

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CASE NO. 2007-WC-00155**

**GARY HOLLOWAY (Claimant)**

**APPELLEE**

**VERSUS**

**F & F CONSTRUCTION (Employer);  
A MEMBER OF THE BUILDERS AND  
CONTRACTORS ASSOCIATION OF  
MISSISSIPPI SELF-INSURER'S FUND (Carrier)**

**APPELLANTS**

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**APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI**

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**BRIEF OF APPELLEE (Claimant)**

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**(Oral Argument Requested)**

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**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 judges of this Court may evaluate possible disqualifications or recusal.

Gary Holloway, (Claimant)

Appellee

James K. Wetzel

with the law firm of James K. Wetzel & Associates

Counsel for Appellee

F & F Construction (Employer); A member of the  
Builders and Contractors Association of  
Mississippi Self-Insurer's Fund

Appellants

Michael D. Young

with the law firm of Markow Walker, P.A.

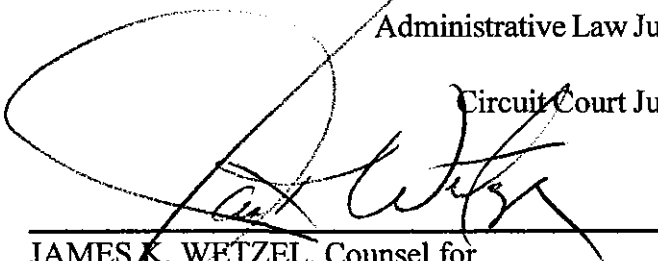
Counsel for Appellants

Honorable Linda Thompson

Administrative Law Judge

Honorable Stephen B. Simpson

Circuit Court Judge



JAMES K. WETZEL, Counsel for  
Gary Holloway, Appellee (Claimant)

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## **STATEMENT OF THE ISSUE**

- I. WHETHER THE ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION OF APRIL 28, 2006 WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTRARY TO LAW

## STATEMENT OF THE CASE

In the present workers' compensation claim, Claimant, Gary Holloway, filed a Petition to Controvert on October 18, 2004, alleging that on September 17, 2004, he received a work related injury to his back and legs. On January 14, 2005, he filed an Amended Petition to Controvert to correct the alleged injury date to September 10, 2004. The Employer and Carrier denied the compensability of the injury and did not pay any workers' compensation benefits. (R.E 1).

A hearing was held in Gulfport, Mississippi on October 25, 2005, and the primary issue submitted to the administrative law judge for resolution was as follows:

"The issue to be resolved by the administrative law judge was whether the Claimant, Gary Holloway, received a work related injury on or about September 10, 2004, as alleged in the Amended Petition to Controvert."

The full order of the administrative law judge which comprises twelve (12) pages, was handed down on December 9, 2005, and the administrative law judge concluded, *inter alia*, as follows:

After carefully considering the pleadings, prehearing statements, lay and medical evidence, the demeanor of the witnesses at the hearing, and the applicable law, the administrative law judge finds as follows:

1. The Claimant, Gary Holloway, received a work related injury to his low back on or about September 10, 2004, as alleged in the amended Petition to Controvert. According to his employer and supervisors, Mr. Holloway was a good, dependable, faithful employee, and Mr. Holloway testified that he enjoyed his work as a pipe layer. He is not a very articulate man, however, and he cannot read or write. He also is not good with dates, and this explains the confusion about when he had the work injury. When he presented to the emergency room on September 17, 2004, he reported that he had injured his back lifting up on some pipe three days earlier. It is certainly believable that he could have injured his back as he said he did because of the kind of work he regularly did as a pipe

layer. Several days earlier, he was working for F & F Construction as a pipe layer. Frank Hayden supported Mr. Holloway's story that he reported an injury to him on Tuesday, September 21, 2004, which was after Mr. Holloway went to the emergency room, having realized he had an injury that was not going to get better without medical attention. Mr. Holloway mistakenly reported to the employer or the employer mistakenly heard him report an injury on September 17, 2004, a day when Mr. Holloway did not work, explaining why the employer thought he did not have a work injury. But at the hospital on the early morning of September 17, 2004, Mr. Holloway reported an injury three to five days earlier when he was lifting pipe. His story is credible.

2. Mr. Holloway's average weekly wage on September 10, 2004, was \$399.07, as stipulated by the parties.

### ***ORDER***

IT IS THEREFORE ORDERED that the employer and carrier pay workers' compensation benefits to the claimant as follows:

1. Provide medical services and supplies as required by the nature of the claimant's injury and the process of his recovery there from pursuant to Mississippi Code Annotated §71-3-15 (1995), General Rule 12, and the Medical Fee Schedule.
2. Temporary total disability benefits at the rate of \$266.05 per week during any period Mr. Holloway was temporarily totally disabled; and
3. Penalties and interest on all due and unpaid compensation benefits. (R.E.2).

The Employer/Carrier filed a petition for review on or about December 15, 2005, alleging that (1) the administrative law judge erred in finding that claimant sustained a work related injury to his low back on or about September 10, 2004, and (2) the administrative law judge erred in finding claimant's "story" was credible in light of all the evidence to the contrary.

The Workers' Compensation Commission, having considered the briefs filed by the respective parties and after considering same, entered its decision on April 28, 2006, and as the "ultimate finder of fact" concluded and ratified the decision of the



administrative law judge and affirmed the “order of the administrative law judge” dated December 9, 2005. (R.E.3).

Circuit Court Judge Stephen B. Simpson having reviewed the record on appeal, having heard oral argument and having considered the briefs and applicable law, entered an order on December 13, 2006, affirming the decision of the Full Commission and administrative law judge that the Claimant sustained his burden of proof by a preponderance of the evidence that his injury arose out of in the course of his employment through a work related injury on September 10, 2004. (R.E.4). From said ruling, the Employer/Carrier appealed to this Supreme Court.

## ARGUMENT

### II. WHETHER THE ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION OF APRIL 28, 2006 WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTRARY TO LAW

As this Supreme Court is well aware, the findings and orders of the Mississippi Workers' Commission are binding on this Court and all appellate courts so long as the decisions are supported by substantial evidence. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994); *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988); *Champion Cable Construction Co., Inc. v. Monts*, 511 So. 2d 924, 927 (Miss. 1987). This is sometimes referred to as a "general deferential standard of a review to the findings of the Commission." *See, Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243-45 (Miss. 1991).

Great deference is given to the findings of the Commission when supported by substantial evidence. *Accord, Harper v. North MS Medical Center*, 601 So. 2d 395 (Miss. 1992). As a matter of custom and practice, the administrative law judges generally, within the Commission, are the individuals who conduct the hearings and hear the live testimony. However, it is the Commission itself that is the "finder of facts" and on judicial review, its findings and decisions are subject to the normal deferential standards, and notwithstanding the opinions of the administrative law judge. *Walker Mfg. Co.*, 577 So. 2d at 1245.

An appellate court such as this Court must defer to an administrative agency's finding of fact if there is even a quantum of credible evidence which supports the

agency's decision. *Hail v. Ruleville Healthcare Center*, 687 So. 2d 1221, 1224 (Miss. 1997). This highly deferential standard of review essentially means that the Supreme Court and the Circuit Courts will not overturn a Commission decision unless said decision is arbitrary and capricious. *Id.*, at 1225; *Also see, Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

The Supreme Court has held: "We do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye toward determining how we would resolve the factual issues were we the trier of facts; rather, our functions is to determine whether there is substantial credible evidence to support the factual determination by the Commission." *South Central Bell Telephone Co. v. Aden*, 474 So. 2d 584, 589 (Miss. 1985). Stated differently, the Supreme Court has stated it will reverse the Commission's order only if it finds that the order was clearly erroneous and contrary to the overwhelming weight of evidence. *Miles v. Rockwell International*, 445 So. 2d 528, 536 (Miss. 1984) (citing *Masonnite Corp. v. Fields*, 91 So. 2d 282 [Miss. 1956]) *Riverside of Marks v. Russell*, 324 So. 2d 759, 762 (Miss. 1975). An appellate court may not simply reweigh the evidence and substitute its decision with that of the Commission. Indeed this Court, as a supreme court, has a duty to defer to the Commission when its decision can be supported. *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988).

Whether the order of the Mississippi Workers' Compensation Commission is supported by substantial evidence, Claimant would admit that to be entitled to benefits under the Workers' Compensation Act, Claimant bears the burden of proving by a preponderance of the evidence each element of the claimant of disability. *Hedge v.*

*Leggett & Platte*, 641 So. 2d 9, 13 (Miss. 1994). Therefore, Claimant Holloway, was required to prove that (1) an accidental injury occurred; (2) it arose out of and in the course of employment; and (3) a casual connection between the injury and the claimed disability. The Employer/Carrier argues that the substantial evidence does not support Holloway's claim of a work related injury. Therefore, the Employer/Carrier in this case is requesting this Honorable Court to reweigh the Commission's decision as the ultimate fact finder. As this Court is well aware, the Commission enjoys the presumption that it made proper determinations as to weight and credibility of the evidence and its factual findings are binding on this Court, as a reviewing court.

Mississippi courts have held that "substantial evidence" means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991). Thus, it may be said that substantial evidence "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Id.*, at 773. Therefore, this Court must look to determine whether there was substantial evidence to support the Commission's determination.

As this Supreme Court can readily ascertain the question comes down to the "credibility of the Claimant." The administrative law judge and as adopted by the Workers' Compensation Commission and affirmed by the Circuit Court made proper finding of fact based upon the demeanor and credibility of the Claimant and found that the Claimant's testimony was credible and that he did sustain an injury while in the course and scope of his employment. There was absolutely no testimony that contradicted Mr. Holloway that he was in any way injured other than on the job as

alleged. There was no showing from any independent witness that Mr. Holloway could have injured himself in some other manner off the job. There was no testimony to contradict his testimony other than his mistaken belief that the accident happened on September 17, 2004. It is not necessary under the Mississippi Workers' Compensation laws that Mr. Holloway prove by absolute certainty the day he was injured on the job, but his burden of proof is "a preponderance of the evidence." Apparently the evidence preponderated in his favor as found by the Commission as the trier of fact. Therefore, as this Honorable Court can ascertain there was substantial evidence upon which the Commission and administrative law judge derived their decision for compensability of this claim and the employer has not set out any testimony which is unreasonable of belief.

The Employer/Carrier in this case is attempting to have this Honorable Court "reweigh the evidence" and the Supreme Court is not to reweigh the evidence but only determine whether there is evidence to support the decision which clearly was set out by the administrative law judge. Hence, the Employer/Carrier has not proved to this Honorable Court that there was not substantial evidence to support the Commission's decision. Therefore, this Honorable Court should affirm the ruling and decision of the Workers' Compensation Commission and the Circuit Court on this issue.

As stated in *Dunn*, §272, *Mississippi Workers' Compensation*:

Evidence which is not contradicted by positive testimony or circumstances, and which is not inherently improbable, incredible or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected, even though the witness is a party or interested; and unless uncontradicted evidence is shown to be untrustworthy, it is to be taken as conclusive and binding on the triers of fact. If unimpeached testimony supported by all the circumstances in the case, and if there are no substantial grounds within the record upon cogent and logical emphasis made be drawn to the contrary, the Commission may not base its decision upon speculation that the witness might have been

mistaken or untruthful and something else might possibly occur. *See, Tanner v. American Hardware Corp.*, 119 So. 2d 380 (1960); *Machine Products Co. v. Wilemon*, 107 So. 2d 114 (1958).

Further, as has been stated on many occasions by this Honorable Supreme Court, it is not the province of the appellate court to pass upon the weight of the evidence where same is conflicting in substantial particular and to determine where the preponderance lies. However, the Court in a number of cases, has made reference to the weight or "great weight of the evidence" and has acted thereon to reverse a denial of compensation, in the strict application of the "substantial evidence rule" as in common law is doubtful. *See, King v. Westinghouse Electric Corp.*, 92 So. 2d 209 (Miss. 1957), wherein it is said that "doubtful cases should be resolves in favor of compensation."

The brief of the Employer/Carrier before this Honorable Court fails to make any allegation that the circuit court judge or the administrative law judge or the Workers' Compensation Commission made an erroneous finding of fact that the testimony of the Claimant was not credible or deemed unworthy of belief. The Employer/Carrier attempts to point out evidence in the record from testimony of its own employees that contradicts that of the Claimant. The Carrier makes bald assertions that the Full Commission's decision was not based upon substantial evidence. However, the administrative law judge's decision which was adopted by the Full Workers' Compensation Commission and affirmed by the Circuit Court set out all the relevant testimony very clearly and did not support its decision on just isolated testimony. The administrative judge made a very clear decision which cannot be argued with. She stated "his story is credible." Therefore, this case is a factual decision made by the Workers' Compensation Commission and affirmed by the Circuit court. After a full review of the record,

Claimant would submit to this Honorable Court that the Commission made its decision based upon substantial evidence that his injury arose out of and in the course of his employment and that the Claimant did sustain his burden of proof.

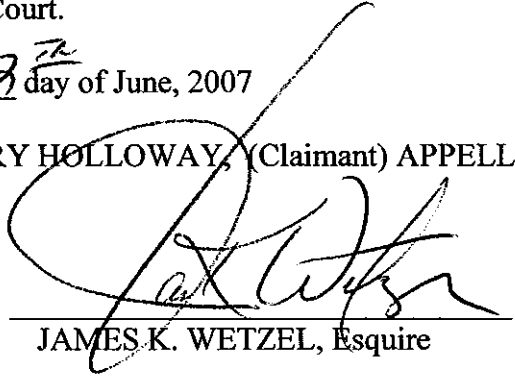
### **CONCLUSION**

Claimant requests this Honorable Court to affirm the findings of the Workers' Compensation Commission and find no error in the decision of the Commission or the Administrative Law Judge or the Circuit Court.

Respectfully submitted, this the 13<sup>th</sup> day of June, 2007

GARY HOLLOWAY, (Claimant) APPELLEE

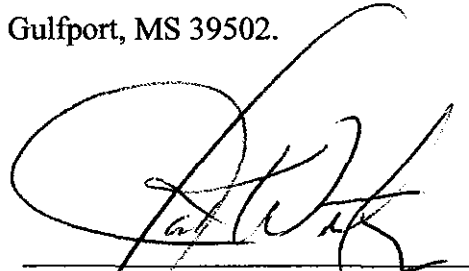
BY:

  
JAMES K. WETZEL, Esquire

**CERTIFICATE OF SERVICE**

I, James K. Wetzel, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to Michael D. Young, Esquire, with the law firm of Markow Walker, at their usual mailing address of P. O. Box 13559, Jackson, MS 39236-3669; to the Honorable Linda Thompson, Administrative Law Judge, Mississippi Workers' Compensation Commission, at P. O. Box 5300, Jackson, MS 39296-5300; and to the Honorable Stephen B. Simpson, Harrison County Circuit Court Judge, at P. O. Drawer 1570, Gulfport, MS 39502.

DATED this the 12<sup>th</sup> day of June, 2007.

  
JAMES K. WETZEL, ESQUIRE

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