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ABLE BUT UNWILLING TO WORK: WHY THE CURRENT STATE OF WORKERS' COMPENSATION LAW IN MISSISSIPPI DETERS WORKERS FROM RETURNING TO WORK AS SOON AS THEY ARE PHYSICALLY ABLE

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I. INTRODUCTION

In 2019, the National Safety Council estimated that the total economic cost of work-related deaths and injuries in the United States was $171,000,000,000 and the amount of workdays lost due to these deaths and injuries was 105,000,000 days.[1] On average, for every day of work missed by a worker due to a work-related death or injury, the total economic loss was over $1,600 per worker.[2] Therefore, any time a worker is injured on the job, the overarching goal for both the employer and the employee should be for the worker to return to work as soon as is safely possible to help mitigate the economic loss to both the company and society as a whole, right?

Employers suffer both direct and indirect costs when a worker suffers a work-related death or injury and is forced to miss time from work.[3] Direct costs are those covered by workers' compensation insurance.[4] Indirect costs are all uninsured additional costs associated with an accident.[5] Indirect costs can be two to ten times more expensive than direct costs to an employer.[6] Additionally, indirect costs are uninsured and come directly from the employer's pocket.[7] A few examples of indirect costs are productive time lost by an injured worker, time to hire or train a worker to replace the injured worker until they return to work, and reduced morale among employees.[8] These are all indirect costs that can be mitigated by having an injured worker return to work as soon as it is safely possible.

Additionally, studies have shown that returning to work is beneficial to the physical and mental health of an injured worker.[9] Despite all of these reasons for having an injured worker return to work as soon as is safely possible, a recent change in the Workers' Compensation law in Mississippi has discouraged injured workers from returning to work as soon as they are cleared by a doctor. Instead, the law forces the injured worker to wait until

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[1] *Work Injury Costs*, NATIONAL SAFETY COUNCIL INJURY FACTS, https://injuryfacts.nsc.org/work/costs/work-injury-costs/ (last visited Feb. 17, 2020).

[2] *See id.*

[3] United States Department of Labor, *Direct and Indirect Costs of Accidents*, OCCUPATIONAL SAFETY AND HEALTH TRAINING, https://www.oshatrain.org/courses/pages/700costs.html (last visited Feb. 17, 2020).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Anya Stephens, *Why Returning to Work After an Injury is so Important*, PEOPLESENSE (Aug. 7, 2017), https://www.peoplesense.com.au/news/article/07082017-239/why-returning-to-work-after-an-injury-is-so-important.

they reach maximum medical improvement before returning to work if the worker is to have any hope of receiving permanent disability benefits.

The reason for this absurdity is found in a recent Mississippi Supreme Court decision. The court applied a rebuttable presumption that an injured worker suffered no loss of wage-earning capacity when she returned to work at the same (or greater) pay she received before the injury even though she had not reached maximum medical improvement. Historically, this presumption had only been applied after an injured worker reached maximum medical improvement and healing was complete. Currently, a worker who has been medically cleared to return to work need not do so until he reaches maximum medical improvement if he wishes to receive permanent disability benefits (if the need for such benefits arises). If that injured worker returns to work, he will automatically be presumed to have suffered no loss of wage-earning capacity and will be saddled with the burden of proof to show rebutted evidence.

This Comment will analyze and discuss the rebuttable presumption in Mississippi Workers' Compensation law that an injured worker who returns to work at the same position with the same (or greater) pay as before his or her workplace-related injury has suffered no loss of wage-earning capacity. Specifically, this Comment will explain why this presumption should only be applicable if the injured worker returns to work after he or she has reached maximum medical improvement. Section II will provide a background to this rebuttable presumption as well as on Workers' Compensation law in Mississippi. Section III will discuss why the rebuttable presumption should only be applied if the worker returns to work after he or she has reached maximum medical improvement.

II. BACKGROUND

A. What is Permanent Disability?

Permanent disability is a disability that "will remain with a person throughout" his or her lifetime, or from which he will not recover; one "that in all possibility, will continue indefinitely."[10] Generally, a worker is eligible for permanent disability benefits from the Workers' Compensation Commission if the worker has not made a complete recovery from his work-related injury once the condition has stabilized.[11] The test to determine how much a permanently disabled worker should be compensated varies from

[10] *Permanent disability*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

[11] *Workers' Compensation: Permanent Disability Benefits*, LEGAL AID AT WORK, https://legalaidatwork.org/factsheet/workers-compensation-permanent-disability-benefits/ (last visited January 11, 2020).

state to state.[12] Typically, workers' compensation for permanent total disability is "a percentage of the worker's wages, average weekly or monthly earnings, spendable weekly wages, or the statewide average weekly wage."[13] Some states have asserted that the purpose of permanent total disability payments is to provide permanently totally disabled workers with the equivalent of continued employment in the form of lifetime wage replacement.[14]

Specifically in Mississippi, statutory law has defined disability as the "incapacity because of an injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings."[15] Additionally, Mississippi statutory law provides that if a worker is permanently disabled, he will be entitled to compensation payments from the Workers' Compensation Commission.[16] The amount of compensation to which each worker is entitled is calculated using the guidelines listed in Section 71-3-17 of the Mississippi Code.[17]

Section 71-3-17 states that if a worker suffers permanent total disability, they will be entitled to receive sixty-six and two-thirds percent of their average weekly wages, but these payments should not exceed four-hundred fifty weeks or an amount greater than four-hundred fifty weeks times sixty-six and two-thirds percent of their average weekly wage.[18] Section 71-3-17 also states that if a worker suffers permanent partial disability, the compensation shall be sixty-six and two-thirds percent of their average weekly wages, subject to the maximum limitations as to weekly benefits defined by the Mississippi Code.[19]

In order to determine whether the statutory definition of disability is met in Mississippi, the Mississippi Supreme Court has ruled that the claimant must be unable to acquire work in the same employment or similar jobs, and the claimant's unemployability must be due to the injuries in question.[20] Another way of stating this is that in order for a claimant to be eligible for disability payments, the claimant must have suffered a loss of wage-earning capacity.

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[12] *Permanent total disability*, 2 Modern Workers Compensation § 200:19, Westlaw (database updated August 2022).

[13] *Id.*

[14] *Id.*

[15] MISS. CODE ANN. § 71-3-3 (2021).

[16] *Id.* § 71-3-17.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Georgia Pacific Corp. v. Taplin, 586 So. 2d 823, 828 (Miss. 1991).

Determining whether a claimant has suffered a loss of wage-earning capacity is not as black-and-white as it may appear. Courts often have trouble determining whether an injured worker will make a full recovery to work at his pre-injury payrate or whether he will lose that capacity. In order to aid the Mississippi courts in making this determination, the Mississippi Court of Appeals has identified a number of factors to determine whether an injured worker has suffered a loss of wage-earning capacity.[21] These factors include "the amount of education and training that the claimant had, [his] inability to work, [his] failure to be hired elsewhere, the continuance of pain, and any other related circumstances."[22]

B. The Rebuttable Presumption Prior to Hudspeth Regional Center v. Mitchell

In Mississippi, decisions concerning loss of wage-earning capacity are generally factual inquiries left largely to the discretion of the Mississippi Workers' Compensation Commission.[23] However, in *Karr v. Armstrong Tire & Rubber Company*, decided in 1953, the Mississippi Supreme Court took some of the discretion out of the Commission's hands and ruled that if an injured worker is able to return to work and receives the same or greater earnings as those prior to the injury, a rebuttable presumption arises that the worker's wage-earning capacity has not been diminished as a result of the work-related accident.[24] In that case, the claimant was cutting an oil pipe with an electric torch.[25] A fire started during the process, and the claimant was able to put it out using a fire extinguisher.[26] However, the contact of the chemicals from the fire extinguisher with the fire produced a heavy, smoky, gaseous mixture which covered the claimant and caused painful irritation of his chest, face, and throat.[27] Due to these injuries, the claimant suffered permanent partial loss of the use of his voice.[28] The claimant was then out of work for four weeks but was able to return to work in his previous position.[29] The claimant filed a claim for reduced wage-earning capacity resulting from permanent partial loss of his voice.[30] The Attorney-Referee (former title of Administrative

[21] Durbin v. Brown, 178 So. 3d 789, 795 (Miss. Ct. App. 2013).
[22] *Id.*
[23] McKenzie v. Howard Indus., 2020 WL 634072 (Miss. Ct. App. 2020).
[24] 61 So. 2d 789 (Miss. 1953).
[25] *Id.* at 790.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

Law Judges) claimed that the claimant was not entitled to compensation solely based on the loss of his voice.[31] The Workers' Compensation Commission and the circuit court affirmed that determination.[32] The case was then appealed to the Mississippi Supreme Court.[33] The Court asserted that, because the claimant was working in the same position he was before the injury and making more money to boot, a rebuttable presumption arose that the claimant had suffered no loss of wage-earning capacity.[34] The court then remanded the case with instructions to apply this presumption.[35] Additionally, the *Karr* court went on to acknowledge that it was difficult to discern the relevant period for post-injury earnings when discussing the loss of wage-earning capacity.[36] The court stated, "[t]he only possible solution is [to] make the best possible estimation of future impairment of earnings, on the strength not only of actual post-injury earnings but of any other available clues."[37]

The rebuttable presumption that was first recognized in *Karr* has been continuously applied since 1953 in workers' compensation claims.[38] However, each of these applications occurred in cases where the injured worker returned to work after reaching maximum medical improvement.[39] The Mississippi Workers' Compensation Commission has defined maximum medical improvement as:

> "[the point at which] the patient reaches maximum benefits from medical treatment or is as far restored as the permanent character of his injuries will permit and/or the current limits of medical science will permit. Maximum medical improvement may be found even though the employee will require further treatment or care."[40]

Therefore, the only time the presumption has been applied is when the injured worker returns to work after the worker's condition has reached the point at which it will not improve anymore. Multiple cases illustrate this important point.

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 792.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Mississippi Worker's Compensation Medical Fee Schedule*, SOS.MS.GOV (June 15, 2019), https://www.sos.ms.gov/adminsearch/ACProposed/00024122b.pdf.

In *Omnova Solutions, Inc. v. Theresa LIPA*, the court applied the presumption only after the injured worker returned to work after reaching maximum medical improvement.[41] In that case, the claimant was injured on July 20, 2000.[42] She was released to return to work in June 2002 and reached maximum medical improvement on July 8, 2002.[43] She returned to work in July 2002 following her release and reached maximum medical improvement almost simultaneously.[44] She continued in that position for four to five months but was then demoted from her position.[45] The Supreme Court ruled that, since she was able to return to the same work position (at least for a time) at the same pay rate she had received before her injury, the presumption that there was no loss of wage-earning capacity must be applied.[46]

A similar application of the presumption occurred in *Agee v. Bay Springs Forest Products, Inc*.[47] In that case, a worker suffered a back injury during the course and scope of his employment.[48] The worker was off work for some time and underwent surgery.[49] Approximately four months later, the worker's doctor cleared him to go back to work, insisting that he had reached maximum medical improvement.[50] He then went back to work for the same company as before the accident at the same rate of pay.[51] Though the court admitted the worker's back would never be as strong as it was before the injury, it nevertheless presumed he had suffered no loss of wage-earning capacity because he returned to work at the same rate of pay as before.[52]

In Mississippi, there has not been a large number of cases that actually address an instance where an injured worker returned to work before reaching maximum medical improvement. However, in *Flowers v. Crown Cork & Seal USA, Inc.*, the Mississippi Supreme Court did address a case where an injured worker returned to work before reaching maximum medical improvement.[53] In *Flowers*, the claimant was injured during the course and scope of his employment.[54] He went to a doctor who stated that

[41] 44 So. 3d 935 (Miss. 2010).
[42] *Id.* at 937.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 938.
[46] *Id.* at 941.
[47] 419 So. 2d 188 (Miss. 1982).
[48] *Id.* at 189.
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] 167 So. 3d 188 (Miss. 2014).
[54] *Id.* at 190.

the claimant had not reached maximum medical improvement but could return to work wearing a brace.[55] Prior to returning to work, however, the claimant saw another specialist who decided the claimant was not fit to return to work.[56] The court ruled that because no date for maximum medical improvement had been established, any ruling on permanent disabilities would be premature.[57]

Additionally, in *Flowers* the Supreme Court provided the relevant time frame to determine permanent disability.[58] The court decided that it is the duty of the Workers' Compensation Commission to look at the evidence presented and determine whether and when a claimant has reached maximum medical improvement.[59] Having done so, the Workers' Compensation Commission must then decide, from the evidence presented, whether the claimant is entitled to permanent disability.[60]

C. The New Rebuttable Presumption Created in Hudspeth Regional Center v. Mitchell

Before the decision in *Hudspeth Regional Center v. Mitchell,*[61] the rebuttable presumption of no loss of wage-earning capacity had never been applied by the Commission or Mississippi courts unless the injured worker had returned to work after he reached maximum medical improvement. In *Hudspeth Regional Center v. Mitchell*, the Mississippi Supreme Court, for the first time, held that the rebuttable presumption that a worker has suffered no loss of wage-earning capacity if she returns to work at the same rate of pay as before the injury applied even before the worker reached maximum medical improvement.[62]

In this case, the plaintiff was injured while working in the course and scope of her employment at Hudspeth Regional Center ("Hudspeth").[63] Following the injury, the plaintiff was able to return to work in her same position at the same rate of pay as before the injury.[64] However, after returning to work, the plaintiff was terminated with cause.[65] The employer

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*at 194.
[59] *Id.*
[60] *Id.*
[61] 202 So. 3d 609 (Miss. 2016).
[62] *See id.*
[63] *Id.* at 619.
[64] *Id.*
[65] *Id.* at 620.

cited a number of disciplinary issues for the termination.[66] The plaintiff then applied for jobs at four different hospitals but was not offered employment with any of them.[67] Four months after the plaintiff was terminated by her original employer, the plaintiff reached maximum medical improvement with a three-percent permanent partial impairment to her body as a whole.[68] She was still unemployed at this time.[69]

The plaintiff then filed a petition to controvert with the Mississippi Workers' Compensation Commission.[70] A petition to controvert is the formal document filed with the Workers' Compensation Commission that officially begins litigation.[71] The petition to controvert alleged disability due to the injuries suffered during the course and scope of the plaintiff's employment.[72] An administrative law judge ("ALJ") heard the claim and found that the plaintiff suffered a permanent medical impairment as a result of this injury and should be entitled to permanent disability payments.[73] The Workers' Compensation Commission and the Mississippi Court of Appeals both affirmed the administrative law judge's ruling.[74]

The Mississippi Supreme Court then granted certiorari.[75] The court decided that because the plaintiff was able to return to her job at Hudspeth following her injury at the same rate of pay as before the injury, the rebuttable presumption that the plaintiff suffered no loss of wage-earning capacity must be applied.[76] The court remanded the case with the instructions to apply this presumption.[77]

On remand, the ALJ for the Workers' Compensation Commission first noted that the Mississippi Supreme Court had incorrectly applied the presumption, because the court applied it when the injured worker returned to work before reaching maximum medical improvement.[78] However, the ALJ acknowledged that he must apply the presumption to the instant case because the Mississippi Supreme Court stated as much.[79] The presumption

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[66] *Id.*

[67] *Id.*

[68] *Id*

[69] *Id.*

[70] *Id.*; Linda Mitchell, Claimant, No. 1110464-M-1964-E, 2014 WL 1800771 (Miss. Work. Comp. Com. Apr. 25, 2014).

[71] Tupelo Pub. Sch. Dist. v. Parker, 912 So. 2d 1070 (Miss. Ct. App. 2005).

[72] *Hudspeth*, 202 So. 3d at 610.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Mitchell v. Hudspeth Regional Center, No. 1110464-M-1964-E32, 2017 WL 6663952, at *7 (Miss. Work. Comp. Com. Aug. 21, 2017).

[79] *Id.*

was applied, and the ALJ rebutted the presumption using the rebuttal factors.[80] The rebuttal factors in Mississippi are (1) the increase in general wage levels since the accident; (2) the claimant's own increased maturity or training; (3) longer hours worked by the claimant after the accident; (4) payment of wages disproportionate to capacity made out of sympathy to the claimant; and (5) the temporary and unpredictable character of post-injury earnings.[81] The ALJ contended that the only reason the worker was able to continue working following her release was because she held a unique position with the hospital; she would not have been able to perform similar work for another hospital.[82] The ALJ declared that the evidence in this case was enough to rebut the presumption and that the worker had suffered a significant loss of wage-earning capacity and permanent disability.[83]

Once again, the case was appealed to the Mississippi Court of Appeals.[84] The court held there was insufficient evidence to rebut the presumption and, thus, the ALJ erroneously rebutted the presumption.[85] The court reversed and rendered the ALJ's decision.[86] The dissenting opinion asserted that the ALJ's factual findings should not be overturned by the Court of Appeals simply because it saw the evidence in a different light than the ALJ.[87]

Hudspeth's legacy was a new presumption that no loss of wage-earning capacity is to be applied even if an injured worker returns to work before reaching maximum medical improvement.[88] Before *Hudspeth*, Mississippi courts had never applied this presumption when the worker returned to work before reaching maximum medical improvement.[89] To add to the confusion, the Mississippi Supreme Court did not specifically address the fact that it was overturning the previous rule that the presumption could only be applied if the worker returned to work after reaching maximum medical improvement.[90] In fact, the Supreme Court in *Hudspeth* never even acknowledged the existence of this rule regarding the presumption.[91] There is now a great a deal of uncertainty among attorneys

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Hudspeth Reg'l Center v. Mitchell, 334 So. 3d 148 (Miss. Ct. App. 2019).
[85] *Id.* at 159.
[86] *Id.*
[87] *Id.* at 159-60 (Greenlee, J., dissenting).
[88] *Presumption of no loss: rehired at same wage*, Miss. Workers' Comp. L. § 5:21, Westlaw (database updated July 2022).
[89] *Id.*
[90] *Id.*
[91] *Id.*

about the law in this situation and how they should advise their clients about returning to work before maximum medical improvement is determined.

D. The Law in Other States

One state whose law resembles that of Mississippi is Maine.[92] Maine's workers' compensation statute states, "if an employee is employed at any job and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits for the duration of employment."[93] However, unlike the law in Mississippi, Maine has a provision which states:

> (D) If the employee [has been] employed at any job [following an injury] for 100 weeks or more [and] loses that job through no fault of the employee, the employee is entitled to receive compensation . . . pursuant to the following: (1) If, after exhaustion of unemployment benefit eligibility of an employee, the employment since the time of injury has not established a new wage-earning capacity, the employee is entitled to receive compensation based upon the employee's wage at the original date of injury. (2) If the employee has established a new wage-earning capacity, the employee is entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury. There is a presumption of wage-earning capacity established for any employments totaling 250 weeks or more. (3) If the employee becomes reemployed at any employment, the employee is then entitled to receive partial disability benefits as provided in paragraph B.[94]

The statute also states, "if [an] employee, after having been employed at any job following the injury for less than 100 weeks, loses the job through no fault of the employee, the employee is entitled to receive

[92] *See* Me. Rev. Stat. Ann. tit. 39-A, § 214 (West 2012).
[93] *Id.* § 214(1)(C).
[94] *Id.* § 214(1)(D).

compensation based upon the employee's wage at the original date of injury."[95]

Another state which has workers' compensation laws similar to Mississippi is Michigan.[96] The law in Michigan states:

> (E) If the employee, after having been employed pursuant to this subsection loses his or her job through no fault of the employee and the employee is still disabled, the employee shall receive compensation under this act as follows: (i) If the employee was employed for less than 100 weeks, the employee shall receive compensation based upon his or her average weekly wage at the time of the original injury. (ii) If the employee was employed for 100 weeks or more but less than 250 weeks, then after exhausting unemployment benefit eligibility, a worker's compensation magistrate may determine that the unemployment since the time of the injury has not established a new wage-earning capacity and, if the magistrate makes that determination, benefits shall be based on his or her average weekly wage at the original date of injury. If the magistrate does not make that determination, the employee is presumed to have established a post-injury wage earning capacity and benefits shall not be paid based on the wage at the original date of injury. (iii) If the employee was employed for 250 weeks or more, the employee is presumed to have established a post-injury wage earning capacity.[97]

III. ANALYSIS

Workers' compensation law in Mississippi has historically applied a rebuttable presumption that an injured worker who returns to the same position with the same (or greater) pay as before his or her workplace-related injury has suffered no loss of wage-earning capacity.[98] In recent years, this presumption has caused confusion among workers' compensation attorneys in Mississippi due to varied application. Until 2015, the presumption had only been applied in cases where the injured worker returned to work after reaching maximum medical improvement. However, in *Hudspeth*, the Mississippi Supreme Court applied this

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[95] *Id.* § 214(1)(E).
[96] *See* Mich. Comp. Laws § 418.301(9)(e).
[97] *Id.*
[98] *See Hudspeth*, 202 So. 3d at 610.

presumption where an injured worker returned to work and was fired before reaching maximum medical improvement.[99] The Supreme Court never directly addressed the historical "unwritten" rule that this presumption should only be applied if the injured worker returned to work after reaching maximum medical improvement. Instead, the court simply applied the presumption with no mention of historical precedent.[100]

To alleviate the confusion this case has created, the Mississippi Supreme Court should clarify that the presumption should only be applied if the injured worker returns to work following the achievement of maximum medical improvement. There are three main reasons such clarification is needed. First, it is in the best interest of workers as well as employers for the presumption to apply only if the worker returns to work following maximum medical improvement. Second, over sixty years of precedent has recognized that the presumption only applies if the worker returns to work following maximum medical improvement. Finally, while Mississippi has a rule which prejudices injured workers if they return to work following their injury and subsequently get fired, other states return injured workers to disability status if they return to work following their injury and are then fired; Mississippi should adopt similar legislation.

A. Public Policy

To apply the presumption that an injured worker has suffered no loss of wage-earning capacity if they return to work before reaching maximum medical improvement is simply bad public policy. The goal of an injured worker should be to return to work as soon as it is safely possible to do so. Injured workers are often safely able to return to work—generally with restrictions and limitations—before they reach maximum medical improvement. However, the ruling in *Hudspeth*[101] deters injured workers from returning to work (even if they could do so safely) because the worker will face an uphill battle to receive permanent disability benefits, should that need ever arise.

In Mississippi, injured workers are encouraged to attempt to return to work with restrictions and limitations during the recovery period, and employers are encouraged to accommodate those efforts. Returning to work during the recovery period is beneficial to both the employer and to the employee.

Returning to work following an injury is beneficial to the employee for a number of reasons. First, returning to work often requires the

[99] *Id.*
[100] *See id.*
[101] *Id.*

employee to be more physically active than the employee was while sitting at home.[102] This can help aid in the recovery of the existing injury.[103] Second, returning to work often helps with the worker's mental health.[104] According to a study conducted by the American Journal of Public Health, unemployed workers have a significantly higher chance of showing symptoms of somatization, depression, and anxiety than employed workers.[105] Thus, returning to work is often good for injured workers' mental health. Finally, a person's workplace is often like a second home, and their coworkers are often their second family.[106] Therefore, returning to work will oftentimes provide a worker with another support team, in addition to his immediate family, to aid the worker in his recovery.[107]

Moreover, having an injured worker return to work as soon as it is safely possible to do so is also beneficial to the employer. The longer the employee is out of work, the more likely it is that the employer will have to find replacement employees. For employers, finding suitable employees can prove to be challenging at times. This issue can be particularly troublesome for employers with a need for specially-trained employees or that are located in a sparsely populated area. Additionally, hiring new employees is often time-consuming. In order to hire a new employee, the employer must find and then train the employee. Therefore, having an injured worker return to work as soon as it is safely possible can reduce the need for the employer to hire new employees, consequently saving the employer time and money.

After *Hudspeth*, the smart choice for an injured worker is to not return to work until they have reached maximum medical improvement. Any injured worker who returns to work before reaching maximum medical improvement would immediately be subject to a presumption that the claimant suffered no loss of wage-earning capacity as soon as the first paycheck was provided. The worker is then faced with the task of rebutting the presumption in order to recover permanent disability. This shifts the burden of proof from the employer to the worker.

Additionally, applying this presumption when an injured employee returns to work before reaching maximum medical improvement could lead an employer to implement certain devious practices. For example, any time an employee is injured, an employer could incentivize the employee to

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[102] Stephens, *supra* note 9.

[103] *Id.*

[104] *Id.*

[105] M.W. Linn, *Effects of Unemployment on Mental and Physical Health*, 75 AM. J. PUBLIC HEALTH 502, 504 (1985).

[106] Stephens, *supra* note 9.

[107] *Id.*

return to work as soon as possible (possibly by offering a raise or promotion) knowing that the employee's position would only be available to them for a short time.

Overall, the benefits of having injured workers return to work as soon as is safely possible could be had simply by applying the presumption of no loss of wage-earning capacity when the worker returns to work after reaching maximum medical improvement.

B. Precedent

Although the Mississippi Supreme Court has never directly stated that the rebuttable presumption only applies if the injured worker returns to work after reaching maximum medical improvement, over sixty years of judicial decisions would seem to state as much. It has become an "unwritten" rule in Mississippi that the presumption should only be applied if the worker returns to work following maximum medical improvement. To ignore this historical application of the presumption is to ignore years of judicial decisions.

From *Karr* to *Hudspeth*, the rebuttable presumption that an injured worker suffered no loss of wage-earning capacity has only been applied in cases where the injured worker returned after reaching maximum medical improvement. There have been dozens of cases involving this presumption, and in every case the presumption was applied only when the worker returned to work after reaching maximum medical improvement.

Additionally, in *Hudspeth*, the Mississippi Supreme Court did not mention that historically the rule had not been applied unless the worker returned to work after reaching maximum medical improvement.[108] The court did not include any thought or reasoning as to why it was overturning over sixty years of precedent; it merely changed the previous rule.[109] For a court to overturn over sixty years of precedent without including any reasoning as to why it was overturning dozens of previous decisions sets a dangerous example.

Without stare decisis, courts could simply rule on issues in any way they see fit. Courts could decide based on their own beliefs, the beliefs of others, their relationships to the parties involved, or any number of other reasons. There would be no rhyme or reason as to why courts were making decisions. For precedent to be overturned by a court, there typically must be a substantial reason to do so. The Mississippi Supreme Court has stated, "a former decision of this court should not be departed from, unless the rule

[108] *See Hudspeth*, 202 So. 3d 609.
[109] *See id.*

therein announced is not only manifestly wrong, but mischievous."[110] Moreover, the Mississippi Supreme Court has also decided that the court will only depart from precedent "when such departure is necessary to avoid the perpetuation of pernicious error."[111]

In the case of *Hudspeth*, perhaps there was a substantial reason for the court to overturn the decisions of all of prior courts and rule that the presumption of no loss of wage-earning capacity could be applied when the injured worker returned to work before reaching maximum medical improvement.[112] However, in the court's decision there is simply no reasoning as to why the court was changing this rule.[113] The court simply stated that because the claimant returned to work following her injury, she was subject to the presumption that she had suffered no loss of wage-earning capacity.[114]

Additionally, there appears to be no reason why the original application of the presumption was manifestly wrong. In fact, it appears that the application decided in *Hudspeth*[115] is more incorrect than the original application of the presumption. Therefore, the Mississippi Supreme Court should not have departed from the way the presumption had been applied for over sixty years. Departing from this rule is contradictory to the Mississippi Supreme Court's statement in *Forest* that a prior decision from the Mississippi Supreme Court should not be departed from unless it was manifestly wrong.[116]

Overall, it is clear that allowing the new rule on the presumption of loss of wage-earning capacity to stand will set a dangerous example for the Mississippi judicial system. It will allow courts to overturn prior rulings without giving a rationale for doing so.

C. Other States

Mississippi, Maine, and Michigan all have workers' compensation laws describing how an injured worker who returns to work and is subsequently fired should be compensated. Maine and Michigan, unlike Mississippi, have laws that were enacted by their legislatures and are designed to protect injured workers who get fired following returning to work after an injury.[117] Mississippi case law in the area of workers'

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[110] Forest Prod. & Mfg. v. Buckley, 66 So. 279, 280 (Miss. 1914).
[111] Stone v. Reichman-Crosby Co., 43 So. 2d 184, 190 (Miss. 1949).
[112] *See Hudspeth*, 202 So. 3d at 609.
[113] *See id.*
[114] *Id.*
[115] *Id.*
[116] *Forest*, 66 So. at 280.
[117] Mich. Comp. Laws § 418.301.

compensation is designed to protect the employer and the carrier instead of the injured worker.[118]

The biggest issue with Mississippi's "new" rebuttable presumption is that it benefits the employer and carrier much more than it benefits the injured worker.[119] On the other hand, Maine and Michigan's workers' compensation laws provide that an injured worker can return to work following an injury and if he or she gets fired through no fault of their own, he or she can be put back on disability payments.[120] This way of handling an injured worker's return to work is much more beneficial to the injured worker than the laws in Mississippi. Additionally, Maine and Michigan's laws are also beneficial to the employer because injured workers do not have anything to deter them from returning to work. Therefore, the indirect cost to the employer is mitigated by having the injured worker return to work quicker.

The Mississippi Legislature should consider adopting workers' compensation laws like those in Maine and Michigan. Mississippi should implement statutory law which states that injured workers who return to work but are subsequently fired are then eligible once again to receive disability payments based on how many weeks the worker has been back at work. Ideally, Mississippi would enact a law that looks very similar to either the law enacted in Maine or Michigan. Both of these laws have provisions in place which compensate injured workers who are fired due to no fault of their own after returning to work following an injury. If Mississippi were to enact a law that reads similar to that in Maine or Michigan, injured workers would no longer be deterred from returning to work as soon as possible. This would alleviate many of the issues that have arisen due to the recent changes in the law in Mississippi.

IV. CONCLUSION

In order to rectify the problem that Mississippi workers' compensation attorneys and Mississippi injured workers face, the Mississippi Supreme Court has two viable options. The first, and perhaps most effective, option would be to simply overturn the ruling from *Hudspeth* and only apply the presumption when an injured worker returned to work after reaching maximum medical improvement. This would ensure that injured workers would not be deterred from returning to work before they reach maximum medical improvement. The second option is for the Mississippi Supreme Court to confirm that the presumption should be

[118] *See Hudspeth*, 202 So. 3d at 609.
[119] *See id.*
[120] Mich. Comp. Laws § 418.301.

applied any time that an injured worker returns back to work—whether they have reached maximum medical improvement or not—and the court should explain why it is overturning over sixty years of precedent. While this would continue to deter workers from returning to work, it would at least rectify the confusion that attorneys now face in determining the burden to the injured worker.

The current law surrounding this presumption could at best be characterized as vague. There are hundreds of cases where Mississippi courts have only applied the presumption when a worker returns to work only after reaching maximum medical improvement. Some cases interpret the law one way; others read it very differently, all without any acknowledgement that over sixty years of precedent has been overturned. This leaves attorneys and injured workers in precarious situations where the exact meaning of the law is not fully understood. For public policy reasons, and for the integrity of Mississippi's judicial system, this confusion needs to be addressed. Overall, the best outcome would be for the law surrounding the presumption to revert back to the way it has been applied since 1953.