IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BOYD MISSISSIPPI, INC. AND
CONTINENTAL CASUALTY COMPANY — APPELLANT

Brief

VS. — CASE NO. 2007-WC-00422

IRIS MOORE — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. Boyd Mississippi, Inc.
   d/b/a The Silver Star Casino ----------Appellant
2. Continental Casualty Company ---------- Appellant
3. Iris Moore ----------Appellee
4. Amy Kilpatrick Taylor ---------- Counsel for Appellant
5. Jim Davis Hull ---------- Counsel for Appellee
6. Vernon Cotten ----------Circuit Court Judge

Submitted on this, the 25th day of June, 2007.

Amy K. Taylor

Amy K. Taylor
Attorney of Record for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW:

STATUTES:

STATEMENT OF ISSUES

1. **WHETHER SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD TO SUPPORT THE FINDING OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION THAT THE CLAIMANT FAILED TO MEET HER BURDEN OF PROOF TO ESTABLISH THAT SHE SUSTAINED A WORK-RELATED INJURY IN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH EMPLOYER.**

STATEMENT OF THE CASE

Iris Moore (hereafter "Claimant") alleges she sustained a work-related injury on or about September 28, 1996, while employed with Silver Star Casino (hereafter "Employer") in Philadelphia, Mississippi. (RE at 7). The claimant specifically alleged that she suffered an injury to her left eye while cleaning glass doors for the employer. (RE at 7). Employer and Carrier contested Claimant's alleged injury, and a hearing was held in this matter before the Honorable Cindy P. Wilson on October 6, 2005. During the hearing on the merits Claimant testified on her own behalf and presented her sister, Avis Cole, as a corroborating witness. Deposition testimony of William Lee Johnson, O.D and the deposition testimony of Dr. Joel H. Herring were both submitted as General Exhibits. Employer Accident Forms were also submitted as a General Exhibit.

Prior to the hearing the parties stipulated that, in the event a work-related injury was determined to have taken place, Claimant's average weekly wage at the time of the alleged injury was $290.53. (R. at 3). The parties also stipulated that the claimant's average weekly wage at the time of the hearing was $381.00. (R. at 3). On February 7, 2006, Judge Cindy Wilson opined that the claimant failed to prove by a preponderance of the evidence that her left eye condition was causally related to an alleged accident of September 28, 1996, during her employment at Silver Star Casino. (RE at 19). Additionally Judge Wilson stated that she did not find the claimant's testimony to be believable and pointed to several inconsistencies in support of same. (RE at 18). On February 22, 2006, Claimant submitted a Petition for Review of the Decision of the Administrative Judge. (RE at 20-22). On June 20, 2006, the Full Commission affirmed the Order of the Administrative Judge. (RE at 23). The claimant then appealed the case to the Circuit Court of Neshoba County, Mississippi. (RE at 24-25). The Circuit Court entered

an Amended Order on December 12, 2006, Reversing the Decision of Board of Review and Appeals Referee. (RE at 5-6). The employer and carrier have appealed that decision to the Mississippi Supreme Court. No oral argument is requested in connection with the appeal.

STATEMENT OF THE FACTS

Claimant was employed by Employer beginning in July, 1996. (R. at 21). Claimant was hired as a carhop/bellhop in the valet department. (R. at 23). Claimant testified that her job duties included going up to the rooms, taking out the luggage for the customers to their cars, and assisting the patrons with loading their car before they left the hotel. (R. at 24). The claimant also had the responsibility to clean some glass doors in her position. (R. at 24, 26).

On direct examination Claimant testified that her injury occurred on September 28, 1996, while cleaning the sets of glass doors. (R. at 27).[1] The claimant testified that she was in a squatting position cleaning the bottom part of the door when someone came out of the door wearing blue jeans and cowboy boots. (R. at 27, 66). According to the claimant's direct examination, the door slammed into her and knocked her down onto her backside. (R. at 27, 28). The claimant had also previously testified in her deposition on September 7, 2005, that, at the time of her alleged injury, she was in a squatted position cleaning the glass windows. (R. at 62, 63, 66). During her deposition the claimant was also adamant that whoever hit her in September, 1996 had on cowboy boots and blue jeans, and that a lady helped her up off the floor. (R. at 66). The claimant testified that she got hit by the door right by the handle because she was squatting at the time. (R. at 80).

At the hearing the claimant testified that she went straight to security to report the accident where she spoke with Bobbie Coleman. (R. at 29, 31). The claimant completed a voluntary statement. (R. at 32). The claimant testified that she completed the Employee

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[1] The claimant's original Petition to Controvert listed the date of accident as January, 1998. The date for the alleged accident was amended by agreement between Claimant and Employer and Carrier to be September 28, 1996, at the hearing of this matter.

Accident Report on that date, and she recognized that same was in her handwriting. (R. at 34, 66; See RE at 75;General Exhibit 3 at 3). Upon review of said Employee Accident Report, the alleged accident was described as occurring while the claimant was bringing in a cart of luggage. (RE at 75; General Exhibit 3 at 3). The report further stated that a lady was coming out of the door, and she pushed it toward the claimant causing her to be hit in the face. (RE at 75; General Exhibit 3 at 3). The claimant signed this form on September 28, 1996, affirming that the information provided in same was correct to the best of her knowledge. (RE at 75; General Exhibit 3 at 3). The claimant testified that she returned to work and worked the rest of her shift. (R. at 40). The claimant did not lose any days from work as a result of the alleged accident. (R. at 41, 42).

When questioning the claimant about the inconsistencies between the report (RE at 75; General Exhibit 3 at 3) and her direct examination and deposition testimony, the claimant testified that she did not remember exactly what she was doing "to tell you the truth." (R. at 67). The claimant testified that she was cleaning the door at the time that she was hit, but there was a cart of luggage sitting to the side. (R. at 67, 68). She could not explain why she wrote on the Employee Accident Report on the date of the alleged accident that something else had occurred. (R. at 68).

The claimant testified that she had continuous redness in her left eye from September, 1996 until September, 2002, but no physician ever asked her about the redness in her eye. (R. at 45, 46, and 47). The claimant testified that she did not realize there was any injury, and that she saw an eye doctor on an annual basis between September, 1996, and September, 2002. (R. at 47).

The claimant testified that the first time she went to a doctor specifically concerning her

left eye bothering her was September, 2002, when she presented to Dr. Lee Johnson. (R. at 42). Claimant testified that, between the alleged accident of September, 1996, and the time that she presented to Dr. Lee Johnson in September, 2002, there was nothing that occurred with regard to her left eye to make her think she had any serious injury. (R. at 47).

The claimant testified that in September, 2002, she was playing with her one (1) year old child when he bumped her in the left eye. (R. at 49). The claimant testified that her eye teared up at that time, and she called to make an appointment for Dr. Johnson to check her eye. (R. at 49). The claimant testified that the evening before that appointment with Dr. Lee Johnson, a black spot appeared at the bottom of her eye. (R. at 48, 49). The claimant testified that she reported the history to Dr. Johnson of getting hit in the eye by her child prior to the examination in September, 2002. (R. at 49). Dr. Johnson examined the claimant's eye and referred her to Jackson where she began treating with Dr. Joel H. Herring. (R. at 50, 51).

The claimant testified that, following the initial examination by Dr. Joel Herring, she underwent surgery the same day. (R. at 53). The claimant testified that, in total, she has had seven (7) surgeries on her left eye, and is currently classified legally blind. (R. at 54).

The claimant continued in her job as a hotel service attendant after the alleged accident in 1996. Thereafter she was promoted to the desk clerk job at the Spa. (R. at 70). She was still in that position when her employment separated with the employer in this case in 1999. (R. at 70). The claimant has been employed with Wells Lamont Corporation since that time. (R. at 57). The claimant testified that Blue Cross Blue Shield, her private insurance, through her job at Wells Lamont Corporation, paid all of her medical treatment concerning her left eye and multiple surgeries. (R. at 71, 72). The claimant never presented those medical bills concerning her eye treatment and multiple surgeries to the employer in this case for payment. (R. at 72). At the time

the claimant started seeing Dr. Johnson in 2002 for her left eye problem, she was working at Wells Lamont Corporation and had been with that company for a three (3) year period of time. (R. at 72). The claimant testified that the first time she had knowledge that the eye problem for which she was seeing Dr. Johnson was related to the alleged accident of September 29, 1996, was in September, 2002. (R. at 43, 44).

The claimant's sister, Avis Cole, also testified on behalf of the claimant. (R. at 5). Ms. Cole was employed by the employer as a change attendant on September 28, 1996. (R. at 6). Ms. Cole testified that she first learned of the alleged accident on the day it occurred. (R. at 14). She testified that the male employee who had swung the door came and told the girl at the end of the carousel where she was working what had occurred. (R. at 14, 15, and 16). Ms. Cole testified that she overheard that conversation. (R. at 14, 15, and 16). Ms. Cole first saw her sister on the date of the alleged accident after she came from the security office. (R. at 9). At that time Ms. Cole observed a big knot about the claimant's left eye. (R. at 7). She also observed the claimant's eye being a blood shot red on that date. (R. at 8). Ms. Cole testified that the knot remained on the claimant's left eye for greater than a one (1) week period of time, and that the discoloration was still present in the claimant's left eye at the date of the hearing. (R. at 10). Ms. Cole testified that the claimant's current condition of her eye was how it looked on September 28, 1996. (R. at 10).

During cross-examination Ms. Cole testified that she was terminated from her job with the employer on March 4, 2000, because of a bank shortage. (R. at 13). As of the date of the hearing Ms. Cole was not employed due to a prior work-related injury that she herself had sustained consisting of a knee injury and bulging disc. (R. at 14). Ms. Cole testified on cross-examination that the condition of the claimant's eye on the date of the hearing was darker than it

was the day of the accident. (R. at 18). Ms. Cole testified that she saw her sister on a daily basis until August, 2005. (R. at 16, 18). Ms. Cole testified that the discoloration of the claimant's eye had gradually gotten darker over the years. (R. at 18). Despite her testimony that the claimant's eye had remained discolored between September, 1996, and September, 2002, when she sought medical treatment, Ms. Cole did not encourage her sister to seek medical treatment. (R. at 18, 19).

The deposition testimony of William Lee Johnson, O.D. was admitted as General Exhibit 1. Dr. Johnson graduated from the Southern College of Optometry in Memphis, Tennessee, with a Doctor of Optometry. (RE at 27; General Exhibit 1 at 6). Dr. Johnson is not a medical doctor, and does not perform surgery in his profession. (RE at 27; General Exhibit 1 at 6). Dr. Johnson was tendered as an expert in the field of optometry and asked to give his opinions based only upon a "reasonable optometry probability". (RE at 28; General Exhibit 1 at 7).

Dr. Johnson testified the claimant had first been seen in his clinic on February 18, 1998, when she saw his predecessor, Dr. Kramer, for an annual visit. (RE at 35-36; General Exhibit 1 at 16, 17). The only history provided on that date by the claimant was one of having worn glasses in elementary school, and there was no indication of any type of trauma that she had experienced to her eye in the recent past. (RE at 35; General Exhibit 1 at 16).

The claimant's first visit with Dr. Johnson himself was on February 19, 2000 when she presented for new eye glasses. (RE at 29; General Exhibit 1 at 8). Dr. Johnson saw the claimant on an annual basis from February 19, 2000 until he referred her to Dr. Herring on September 25, 2002. In April, 2001, the claimant presented and reported "some" decrease in her vision. (RE at 30,37; General Exhibit 1 at 9, 19). Dr. Johnson testified that the claimant was forty-three (43) years old, and it was not unusual for a person's vision to decrease as they got older. (RE at 37;

General Exhibit 1 at 19). Dr. Johnson testified that it was not until September 25, 2002, that he found something actually physically wrong with the claimant. (RE at 31; General Exhibit 1 at 10). On that date he found a retina detachment on the left eye in the superior quadrant. (RE at 31; General Exhibit 1 at 10).

The claimant had presented for her annual check up as usual in March, 2002, but again returned four (4) months later on September 25, 2002. (RE at 38; General Exhibit 1 at 20). When she returned in September, 2002, the claimant reported a decrease of vision since August, 2002, especially in the bottom of the left eye. (RE at 38, 39; General Exhibit 1 at 20, 21). That was the first time that the claimant had pinpointed anything like that for Dr. Johnson. (RE at 39; General Exhibit 1 at 21). At that point Dr. Johnson referred the claimant to Dr. Herring because the retina detachment that had been diagnosed was outside of his scope for treating since it required surgery. (RE at 40; General Exhibit 1 at 22). Dr. Johnson is able to diagnose retina detachments but he is not able to treat same. (RE at 40; General Exhibit 1 at 22).

Dr. Johnson testified that the claimant had indicated at some point in time that she had sustained an accident working for the Silver Star Casino where she was hit with a door on the left side. (RE at 31; General Exhibit 1 at 10). Dr. Johnson noted that Dr. Herring sent him a letter concerning the claimant's visit where he stated that the claimant had been bumped in the eye with an elbow while playing with her children. (RE at 40; General Exhibit 1 at 22). Dr. Johnson testified that the claimant did not mention anything to him about being bumped in the eye with the elbow while playing with her children, but he had no reason to doubt Dr. Herring's recording of that history. (RE at 41; General Exhibit 1 at 23).

Dr. Johnson did not see the claimant between September, 2002 and February, 2004 while she treated with Dr. Herring. (RE at 41; General Exhibit 1 at 23). When the claimant resumed

her treatment with Dr. Johnson in February, 2004, she was back on her annual check up rotation. (RE at 41; General Exhibit 1 at 23). Dr. Johnson testified that the claimant explained to him in 2004 that she had an accident on January 10, 1998, where she was bumped on the left side of the head. (RE at 42, 45; General Exhibit 1 at 24, 27). Dr. Johnson explained that the conversations with the claimant concerning this alleged accident occurred several times in passing but they were not in a medical setting so they were not present in his medical notes. (RE at 43,44; General Exhibit 1 at 25, 26). He stated that the claimant would discuss it with him when she came in with another patient or relative but never discussed it with him on her annual checkup. (RE at 43, 44, 45; General Exhibit 1 at 25, 26, and 27). Dr. Johnson has over 25,000 patients total, and testified that he remembered conversations that he had with a lot of them. (RE at 44; General Exhibit 1 at 26).

Dr. Johnson submitted a note dated April 6, 2005, which stated that he would defer the causation opinion to Dr. Joel Herring. (RE at 45, 54; General Exhibit 1 at 27, Exhibit A). Dr. Johnson testified that the reason he opted to defer the causation opinion to Dr. Herring was because Dr. Herring was the specialist treating the actual problem. (RE at 46; General Exhibit 1 at 28). Dr. Johnson also reviewed a document submitted under Affidavit that he signed dated May 17, 2005. (RE at 46; General Exhibit 1 at 28). He agreed that this May 17, 2005, document stated his opinion to be that there was a correlation between the accident and the retina detachment. (RE at 46, 55 -56; General Exhibit 1 at 28, Exhibit B). Dr. Johnson testified that was his opinion to a reasonable medical probability. (RE at 47; General Exhibit 1 at 29).

In attempting to explain his differing opinions between his first notation of April 6, 2005, when he stated that he would defer the causation opinion, and May 17, 2005, when he made a conclusion concerning the causation, Dr. Johnson cited a study performed by the American

Academy of Family Physicians dated April 1, 2004. (RE at 47; General Exhibit 1 at 29). Dr. Johnson testified that he located this study as he was working on a continuing education project. (RE at 48; General Exhibit 1 at 30). He printed it off the internet on June 2, 2005. (RE at 48; General Exhibit 1 at 30). He agreed, therefore, that the study would have been in effect on April 6, 2005, at the time he issued his first note through which he stated he would defer the opinion on causation to Dr. Herring. (RE at 48; General Exhibit 1 at 30). He stated that his April 6, 2005, note, agreed that there was a possible link to the claimant's accident and the problems she later had with her left eye. (RE at 49; General Exhibit 1 at 31). He went further to state, however, that he would defer to Dr. Herring as to whether the problem could lie dormant for an extended period of time. (RE at 49; General Exhibit 1 at 31).

Dr. Johnson agreed in his deposition that he had previously acknowledged in his April, 2005, note that there was a possible link consistent with the study he was referencing from the American Family Physician that he printed off the internet. (RE at 49; General Exhibit 1 at 31). Dr. Johnson testified that there was nothing else that changed his mind from deferring to Dr. Herring's opinion in April, 2005, to issuing his own opinion on May 17, 2005. (RE at 49; General Exhibit 1 at 31). Dr. Johnson testified that the April 6, 2005, note and May 17, 2005 note were essentially the same as both stated that it was a possibility that the retina detachment could have been caused by the accident. (RE at 51, 55-56; General Exhibit 1 at 36, Exhibit B). Dr. Johnson testified that, so far as he could tell, the only difference would be that Dr. Joel Herring would be able to issue his opinion to a reasonable medical probability where his opinion was only optometric. (RE at 51; General Exhibit 1 at 36). That was his testimony despite the fact that the actual notation on the May 17, 2005, report and his testimony during cross-examination was stated to a reasonable medical probability. (RE at 52; General Exhibit 1 at 37,

Exhibit B)(emphasis added).

Dr. Johnson testified on direct examination that the accident described by the claimant would be a competent producing cause of the retina detachment that he diagnosed and for which he referred her to Dr. Joel Herring. (RE at 32; General Exhibit 1 at 11). Dr. Johnson testified that to a "reasonable medical probability" the accident described to him while working at the Silver Star Casino caused the retina detachment that he diagnosed. (RE at 33; General Exhibit 1 at 12)(emphasis added). Dr. Johnson testified that the claimant is currently legally blind in the left eye as a result of the multiple surgeries, and that the legal blindness is related to the retina detachment. (RE at 34; General Exhibit 1 at 13). He went further to state that to a reasonable medical probability the loss of vision experienced by Ms. Moore in the left eye was related to her accident at the Silver Star Casino. (RE at 34; General Exhibit 1 at 13)(emphasis added).

When asked on cross-examination whether he still deferred to Dr. Herring as to the causation opinion Dr. Johnson testified that Dr. Herring would be the specialist that actually performed the surgery. (RE at 52, 53; General Exhibit 1 at 37, 38). Dr. Johnson could not testify that there was not another factor in the claimant's life that could possibly have caused the problem. (RE at 50; General Exhibit 1 at 33).

The deposition testimony of Dr. Joel H. Herring was also admitted as General Exhibit 2. Dr. Joel Herring is a licensed medical physician who testified as an expert witness in the field of ophthalmology with a sub-specialty in retina surgery. (RE at 58, 59; General Exhibit 2 at 3,4). Dr. Herring first saw the claimant on September 26, 2002, with a complaint of decreased vision and visual field in the left eye. (RE at 60; General Exhibit 2 at 6). Physical examination revealed a retina detachment on the left eye with a strong traction line with evidence of scarring and some chronic demarcation lines. (RE at 61; General Exhibit 2 at 7). Dr. Herring testified

that the claimant had two (2) things going on at that time. (RE at 62; General Exhibit 2 at 8). The claimant had some scarring both under the retina and on top of the retina. (RE at 62; General Exhibit 2 at 8). Dr. Herring testified that he could not state exactly how long the scarring had been present. (RE at 62; General Exhibit 2 at 8). Dr. Herring testified that the second (2nd) thing going on with the claimant was a retina detachment that looked acute and recent. (RE at 62; General Exhibit 2 at 8). Dr. Herring testified that the problem he saw the claimant for on the initial visit in September, 2002, arose from a combination of the chronic scarring condition and the more acute problem. (RE at 62; General Exhibit 2 at 8). Dr. Herring testified that the claimant required surgery to repair the retina detachment and then developed scar tissue in the eye which led to subsequent surgeries, including cataract surgery. (RE at 63; General Exhibit 2 at 9).

Dr. Herring testified that on September 26, 2002, the claimant reported to him that she had been elbowed in the eye while playing with her children some time within a month to six (6) weeks prior to that visit. (RE at 65, 71; General Exhibit 2 at 11, 17). Dr. Herring testified that, if the elbow incident had occurred two (2) months prior to the visit, it would be considered chronic. (RE at 65,66; General Exhibit 2 at 11, 12). As such, Dr. Herring testified that it was conceivable that the elbow incident could be the competent producing cause of the scarring that he noticed in the eye, as well. (RE at 66; General Exhibit 2 at 12).

Dr. Herring testified that the elbow incident was the only injury that the claimant mentioned to him at the time. (RE at 66; General Exhibit 2 at 12). Dr. Herring testified that he never got information from the claimant concerning any type of alleged injury where she was hit in the eye by a door while working for a casino. (RE at 66; General Exhibit 2 at 12). Dr. Herring testified that the only history that he ever received from the claimant is when she first presented

on September 26, 2002. (RE at 71; General Exhibit 2 at 17). The only other information that he has received as to what might have happened to the claimant's eye was from the claimant's attorney. (RE at 71; General Exhibit 2 at 17).

Dr. Herring testified that it was conceivable that an incident presented to him in a hypothetical situation by claimant's counsel could have been the competent cause of the retina detachment for which he treated the claimant. (RE at 68; General Exhibit 2 at 14)(emphasis added). The hypothetical situation presented to the doctor was based upon the assumption that the claimant was bending over cleaning a door when the door was opened and hit her on the left side of the face in the eye and knocking her down to the ground. (RE at 67; General Exhibit 2 at 13). Dr. Herring stated, however, that he could not draw a definite correlation since any significant injury, whether an elbow or a door, could begin the process that leads to scarring and the detachment in the eye. (RE at 68; General Exhibit 2 at 14).

Dr. Herring testified it is conceivable that a small retina detachment could exist for years before it would get large enough that an individual would notice it. (RE at 64; General Exhibit 2 at 10). Dr. Herring testified, however, that he could not say it was probable in medical terms whether an alleged injury to the claimant's eye while working at the casino could have resulted in a small dormant detachment that could have existed in a dormant state from the date of her alleged accident in 1996, until she first went to see Dr. Johnson with her first complaints of problems in 2002. (RE at 59,70; General Exhibit 2 at 15, 16). Dr. Herring stated that all he could say to a reasonable medical probability was that trauma was a causative effect in either the predisposition for a further retina detachment or certainly toward the scarring, but he could not say to a reasonable medical probability which particular trauma caused the problem. (RE at 74; General Exhibit 2 at 22). Dr. Herring agreed that the claimant advised him that she had no

previous eye problems upon her first presentation to him in September, 2002. (RE at 73; General Exhibit 2 at 21). He agreed that a reasonable assumption, therefore, would be that, even if the scarring was old, since it was not causing the claimant any problems, it was asymptomatic prior to the elbow injury. (RE at 71, 72; General Exhibit 2 at 20, 21).

SUMMARY OF THE ARGUMENT

The employer and carrier below and the Appellant herein would submit that the Circuit Court of Neshoba County, Mississippi, applied an incorrect standard of review when it re-weighed the evidence in this matter. It is long established that the substantial evidence rule is utilized as the standard of review in workers' compensation cases, and that said doctrine requires that the Appellant Court affirm the findings of fact of the Mississippi Workers' Compensation Commission so long as they are supported by "substantial evidence." Weatherspoon v. Croft Metals, Inc., 853 So. 2d 776, 778 (Miss. 2003).

In the instant case the Administrative Judge found that the claimant failed "to prove by a preponderance of the evidence that her left eye condition was causally related to the alleged accident of September 28, 1996." (RE at 19). The Administrative Judge set forth a lengthy opinion detailing her conclusion and the facts that supported same. (RE at 7-19). In doing so the Administrative Judge specifically stated that she did not find the claimant's testimony to believable. (RE at 18). The Full Commission of the Mississippi Workers' Compensation Commission agreed with the Administrative Judge and affirmed her decision on June 20, 2006. (RE at 23).

There were many inconsistencies among the claimant's deposition testimony, hearing testimony, and employee statement prepared at the time of the alleged incident. The claimant never could fully explain the inconsistencies and eventually stated she could not recall what happened "to tell you the truth". Notwithstanding the inconsistencies concerning the alleged incident itself, the claimant's credibility is also brought into question by the fact that the bills for her alleged injury have never been presented through the employer in this matter for payment. Rather, the bills were paid by Blue Cross Blue Shield, her insurance through her current

employer. Furthermore, the claimant never reported anything concerning this alleged incident to Dr. Lee Johnson in a medical setting so that it would appear in his optometry note. She did report an incident to Dr. Joel Herring, the specialist who performed the surgery on her, but told Dr. Herring that she was elbowed in the eye while playing with her children. She never mentioned anything to Dr. Joel Herring about an alleged injury at work, and he testified that the only information that he had concerning any alleged injury at work came from the claimant's attorney.

Dr. Joel Herring testified that he could not state to a reasonable degree of medical probability that the claimant's alleged injury in September, 1996, was casually related to a retina detachment that he diagnosed in September, 2002. Absent the necessary medical proof, the claimant simply failed to meet her burden to prove not only that she sustained a work-related injury, but that the medical treatment she received was causally related to same. The employer and carrier submit that substantial evidence exists in the record to support the findings of the Administrative Judge and Mississippi Workers' Compensation Commission. As a result the Circuit Court of Neshoba County erred in reversing the decision. The employer and carrier would request that the Order of the Circuit Court of Neshoba County, Mississippi, be reversed and the Order of the Mississippi Workers' Compensation Commission be reinstated.

ARGUMENT

1. **WHETHER SUBSTANTIAL EVIDENCE EXISTS IN THE RECORD TO SUPPORT THE FINDING OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION THAT THE CLAIMANT FAILED TO MEET HER BURDEN OF PROOF TO ESTABLISH THAT SHE SUSTAINED A WORK-RELATED INJURY IN THE COURSE AND SCOPE OF HER EMPLOYMENT WITH EMPLOYER.**

It is well established that the substantial evidence rule is utilized as the standard of review in workers' compensation cases. Weatherspoon v. Croft Metals, Inc., 853 So. 2d 776, 778 (Miss. 2003); R.C. Petroleum, Inc. v. Hernandez, 555 2d So. 1017, 1021 (Miss. 1990). The substantial evidence rule dictates that findings of fact made the Mississippi Workers' Compensation Commission are binding on Appellate Courts so long as they are supported by "substantial evidence." Attala County Nursing Ctr. v. Moore, 760 So. 2d 784, 787 (Miss. Ct. App. 2000); Bolivar County Gravel Company v. Dial, 634 So. 2d 99, 103 (Miss. 1994); See also Metal Trims Industries, Inc. v. Stovall, 562 So. 2d 1293 (Miss. 1990) (stating that decision of Commission as to facts of case will be upheld on appeal if supported by substantial evidence).

Additionally, where the findings of fact of the Commission are supported by substantial evidence, the Appellate Court is charged with the duty to affirm the decision even if the Appellate Court might be convinced otherwise from the evidence if it were the fact finder in the case. Moore, 760 So. 2d 787, 788; Hernandez, 555 So. 2d at 1021 - 1022. "Substantial evidence" has been defined as being more than a "mere scintilla" of evidence but not rising to the level of a "preponderance of the evidence." Moore, 760 So. 2d at 788. The Full Commission operates as ultimate "fact finder", and the reviewing Court is to presume that a proper determination as to credibility and weight of evidence was made by the Commission. Id. at 787.

Furthermore, it is only in "extraordinary cases" that a Circuit Court should reverse the findings of the Commission. Hale v. Ruleville Health Care Center, 687 So. 2d 1221, 1225 (Miss. 1997). The current case does not represent such an "extraordinary case."

In the instant case there certainly exists substantial evidence to support the Commission's finding that the claimant failed to meet her burden of proof to establish that she sustained a work related injury in the course and scope of her employment with the employer. A compensable "injury" under the Mississippi Workers' Compensation Act is defined as an

> accidental injury or accidental death arising out of the course and in the scope of employment without regard to fault which results from an untoward event or events....

Miss. Code Ann. § 71-3-3 (b) (Rev. 1995). It is well settled that a Claimant seeking benefits under the Mississippi Workers' Compensation Act must prove that a compensable injury occurred within the above-stated definition by a preponderance of the evidence. Hedge v. Leggett and Platt, Inc., 641 So. 2d 9, 12 (Miss. 1994); Hernandez, 555 So. 2d at 1021. In fulfilling that burden the claimant must prove, at the very least, that she sustained an accidental injury arising out of and in the scope and course of her employment. Penrod Drilling Company v. Ethridge, 487 So. 2d 1330, 1332 (Miss. 1986). A claimant must also prove "a causal connection between the injury and the claimed disability." Mabry v. Tunica County Sheriff's Dept., 911 So. 2d 1038,1043 (Miss. App. 2005); Hedge, 641 So. 2d at 13.

Furthermore a compensable injury must be proven as a "reasonable probability," and "not by mere surmise, conjecture or speculation." Hernandez, 555 So. 2d at 1020-1021; See also Bracey v. Packard Elec. Division of General Motors Co., 476 So. 2d 28, 29 (Miss. 1985) (holding that recovery in workers' compensation case must be supported by more than mere possibilities). The medical evidence that the claimant needs to assist in this causal relationship,

therefore, would be an expert medical opinion "to a reasonable degree of medical probability." Hernandez, 555 So. 2d at 1021. Furthermore the Commission has the obligation to consider the weight and credibility of all of the evidence offered in support of this claim to determine whether a claimant has successfully met the requisite burden of proof. Miller Transport, Inc. v. Guthrie, 554 So. 2d 917, 918 (Miss. 1989).

It has previously been stated that a claimant is competent to prove his own claim and that his testimony may be accepted without corroboration. Ethridge, 487 So. 2d at 1333. The prerequisite to such testimony being taken as conclusive, however, requires that the testimony is not disputed by other witnesses or circumstances and is not untrustworthy. Ethridge, 487 So. 2d at 1333 (emphasis added); Tanner v. American Hardware Corp., 119 So. 2d 380, 381 (Miss. 1960). In the case at hand the claimant presented her testimony in the course of meeting her burden of proof. The Administrative Judge observed the claimant's demeanor and assessed her credibility. There were many inconsistencies among the claimant's deposition, hearing testimony and the accident forms which she completed immediately following the alleged accident. Employer and Carrier submit that the Commission determined that the claimant was not a credible witness on her own behalf as it affirmed the Order of the Administrative Judge which stated that she "simply did not find the claimant's testimony to be believable." (RE at 18).

For instance during her direct examination at the hearing the claimant testified that she was in the process of cleaning glass doors while being in a squatted position. The claimant testified very specifically that someone wearing blue jeans and cowboy boots came through the door causing it to slam into her and knock her down. The claimant testified that she fell on her backside, and the door hit her on the left side of her face. She testified that she had a large knot in her left eyebrow following same. The claimant's deposition testimony obtained prior to the

hearing in this matter produced the same testimony from the claimant as to how the accident occurred.

According to the employer forms introduced as General Exhibit 3, however, different information was provided on the actual date of the alleged accident. The claimant completed an Employee Accident Report on September 28, 1996, the date of the alleged accident. The claimant testified during direct and cross examination that she completed and signed this form herself in the security office immediately following the alleged accident. On this report in the claimant's handwriting where she was asked to describe what she was doing and how the alleged accident occurred, she stated "I was bringing in a cart of luggage, when a lady was coming out of the door. She pushed it toward me and I got hit in the face." (RE at 75; General Exhibit 3 at 3).

Although the claimant attempted to reconcile the inconsistencies, she never really was able to specifically tell us what occurred. In fact at one point during her cross examination she stated that she did not remember exactly what she was doing, "to tell you the truth," and she could not really remember if it was a man or a lady involved in the alleged incident. This admission was despite the fact that she had adamantly testified on two (2) prior occasions during her deposition testimony and her direct examination with great detail that the person who opened the door had on blue jeans and cowboy boots.

The claimant's sister, Avis Cole, who she attempted to call in corroboration, testified that the first and only knowledge she had that anything had happened concerning a door being opened was when she overheard a male employee talking to a co-worker about same.

In reviewing the trustworthiness of the claimant's testimony it should also be noted that all of the claimant's medical bills concerning treatment for her left eye were filed on her private medical insurance and paid through Blue Cross Blue Shield, which was her private insurance she

obtained through her current employer. The claimant testified that she never returned to the employer in this case to provide them with any of the medical bills concerning her left eye treatment. The employer and carrier would submit to this Court their belief that, had the claimant believed her medical treatment was the result of a work-related injury, she would not have filed the medical bills with Blue Cross Blue Shield. Employer and Carrier are further of the opinion that Blue Cross Blue Shield certainly would not have paid these bills had they received information that same were related to a work-related incident.

Additionally, Dr. Lee Johnson testified that the first time he had knowledge of any alleged work-related accident was in 2004 when the claimant presented for her annual examination. This was despite the fact that he had seen her on an annual basis since February, 2000. At no time prior to 2004 did she mention anything about a work-related accident despite the fact that he diagnosed her with a retina detachment in September, 2002. Furthermore, Dr. Joel Herring testified that the claimant never reported anything to him about an alleged accident while working at the casino. He testified that the only knowledge he received concerning anything of that sort was from the claimant's attorney.

Dr. Herring testified that the only history provided to him by the claimant was that she was playing with her children when she was elbowed in the eye several weeks prior to her initial visit with him in September, 2002. The claimant herself testified that it was the elbow in the eye and the subsequent tearing from same that caused her to schedule an appointment with Dr. Johnson in September, 2002, to get her eye checked. She testified that the appointment with Dr. Johnson was already scheduled when, the night before same, she began to notice the black dot on her eye.

The fact that the claimant had already scheduled an appointment with Dr. Johnson after

she was elbowed in the eye leads one to believe that it was a significant blow that she received since she felt it was necessary to have same "checked out" when she had experienced no previous eye trouble. In fact the claimant reported to Dr. Herring during her initial visit that she had experienced no previous eye problems. When the claimant saw Dr. Johnson, in September, 2002, she presented a history to him that she had noted a decrease of vision since August, 2002, an approximate four (4) to six (6) week period of time, especially in the left eye. That period of time would coincide with the period of time that she reported to Dr. Herring that she had been elbowed in the eye by her child.

The claimant also testified that her eye had held a red tint since the date of the alleged accident of September, 1996. She and her sister both testified that the discoloration had been present in her eye since that time, although at times it had gotten worse. Notwithstanding that fact, however, the claimant testified that she never mentioned same to the eye doctor nor did the eye doctor question her concerning the cause of the redness, even though she saw an eye doctor on an annual basis since at least February, 1998, until the date Dr. Johnson referred her to Dr. Herring in September, 2002.

Additionally, the claimant was not alarmed enough by the alleged redness to present to a physician for an examination concerning same; nor was she concerned enough to mention it to the physician at her annual visit. The lack of claimant's concern and mention of same, coupled with the fact that the eye doctor examining her eyes on an annual basis failed to mention the discoloration, leads one to believe that, if the discoloration of the eye ever existed, it subsided after a period of time. That conclusion would also be contradictory to the claimant's testimony.

In addition to her own testimony not being trustworthy enough to fulfill her burden of proof, the claimant also failed to present medical testimony sufficient to support her claim as

required under the Mississippi Workers' Compensation Act. Dr. Lee Johnson did testify during his deposition that he felt that the claimant's retina detachment was causally related to a work injury that she sustained at the Silver Star Casino in January, 1998. As previously noted for the Court's understanding, at the hearing in this matter the Petition to Controvert was amended to note the date of the alleged accident of September 28, 1996. In his deposition, Dr. Johnson testified on occasion that his opinion was to a reasonable degree of medical probability and on other occasions he testified that his opinion was to a reasonable degree of optometry probability.

Several points are to be made about Dr. Johnson's testimony. First and foremost Dr. Johnson is an eye doctor, not a medical doctor, and not the specialist in this field. He conceded that fact because, once the problem was diagnosed, the claimant had to be referred to a medical doctor for treatment on same. Employer and Carrier take the position that the Commission correctly provided more weight to the more credible specialist testimony of Dr. Herring.

An additional reason why Dr. Johnson's testimony should be called into question is, quite frankly, his credibility with regard to same. Dr. Johnson submitted a handwritten note dated April 6, 2005 which stated that there was a possible link between the claimant's accident and the problems she later had with her left eye. Dr. Johnson stated in that note that he would defer to Dr. Joel Herring on causation as to whether the problem could lie dormant for an extended period of time. Additionally Dr. Johnson testified during his deposition that, despite the fact that his chart had no notation of the claimant providing him any history of being hit in the eye while at work, he recalled her mentioning it to him in passing as early as 2004. Dr. Johnson stated that he independently recalled discussing this matter with the claimant at a time that she was present in his office with another patient for an eye examination. Dr. Johnson estimated that he had 25,000 patients as of the time of his deposition, and the employer and carrier question whether an off

hand conversation with one of the patients would really be as clearly remembered as Dr. Johnson testified.

On May 17, 2005, Dr. Johnson completed another statement. This occurred after Dr. Joel Herring's deposition on May 11, 2005, when Dr. Herring testified that he could not state to a reasonable degree of medical probability concerning the causation issue. Through this second (2nd) note submitted by Dr. Johnson he stated "based on my opinion and with reasonable medical probability" it is a possibility that Ms. Moore's retina detachment could have been caused by her accident on the job on January 10, 1998. (See RE at 56; General Exhibit 1 at Exhibit B). He stated that he was of the opinion that the correlation could be drawn between the accident and the retina detachment because retina detachments can occur from trauma months and even years after the accident.

When questioned about the discrepancies in these two (2) notes, Dr. Johnson stated that the only discrepancy he saw was whether or not he would defer to Dr. Herring. He stated that in the first (1st) note he said it was possible that there was a link between the accident and the subsequent retina detachment and in the second (2nd) note he stated same was possible to a reasonable medical probability. The difference, as he saw it, was that in the first (1st) note he stated he would defer to Dr. Herring as to causation and in the second (2nd) note he provided the causation opinion himself. Later in his deposition testimony, however, Dr. Johnson was specifically asked if he still deferred to Dr. Herring as to the causation opinion. Dr. Johnson responded at that time that Dr. Herring was the specialist that actually performed the surgery.

Certainly any type of opinion Dr. Johnson tried to give to a reasonable degree of medical probability is insufficient to meet the burden of proof in this matter as he is not a medical doctor. Furthermore, any opinion Dr. Johnson would give to a reasonable degree of optometry

probability should certainly be reviewed with the above inconsistencies in mind. Finally, any opinion that Dr. Johnson would give to a reasonable degree of optometry probability would be superceded by the specialist opinion to a reasonable degree of medical probability. Dr. Herring is the expert in this field, as he is a medical doctor with a speciality in ophthalmology and a sub-specialty in retina surgery. His opinion should certainly be more persuasive and carry more weight than a doctor of optometry who is not a medical physician.

Dr. Joel Herring testified that, although it was possible that certain things could cause the claimant's retina detachment, he could not say to a reasonable degree of medical probability that it was an alleged injury she sustained in 1996 while working for the employer. The only thing that Dr. Herring could state to a reasonable degree of medical probability was that a trauma of some sort caused the claimant's retina detachment. He could not state whether it was trauma from an alleged injury at work in 1996 or trauma from an elbow to the left eye by her child prior to him seeing her.

The employer and carrier would submit that what actually occurred is what the claimant reported when she first sought medical treatment for her left eye in September, 2002. Since the claimant scheduled an appointment with Dr. Lee Johnson to return in September rather than her usual annual visit in February of each year, one can ascertain that some type of acute event occurred. The claimant initially reported that she had been bumped in the eye while playing with her child just prior to that September, 2002, visit. She testified that, because her eye teared up, she went ahead and scheduled an appointment with Dr. Johnson for him to "check it out." The night before the appointment with Dr. Johnson was when she first noticed the black dot in her eye the size of an eraser. Apparently it must have been more than a tiny bump in the eye by her child if it led the claimant to schedule an eye appointment to make certain that her eye was fine

since she had never had any prior problems with her eye.

In overturning the decision of the Full Commission the Circuit Court of Neshoba County re-weighed the evidence and opined that Dr. Herring's testimony outweighed any other contrary evidence because he was a specialist in the area. (RE at 5). The Circuit Court went on to concede that Dr. Herring only opined that it was a "conceivable possibility" that the claimant's eye problems were related to her alleged work-related injury. (RE at 5). The Circuit Court noted that, even though Dr. Herring's diagnosis was not definite, the decision should be resolved on the side of the Plaintiff. (RE at 5-6). The Circuit Court supported its decision with case law from this Court that "in doubtful cases, the doubt would be resolved in favor of compensation so that the purpose of the Workers' Compensation Act may be carried out." (RE at 5-6).

While the employer and carrier are aware of the "liberal construction" applied to the Mississippi Workers' Compensation Act, this Court has opined that "liberal construction" does not permit the disregard of traditional notions of "fair play and substantial justice" See Georgia Pacific Corp. v. McLaurin, 370 So. 2d 1359,1361 (Miss. 1979) (noting that traditional notions of "fair play and substantial justice" are not to be disregarded in lieu of "liberal construction" of Act). Although liberal construction of the Act might apply insofar as the claimant's testimony is concerned, there is simply no excuse for the claimant not having the medical evidence she needs to support her claim. It is an absolute requirement under the current status of the workers' compensation law that the claimant must prove her claim by medical testimony. This Court has specifically stated that the principle of liberal construction cannot be utilized to "bridge gaps in the failure of the medical testimony" to determine a causal relationship. Olen Burrage Trucking Co. v. Chandler, 475 So. 2d 437, 439 (Miss. 1985).

In sum it does not appear that there is any credible medical testimony that rises to the

level to confirm that this claimant suffered from a retina detachment that was causally related to a work-related injury of September, 1996. There is some medical testimony and optometry testimony stating suspicions and possibilities, but there is no medical testimony stating to a reasonable degree of medical probability that the claimant's retina detachment in her left eye was causally related to a 1996 injury while at work.

In the event that the Court determines that a work-related accident did occur on September 28, 1996, the claimant sought no medical treatment as a result of same until September, 2002. As a result, there is certainly no causal connection between the claimant's injury and any treatment the claimant received six (6) years later. Neither the medical or lay testimony support such a relationship. Finally, in the event it is determined that a work-related accident did occur in September, 1996, the claimant sustained no disability, occupational or otherwise, as a result of the alleged accident.

CONCLUSION

The Claimant, Iris Moore, has alleged that she sustained a work-related accident to her left eye while employed with the employer on September 28, 1996. To support her allegations, however, Claimant has failed to put on sufficient evidence to prove her claim by a preponderance of the evidence. Although Claimant presented her own lay testimony to support that an alleged work-related injury occurred in September, 1996, same was full of inconsistencies which made it untrustworthy and not reliable. The Full Commission adopted the Administrative Judge's Order which specifically stated that she "simply did not find the Claimant's testimony to be believable." As the Commission is the finder of facts this Court can only defer to its opinion in that regard as long as the findings are supported by "substantial evidence".

The claimant also called Ms. Avis Cole as a corroborating witness for her testimony. Ms. Cole was terminated from the employer on March 4, 2000, for a bank shortage. The employer and carrier would submit that Ms. Avis Cole, therefore, is not a reliable corroborating witness for the claimant against the employer and carrier in the instant matter due to the understandable feelings associated when an employee is terminated from employment for cause.

Additionally the claimant has failed to present any credible medical evidence to adequately support her allegation to a reasonable degree of medical probability as required by the Mississippi Workers' Compensation Law. While the claimant attempted to present some testimony in that regard, none was sufficient to meet her burden of proof as same must rise above "mere surmise, conjecture or speculation." Claimant failed to submit competent medical testimony as to causation to a reasonable degree of medical probability.

In light of the inconsistencies in the claimant's testimony and the unreliable testimony of her corroborating witness, as well as the lack of competent medical testimony to support the

claimant's allegations of a work-related injury, substantial evidence exists to support the Commission's determination that Claimant did not prove that a compensable work-related injury occurred. The Circuit Court applied an incorrect standard of review by re-weighing the evidence presented and reversing the Order of the Commission. As such, the Order of the Circuit Court should be reversed.

Respectfully submitted this the 25th day of June, 2007.

Boyd Mississippi, Inc. and
Continental Casualty Company

BY: Amy K. Taylor
Amy K. Taylor (MSB#[redacted])

CERTIFICATE OF SERVICE

I, Amy K. Taylor, do hereby certify that I have this date delivered, via United States mail, a true and correct copy of the Brief of the Appellant to the following persons listed below:

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This the 25th day of June, 2007.

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