illegally used, it is presumed that the proximate cause of the injury was the use of the drug

## **FACTS**

In 2018, Miles Meek suffered an injury during the scope of his employment at Cheyenne Steel, Inc. (“Cheyenne”). He was transported to a hospital, where he was treated for injuries to his hip, shoulder, groin, and back. Meek was also given a preliminary drug screen that tested positive for marijuana. Cheyenne then began paying temporary total-disability benefits and permanent partial-disability benefits. In 2019, Meek’s treating doctors assigned a two-percent impairment rating and a six-percent permanent partial-impairment rating but released Meek with light-duty restrictions and a lifting restriction. After returning to work, Meek claimed that Cheyenne did not accommodate his restrictions, but Cheyenne’s co-owner and vice president testified that Cheyenne tried to accommodate him, but because Meek was difficult and could not do his job, they terminated him. Meek filed a petition to convert, and Cheyenne pled intoxication as an affirmative defense. At a hearing before an Administrative Judge (“AJ”), Meek argued that the drug test did not contain sufficient data to raise the presumption that marijuana was the proximate cause of his injury, so Cheyenne should have been barred from pleading intoxication. Cheyenne responded by stating that it did not receive the drug test results until 2020 in response to a subpoena and that Meek’s previous admission to marijuana use combined with the positive test result supported the presumption of an intoxication defense. Meek stated that he did not know about the positive drug test, did not use marijuana during the work week or on the job, and did not remember the last time he used it prior to his accident. The AJ found that Meek failed to rebut the presumption of intoxication and denied and dismissed his claim. Subsequently, Meek filed a petition for review by the full Mississippi Workers Compensation Commission (“MWCC”), who then remanded the case to the AJ to issue findings of fact and conclusions of law. However, the AJ did not issue findings of fact or conclusions of law regarding the issue of intoxication but concluded that Meek did not prove the existence of permanent disability exceeding the two percent impairment rating to his hip. Meek appealed, and Cheyenne cross-appealed the order. The MWCC reversed the AJ’s order, stating that Cheyenne had properly pled the affirmative defense of intoxication, that Meek had presented no evidence that misled him or caused him to make decisions to his detriment, and that the payment of benefits did not prohibit Cheyenne from asserting an intoxication defense. Further, the MWCC found that Meek’s intoxication was the proximate cause of the injury and dismissed his claim. Meek appealed.

## **ISSUES**

Whether the (1) MWCC erred in holding that Cheyenne was not estopped from raising intoxication as an affirmative defense after the employer had paid benefits; (2) MWCC erred in its application of the Mississippi Code as it pertained to drug testing; and (3) MWCC’s decision was inconsistent with its decision in *Cartwright v. Southeast Ready Mix Inc.*

## **HOLDING**

(1) Because Cheyenne first set out affirmative defenses in its answer to the petition to controvert filed by Meek, and because Cheyenne testified that it was unaware of Meek’s drug test results until it subpoenaed records to prepare for the hearing on the petition to controvert, the MWCC did not err in holding that the principle of estoppel did not bar Cheyenne’s affirmative defense of intoxication. (2) Because there was no indication that Cheyenne had implemented a drug testing policy or that it requested the drug test, and because the hospital made a unilateral decision to administer the test, the statutes regarding employer drug and alcohol testing were inapplicable to Meek. (3) Because Meek’s drug test showed a presence of marijuana at the time of his injury, and because marijuana was a Schedule 1 Controlled Substance that was illegal at the time of Meek’s accident with no mechanism existing to legally ingest it, the very presence of marijuana in Meek’s system at the time of his accident was enough to violate Miss. Code Ann. § 71-3-121(1) and the application of *Cartwright* would not have changed the outcome. Therefore, the Court of Appeals affirmed the decision of the Mississippi Workers’ Compensation Commission.

**7. Defendant contractor was not the statutory employer but rather “prime” or “general” contractor. As such, the defendant contractor was subject to suit as a third party.**

*Mayberry v. Cottonport Hardwoods*

**Reversed & Remanded - 2021-CA-00246-COA (Nov. 8, 2022)**

En Banc Opinion by Judge Emfinger - Dissent by Presiding Judge Carlton

Hon. M. James Chaney Jr. (Warren County Circuit Court)

Raynetra Lashell Gustavis for Appellant

Melton James Weems & Nicole Alise Broussard for Appellees

**WORKERS’ COMPENSATION - LIABILITY - STATUTORY EMPLOYER** - Miss. Code Ann. § 71-3-7(6) provides that in the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment; the contractor is considered the statutory employer of the subcontractor’s employees

**WORKERS’ COMPENSATION - IMMUNITY- STATUTORY EMPLOYER** - Miss. Code Ann. § 71-3-9 states that the liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, except that if an employer fails to secure payment of compensation as required, an injured employee may elect to claim compensation or to maintain an action at law for damages on account of such injury or death

## **FACTS**

In 2015, Diamond Barge Company LLC (“Diamond Barge”) conveyed all timber on a tract of land to Cottonport Hardwoods LLC (“Cottonport”) by a Special Warranty Timber Deed. The deed described the timber as having been acquired by Diamond Barge via a Transfer of Timber from

Diamond Point Land Company LLC (“Diamond Point”) and stated that it was the intent of Diamond Barge to transfer and convey to Cottonport all timber acquired from Diamond Point. In 2017, MB & LB Investments LLC conveyed by Warranty Timber Deed to Cottonport certain timber on the real property. The deed provided that Cottonport would have the right to enter the property and harvest the timber until December 31, 2021. After purchasing the timber on Davis Island, Cottonport contracted with BLC Trucking to cut and haul timber between the yard and the mill. BLC Trucking then entered into a subcontract with Kettley Trucking, Inc. (“Kettley Trucking”) to haul logs from Davis Island to lumber mills. Kettley Trucking subcontracted with Joseph West, doing business as 747 Trucking, to assist in hauling the logs and West then hired Alex Mayberry to drive West’s log truck and haul logs from Davis Island. Mayberry was injured while his truck was being loaded with logs and he then filed for workers’ compensation benefits, naming Kettley Trucking, BLC Trucking, and Cottonport as employers. All three employers denied the existence of a direct or statutory employment relationship with Mayberry and denied liability to pay him workers’ compensation benefits. Cottonport and BLC Trucking were voluntarily dismissed without prejudice, but the Mississippi Workers’ Compensation Commission (“Commission”) found that Kettley Trucking was Mayberry’s statutory employer and was required to pay him workers’ compensation benefits. Mayberry subsequently filed suit for damages in circuit court against Cottonport, BLC Trucking, and Ernest Moore. The complaint alleged that Moore, employed by Cottonport, was loading logs onto Mayberry’s tractor when a log fell from the loader and struck Mayberry, causing serious injuries. The defendants filed motions to dismiss for failure to state a claim upon which relief could be granted, and the circuit court denied the motions to dismiss without prejudice and allowed discovery on whether the Mississippi Workers’ Compensation Law provided Mayberry exclusive remedy. After discovery, Cottonport filed a motion in which it claimed that it was also Mayberry’s statutory employer and that his claims were barred since workers’ compensation coverage was his exclusive remedy against Cottonport and Moore. The circuit court then granted summary judgment in favor of Cottonport and Moore. Mayberry appealed.

## **ISSUES**

Whether the circuit court erred by (1) finding that Cottonport was Mayberry’s statutory employer and (2) granting summary judgment to Cottonport and Moore for exclusive remedy immunity.

## **HOLDING**

(1) Because Cottonport owned the standing timber and was the owner of the project to harvest the timber, because Cottonport contracted with BLC Trucking to cut and haul the timber, and because BLC Trucking was the “prime” or “general” contractor, the circuit court erred by finding that Cottonport was Mayberry’s statutory employer. (2) Because Cottonport was not Mayberry’s statutory employer, and because Cottonport was a third party subject to suit under Miss. Code Ann. § 71-3-9, the circuit court erred in granting summary judgment to Cottonport and Moore for exclusive remedy immunity. Therefore, the Court of Appeals reversed and remanded the judgment of the Warren County Circuit Court.

**8. Claimant failed to present sufficient evidence that the medical procedure performed nearly a year after the alleged accident was causally related to her work injury, so the Employer was not financially responsible for the procedure.**

*Myrick v. Univ. of Miss. Med. Ctr.*

**Affirmed - 2021-WC-01401-COA (Mar. 21, 2023)**

Opinion by Judge Smith

(Mississippi Workers' Compensation Commission)

Marshall Jackson Goff for Appellant

Daniel Paul Culpepper for Appellees

**WORKERS' COMPENSATION - TOTAL DISABILITY - INABILITY TO RETURN TO WORK** - Under Miss. Code Ann. § 71-3-17, in order to be deemed permanently totally disabled, a claimant must show something more than an inability to return to the job existing at the time of injury

**WORKERS' COMPENSATION - TOTAL DISABILITY - ALTERNATIVE FORMS OF WORK** - A finding that the claimant has not pursued alternate forms of work with sufficient diligence is grounds to deny a claim of total disability

**WORKERS' COMPENSATION - DISABILITY - MEDICAL EVIDENCE** - An injured worker must support a claim of disability with medical findings; medical evidence must prove not only the existence of a disability but also its causal connection to employment

## **FACTS**

In January 2018, Merlene Myrick sustained a work-related injury when she slipped and fell on a patch of ice in the University of Mississippi Medical Center ("UMMC") parking lot as she was walking into work. Myrick sought treatment the following day and over the next few months from various doctors and received various diagnoses. Myrick never returned to work at UMMC. In February 2018, Myrick went to Dr. Leonel Vance for treatment. Dr. Vance noted that Myrick was unable to return to work due to the severity of her pain. In January 2019, Myrick reported to the emergency room claiming she lost motor function in her left lower extremity. An MRI revealed that she had a ruptured disc in her back, and Dr. Adam Lewis performed a left L4-L5 microdiscectomy at that time. Dr. Vance's notes after the surgery indicated that Myrick "underwent a left L4-L5 microdiscectomy during the first week of January 2019 with Dr. Adam Lewis at Merit Health Crossgates - unrelated to her original injury." Dr. Vance's notes also stated that Myrick requested a release to go back to work on March 18, 2019, and Dr. Vance released her to return to work with sedentary duty restrictions. Despite Dr. Vance's release for Myrick to return to work, he also wrote an excuse for Myrick from May 23, 2019, to June 18, 2019, excusing her from work while she remained under his care. In August 2019, Myrick underwent an "Employer Medical Evaluation" with Dr. Jeffrey Summers, in which he also noted that the microdiscectomy procedure was not related to Myrick's work injury. Subsequently, Myrick saw Dr. Vance on November 19, 2019, at which time Dr. Vance placed Myrick at maximum medical improvement

(“MMI”) and requested a functional capacity examination (“FCE”). Although Dr. Vance placed Myrick at MMI, he issued Myrick a work excuse from November 19, 2019, to January 21, 2020. When Myrick returned to Dr. Vance on January 21, 2020, she continued to report that UMMC would not allow her to return to work with any restrictions. Myrick filed a petition to controvert with the Mississippi Workers’ Compensation Commission (“Commission”) disputing the nature and extent of her injury. Myrick requested permanent disability benefits from the Commission, and she requested to have her back surgery deemed causally related to her work injury. The administrative judge rendered a decision finding that Myrick failed to perform an adequate job search and, therefore, failed to ultimately prove she was entitled to permanent disability benefits. The administrative judge also found that Myrick failed to meet her burden of proof to establish that the surgical procedure performed by Dr. Lewis was related to the work injury and therefore determined that UMMC was not financially responsible for the procedure. The Commission subsequently affirmed the administrative judge’s order. Myrick appealed.

## **ISSUES**

Whether the Commission erred (1) by denying Myrick’s request for permanent and total disability benefits because she failed to conduct a job search and (2) by denying her request to have the L4-L5 microdiscectomy procedure deemed causally related to her work-related injury and therefore be deemed the financial responsibility of UMMC.

## **HOLDING**

(1) Because there was sufficient evidence that Myrick did not adequately pursue alternative employment after UMMC allegedly refused to reinstate her, the Commission did not err by denying permanent and total disability benefits to Myrick. (2) Because the records of Dr. Vance did not offer sufficient affirmative medical evidence to causally connect the subsequent surgery to Myrick’s original work injury and there were other doctors’ findings that showed the opposite, the Commission did not err by denying Myrick’s request to have the L4-L5 microdiscectomy procedure deemed causally related to her work-related injury. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Worker’s Compensation Commission.

**9. Claimant alleged that she injured her right shoulder during a functional capacity exam following an injury to her right wrist, hip, back, and neck, but because she failed to show direct evidence that her alleged shoulder injury was a result of her participation in the FCE, the right shoulder injury was deemed non-compensable.**

*Parker v. Miss. Dep’t of Health*

**Affirmed - 2022-WC-00552-COA (Mar. 28, 2023)**

En Banc Opinion by Presiding Judge Carlton - Dissent by Judge Westbrook

Mississippi Workers’ Compensation Commission

James Kenneth Wetzel & Garner James Wetzel for Appellant

Ginger Moore Robey for Appellees

## **WORKERS' COMPENSATION - LOSS OF WAGE-EARNING CAPACITY - FACTORS**

- Factors which should be considered in determining loss of wage-earning capacity 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 circumstances

## **WORKERS' COMPENSATION - OPINION EVIDENCE - EXPERT TESTIMONY**

- Issues with reference to an alleged injury are properly within the province of medical experts, and in all but simple and routine compensation cases, it is necessary to establish medical causation by expert testimony

## **FACTS**

In July 2017, Marsha Parker was injured, during the scope of her employment, after she tripped over a tile on the floor and fell. She injured her right wrist, hip, back, and neck. She informed her supervisor, Dr. Angela Filzen, about her injuries and reported to the emergency room, where she was later given a referral to see Dr. George Salloum. He treated her wrist injury, ordered physical therapy, and referred her to Dr. Eric Graham for her neck and back pain. Dr. Graham recommended surgery, but Parker declined; therefore, he recommended another doctor for pain management, but no treatment was administered. In addition, Dr. Graham recommended physical therapy with Doug Roll for a two-day functional capacity exam ("FCE"). In November 2017, Parker completed day one of the FCE but did not complete day two because she claimed she was injured when a weighted box fell on her right shoulder. Roll's medical report showed no indication that Parker was injured, nor did she ask him to stop the exam. However, Roll could not recall whether Parker had informed him of pain. Roll's notes also indicated that she did not attend the second day because of increased pain. In January 2018, Dr. Graham sent Parker for a second FCE, which she completed in March 2018. In August 2018, Parker returned to Dr. Salloum and reported her injuries from the first FCE. In October 2018, Dr. Salloum recommended surgery for Parker's right shoulder. However, the Mississippi Department of Health ("MDH"), Parker's employer, did not approve the surgery as covered under MDH's workers' compensation obligations. In November 2018, Dr. Mitias performed an employer's medical evaluation on behalf of MDH, and his findings could not show a correlation between her torn rotator cuff and the lifting. Furthermore, Parker's previous injury from 2010 showed a partial tear, and the 2018 report showed the tear extended but still partial. Because of this, he recommended surgery, but informed Parker that her private insurance would have to cover it. Parker was released to work in May 2018 but did not return until February 2019. In May 2020, the Administrative Judge ("AJ") entered an order finding Parker had sustained a compensable right-shoulder injury while participating in an FCE, and she sustained a fifty percent loss of wage-earning capacity. MDH appealed AJ's ruling to the Mississippi Worker Compensation Commission ("MWCC"), arguing AJ's finding was contrary to the evidence and applicable law. The MWCC partly reversed and vacated AJ's order and remanded the case. First, the MWCC found that Parker did not establish that she suffered a compensable right-shoulder injury and that, based on the evidence, a legal rebuttable presumption existed of no loss of wage-earning capacity. Then, the AJ entered a second order finding that Parker sustained a fifty percent loss of wage-earning capacity. MDH appealed AJ's second order, and the MWCC agreed but found that Parker only sustained a fifteen percent loss of wage-earning capacity due to her compensable work-related injuries. Parker appealed.



## ISSUES

Whether the MWCC properly found that (1) Parker did not suffer a compensable right-shoulder injury and (2) Parker's compensable injuries had diminished her wage-earning capacity by only fifteen percent.

## HOLDING

(1) Because Parker's claim did not constitute a simple and routine case, because Parker failed to show direct evidence that her alleged shoulder injury was a result of her participation in the FCE, because Parker was previously diagnosed with a partial right rotator cuff tear in 2010, and the 2018 MRI was similar, because Dr. Matias did not believe Parker's shoulder injury was related to her lifting tasks, because Parker did not mention injuring her shoulder during the exercises performed in the FCE, and because her heart rate remained the same during the musculoskeletal assessment, the MWCC did not err in finding that Parker did not suffer a compensable right-shoulder injury. (2) Because Parker's ability was only minimally impacted, because Parker did not present evidence showing medical advice restricted the number of hours she could work, because Parker had no medical restrictions from fulfilling her work duties, because she was released to return back to work with a fifty-pound lifting restriction and none of her duties would result in lifting over fifty pounds, because Parker's doctor gave her discretion to decide to lift any item, because her doctor gave her access to any accommodations she needed and she never requested any, and because Parker could have sought the light-duty position of dental hygienist, with an earning capacity higher than what she made with MDH, but did not perform a job search, the MWCC did not err in finding that Parker's compensable injuries had diminished her wage-earning capacity by only fifteen percent. Therefore, the Court of Appeals affirmed the judgment of the Mississippi Workers' Compensation Commission.

**10. An injured employee sought damages from the individual who caused his injuries, but because the two parties were "fellow servants," the injured employee's exclusive remedy was workers' compensation benefits.**

*Dawson v. Burgs*

**Affirmed - 2021-CA-01038-COA (Apr. 11, 2023)**

En Banc Opinion by Judge Greenlee - Dissent by Judge Westbrook

Hon. Richard A. Smith (Sunflower County Circuit Court)

Charles M. Merkel Jr., Edward P. Connell Jr., & Robert Alexander Carson III for Appellant

Robert P. Thompson & Charles Barton Wynn Jr. for Appellees

**TORTS - NEGLIGENCE - BORROWED SERVANT** - Under the borrowed servant doctrine, a servant, in general employment of one person, who is temporarily loaned to another person to do the latter's work, becomes the servant of the borrower, although he remains in the general employment of the lender

**TORTS - NEGLIGENCE - BORROWED SERVANT** - In determining whether one is a borrowed servant, courts consider (1) whose work is being performed, (2) who controls or has the right to control the workman as to the work being performed, and (3) whether the workman voluntarily accepted the special employment

**CONTRACTS - INTERPRETATION - WAIVER** - The reality of the workplace and the parties' actions in carrying out a contract can impliedly modify, alter, or waive express contract provisions

**TORTS - NEGLIGENCE - FELLOW SERVANT** - The Mississippi Workmen's Compensation Act bars a suit by an injured employee against a fellow servant when the plaintiff is covered by the Act

## **FACTS**

Staffing agency Brambles Inc. assigned Roger Dawson to work for Dollar General in its warehouse and provided workers' compensation coverage to Dawson. Another staffing agency, Professional Staffing Company Inc. ("Professional Staffing"), assigned Larry Burgs to the same warehouse. In September 2018, Dollar General and Professional Staffing created a temporary service agreement stating that Burgs was an employee of Professional Staffing and should not be considered an employee of Dollar General. However, the agreement indicated that Dollar General would be responsible for training, assisting, instructing, and supervising employees. The agreement also stated that Professional Staffing was an independent contractor for Dollar General. The document noted that the initial service agreement term would run for one year. Over a year later, in December 2019, Dawson was injured when Burgs turned the throttle on a stuck pallet jack that pinned Dawson's leg against a merchandise rack. Liberty Mutual, the worker's compensation insurance carrier for Brambles Inc., compensated Dawson for his injuries. In November 2020, Dawson filed a negligence complaint against Burgs and Professional Staffing under the doctrine of respondeat superior. Liberty Mutual filed an intervening complaint asserting that it had paid benefits to Dawson and was entitled to reimbursement if a court found Burgs and Professional Staffing liable for Dawson's injury. In March 2021, Burgs and Professional Staffing filed a motion for summary judgment, alleging that Dawson could only recover through workers' compensation because Burgs was a "borrowed servant" of Dollar General during the accident. In an affidavit, Professional Staffing's office manager stated that Professional Staffing had no control over job assignments, that Burgs voluntarily accepted temporary employment at Dollar General, that Dollar General trained Burgs, and that Burgs worked on behalf of Dollar General and at their discretion. Dawson admitted that Burgs was performing work for Dollar General at the time of the accident. In August 2021, the circuit court granted Burgs' and Professional Staffing's motion for summary judgment, finding that Burgs was immune from liability as Dawson's "fellow servant" and that Professional Staffing was not vicariously liable for Burgs' actions. Dawson appealed.

## **ISSUE**

Whether the circuit court erred by granting Burgs' and Professional Staffing's motion for summary judgment.

## **HOLDING**

Because Dollar General controlled, supervised, and trained Burgs who was voluntarily working at Dollar General, because Dawson failed to demonstrate significant probative evidence that Dollar General did not have exclusive control over Burgs, because there was no general issue of material fact as to Burgs' status as a borrowed servant, because Burgs was Dollar General's borrowed servant during the accident, because Dawson was limited to workers' compensation benefits as his exclusive remedy, and because Burgs was Dawson's fellow servant, Burgs was immune from liability and Professional Staffing was not vicariously liable for Burgs' actions, and the circuit court did not err by granting Burgs' and Professional Staffing's motion for summary judgment. Therefore, the Court of Appeals affirmed the judgment of the Sunflower County Circuit Court.