

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2006-WC-02101

COPY

HURDLE & SON AND
MISSISSIPPI CASUALTY INSURANCE COMPANY

APPELLANTS

VS.

MICHAEL A. HOLLOWAY

FILED

APPELLEE

AUG 14 2007

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SUPREME COURT
COURT OF APPEALS

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

In the Appellees' brief, Claimant plays a shell game with the applicable law in this matter. Claimant cites only one Mississippi case relating to home care and does not discuss the facts of that case or attempt to apply the law set out in that case to the case at hand. Claimant espouses the theory that none of the Mississippi law on home care is controlling in this matter since all of the Mississippi cases deal with spouses rather than parents providing the care. Interestingly, even though Claimant later relies predominantly on cases from other jurisdictions to support subsequent points, Claimant could not cite one case from any jurisdiction in which the spouse/parent distinction was deemed relevant.

Claimant then asked this Court adopt the principles set out in a New Mexico case and a Texas case relating to the issue of what constitutes compensable nursing care. However, both of these cases involve nursing care provided by spouses. The holdings in both of these cases are contrary to the prevailing law in Mississippi that a spouse can only be compensated for time actually performed nursing services. Ultimately, Claimant is requesting that this Court disregard binding Mississippi Supreme Court precedent and apply the prevailing law from other jurisdictions which conflicts with this Mississippi precedent.

The bottom line in this case is that the Mississippi Supreme Court has provided clear guidelines for addressing the issues in dispute in this matter. Claimant can cite no law from Mississippi or any other jurisdiction which would give a parent more favorable treatment than a spouse, with regard to receiving compensation for nursing care. Mississippi law clearly holds that any relative providing nursing care can only be compensated for time spent actually providing nursing care. Mississippi law is clear that compensation cannot be ordered for the provision of

general household services or time spent sleeping.

Perhaps most importantly to the resolution of this matter, it was the function of the Commission rather than the circuit court or this Court to review the facts and to make an appropriate determination regarding the amount of care which was being provided and for which compensation should be paid. The Mississippi Supreme Court has repeatedly stated that each case involving home care issues must be considered on its own facts and is uniquely subject to a determination on these facts. The Commission's decision was supported by substantial evidence and should be upheld.

II. ARGUMENT

A. Claimant's brief gives a skewed version of the standard of review in this matter.

Claimant's brief seems to cite every case which has ever, in any way, limited or qualified the substantial evidence standard.¹ For instance, Claimant cites the case of *Universal Mfg. Co. v. Barlow*, 260 So. 2d 827 at 831 (Miss. 1972) for the proposition that "[t]he substantial evidence rule permits the appellate courts to examine the record as a whole, check for errors and ascertain whether the beneficent purposes of the Workers' Compensation Act had been carried out." Brief of Appellee, p.6. Taken in isolation, this is not a correct statement of Mississippi law, as the case law in Mississippi is very clear that it is never the function of an appellate court, considering factual disputes in a workers' compensation matter, to re-weigh the evidence, regardless of the beneficent purposes of the Workers' Compensation Act.

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This is not necessarily a criticism, as this approach would be expected from a party requesting that a Commission decision be overturned. Nonetheless, Claimant's description of the substantial evidence standard is not accurate in providing a comprehensive description of the deferential nature of the standard.

In fact, the most fundamental principle relating to workers' compensation appeals is the substantial evidence standard of review, which holds that actual findings of the Mississippi Workers' Compensation Commission are due great deference and are only to be overturned if the findings are not supported by substantial evidence. In *Natchez Equipment Co., Inc. v. Gibbs*, this Court stated:

When the decision of the Commission is before the circuit court on intermediate appeal, that circuit court may not tamper with the findings of fact, where the findings are supported by substantial evidence... **Where the circuit court reverses the Commission by simply supplementing its judgment for that of the Commission, without regard to whether the Commission's findings were substantiated by the weight of evidence, the circuit court commits error.**

Natchez Equipment Co., Inc., 623 So. 2d at 274 (citing *Roberts v. Jr. Food Mart*, 308 So. 2d 232, 234-35 (Miss. 1975) and *Morris v. Lansdell's Frame Co.*, 547 So.2d 782, 785 (Miss. 1989)(emphasis added)). See also, e.g., *Lantermann v. Roadway Exp., Inc.*, 608 So. 2d 1340, 1345 (Miss. 1992), (appeals court applies deferential standard of review to findings and decisions of Commission).

In *TPI Restaurants, Inc. and Insurance Company of North America v. Stephens*, 2002 WL 418718 (Miss. App. 2002), the Court of Appeals stated "so long as the record contains credible evidence which, if believed, would support the Commission's determination, we must affirm." *TPI Restaurants* at ¶ 17. (citing *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss. 1991)). It is assumed as a matter of law that the Full Commission "as trier of fact, has previously determined which evidence is credible, has weight, and which is not." *TPI Restaurants*, at ¶ 17. (citing *Metal Trims Indus. v. Stovall*, 562 So.2d 1293, 1296 (Miss. 1990)).

Claimant has made no allegation that the Full Commission decision was not consistent with

Mississippi precedent. Since no legal issue is involved in this appeal, the standard of review is the substantial evidence standard. The sole and limited function of the circuit court was to review the evidence and to determine if substantial evidence existed to support the Commission decision. It was not the function of the circuit court to examine all of the evidence and make an independent determination regarding where the greater weight of the credible evidence lay in this matter. However, that is what the circuit court did. The circuit court's order did not in any way comment on the substantial and overwhelming evidence which supported the Commission decision in this matter.

B. Claimant provided no legal support for his proposition that there should be some distinction in the law between a spouse providing nursing services and a parent providing nursing services.

As noted, there are a number of cases in Mississippi providing guidelines for an employer and carrier's responsibility to pay for home nursing services provided by an injured claimant's relative. Claimant did not discuss any of these cases in his brief and did not attempt to apply the law set out in these cases to the facts of the instant case. Instead, Claimant has asked this Court to adopt the proposition that parents should receive a more favorable legal treatment than spouses with regard to compensation for home nursing services. Claimant could not cite one Mississippi case to support this proposition. In discussing the applicable law, the Mississippi Supreme Court speaks in terms of relatives rather than spouses: "It is well established that nursing care provided **by a relative** to an injured claimant is compensable as a medical benefit pursuant to Mississippi Code Annotated § 71-3-15 (1)." *Mississippi Transportation Commission v. Deweese*, 691 So. 2d 1007, 1012 (Miss. 1997) (emphasis added). In his discussion of Mississippi law, *Deweese* groups "relatives" together and does not distinguish spouses. In taking this approach, *Deweese* rejects

the concept of disparate treatment. Further, despite the fact that, later in his brief, Claimant is eager to have this Court adopt foreign legal decisions which conflict with Mississippi law, Claimant could not cite one case from any jurisdiction which indicated that there was a valid legal distinction between a parent providing home care and a spouse providing home care.²

From a factual standpoint, Claimant makes the following argument: “[h]ad he not been paralyzed, Mr. Holloway’s mother and stepfather would not be involved in any of the day to day needs of their 45 year old son. These facts alone distinguish Mr. Holloway’s case from every case cited in the Appellant’s brief, which all concern care provided by spouse. There are many household duties that spouses share or perform for one another.” Brief of Appellee, p. 7. This argument makes a distinction where there is none. Regardless of whether spouses are providing home care or parents are providing home care, the care is being provided voluntarily. There is no legal requirement that a spouse or parent provide the care. Mr. and Mrs. Wiseman have the choice of providing care in this matter. If they choose to do so, they are entitled to be compensated pursuant to the guidelines for provision of home nursing services set out by the Mississippi Supreme Court and by the Mississippi Workers’ Compensation Commission. Mr. and Mrs. Wiseman are entitled to no better or worse treatment than other types of relatives, for their voluntary decision.

Further, Claimant’s argument glosses over the facts in this case. Claimant notes that Mr. and Mrs. Wiseman perform a number of household services for Claimant, but these household services, such as cooking meals or washing clothes, are performed in conjunction with their own

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Counsel for Appellants has been unable to find any case from any jurisdiction which distinguishes between spouses and parents with regard to what activities constitutes compensable services.

household services and maintenance. Mr. and Mrs. Wiseman are, in effect, asking to be compensated for the preparation of their own meals and the washing of their own clothes and the cleaning of their own house.

Further, it must be remembered that Employer and Carrier are currently providing payment for 16 hours a day of nursing services. This would certainly include time spent by Mr. and Mrs. Wiseman performing services which may not be strictly classified as nursing care.

C. Mississippi law is clear that no compensation is allowed for “downtime” in the provision of nursing services.

It is not contested in this matter that Mr. and Mrs. Wiseman sleep simultaneously during the night. This fact, in and of itself, provides substantial evidence to support the Commission decision.

In his brief, Claimant notes “[t]he question of a carrier compensating for time ‘actually performing services’ versus time ‘on call’ has not been specifically ruled upon in Mississippi.” Brief of Appellee, p. 8. This is simply not the case. Mississippi case law affirmatively sets out the types of activities which can be compensable as nursing services under the Mississippi Workers’ Compensation Act. In *Graham v. City of Kosciusko* (*Graham 1*), 339 So. 2d 60, 65, (Miss. 1976), the Mississippi Supreme Court stated that compensation can only be had for “required nursing services” and the services had to be separated from other non-compensable activities. In *Babcock and Wilcox Co. v. Smith*, 379 So. 2d 538, 539 (Miss. 1980), the Mississippi Supreme Court indicated that “non-technical tasks resembling those performed by orderlies or licensed practical nurses in hospitals” could be compensable. Therefore, Mississippi courts have affirmatively only allowed skilled and unskilled nursing care to be compensable when provided by a claimant’s relative. The guidelines set out by the Mississippi Supreme Court in these cases

and other cases clearly do not contemplate payment to a relative for sleeping.

Claimant would have the Court ignore Mississippi precedent on this issue and apply the New Mexico case of *Shadbolt v. Schneider, Inc.*, 710 P 2d. 738 at 739 (NM CT. App. 1985) and the case of *Texas Employers Ins. Ass'n. v. Choate*, 644 S.W. 2d. 112 (Tex. App. 1982). From a factual standpoint, neither of these cases are in any way distinguishable from the Mississippi cases addressing compensation to a relative for home nursing care. Both foreign cases involve spouses performing home nursing services. The Mississippi cases cited above and cited in Appellant's original brief completely reject the holdings of these foreign decisions. Claimant would have this Court ignore binding precedent from the Mississippi Supreme Court and adopt the holdings set out in foreign courts which are antithetical to prevailing Mississippi law.

D. Claimant's failure to abide by Commission procedure in setting an evidentiary hearing in this matter cannot be contested.

Claimant failed to properly follow Commission procedure in the setting of the hearing on the merits in this matter. Counsel for Employer and Carrier arrived at a "motion hearing" and were confronted with a court reporter and witnesses whose identity had not been disclosed. Based on the fact that Claimant had made the trip from Tupelo to Batesville, the administrative judge allowed the hearing to proceed, subject to the objections of Employer and Carrier.

In his brief, Claimant continually refers to this as an "alleged procedural error." Brief of Appellee p. 10. In fact, Claimant's failure to follow Commission procedure in setting a hearing on the merits is not an alleged procedural error. Both the administrative judge and the full Commission found that Claimant had failed to follow Commission procedure in setting an evidentiary hearing on the merits. These findings were not cross-appealed by Claimant, and Claimant cannot now challenge this finding. Claimant's procedural errors are not simply alleged,

rather they were very real and the fact that Claimant's counsel failed to follow Commission procedure in setting an evidentiary hearing is now established by collateral estoppel.

Both the administrative judge and the full Commission found that Claimant had the opportunity to present all evidence which he desired to present but that Claimant still did not meet his burden of proof in his allegation of entitlement to compensation for additional home care. Therefore, despite their findings regarding the impropriety of Claimant's hearing, the administrative judge and the full Commission found that Employer and Carrier were not prejudiced. But, it is important to note that the only reason that Employer and Carrier were not prejudiced is the fact that the full Commission determined that Claimant failed to make out a *prima facie* case of entitlement to additional home care compensation. Therefore, the circuit court in this matter had two options - affirm or remand. The circuit court could not reverse and render the Commission decision when Employer and Carrier had no opportunity to present evidence.

Claimant makes an argument of a waiver based on the proposition that Commission procedure allows the introduction of additional evidence after the order of an administrative judge, at the discretion of the Commission. This argument is inconsistent with Commission practice. First, the allowance of additional discovery is within the discretion of the Commission. Second, this rule exists for the purpose of introducing limited newly discovered evidence after the administrative judge's order is rendered. The rule simply does not exist and does not countenance this procedural vehicle for the conducting of all discovery. It would be unworkable to have the administrative judge's hearing and then allow the Employer and Carrier to conduct all of their discovery. Of course, discovery is conducted to prepare for a hearing. If the hearing is conducted prior to the conclusion of discovery then Employer and Carrier are, *per se*, prejudiced.

Based on the fact that the Full Commission decision was supported by substantial evidence, this point is moot. However, the Full Commission correctly determined that Claimant did conduct a trial by ambush and, therefore, the sole options available to the circuit court judge were affirmance or remand.


III. CONCLUSION

Employer and Carrier respectfully request that this Court reverse the circuit court and reinstate the order of the full Commission, on the basis that the order is supported by substantial evidence. Employer and Carrier further request any other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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THIS, the 14th day of August, 2007.



J. KEITH PEARSON