

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

**BOYD MISSISSIPPI, INC. AND  
CONTINENTAL CASUALTY COMPANY**

**APPELLANT**

**VS.**

**CASE NO. 2007-WC-00422**

**IRIS MOORE**

**APPELLEE**


*Brief*

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

Submitted on this, the 12<sup>th</sup> day of July, 2007.

  
Jim Davis Hull  
Attorney of Record for the Appellee

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## **STATEMENT REGARDING ORAL ARGUMENT**

The issue presented for appeal in this matter can be resolved on the basis of the record and briefs of the parties. Oral Argument is unnecessary.

**STATEMENT OF THE ISSUE**

**WHETHER THE CIRCUIT COURT WAS CORRECT IN FINDING THE  
WORKERS' COMPENSATION COMMISSION'S ORDER UNSUPPORTED BY  
*SUBSTANTIAL EVIDENCE***

## STATEMENT OF THE CASE

### **I. Factual Background**

Iris Moore began work at the Silver Star Resort and Casino in July, 1996, as a carhop/bellhop. (R. p.23, Line 1-5). Part of her responsibility was wiping and cleaning large plate glass doors. (R. p.25, Line 7-26; R. p.26, Line 1-9). On September 28, 2006, while wiping and cleaning doors at one of the exits, she was involved in an accident when a door struck her on the left side of her face and head. (R. p.27, Line 2-15). The impact broke the skin in her left eye area (R. p.40, Line 2-14), knocked her back on her butt, caused her to see lights, (R. p.27, Line 17-29; R. p.28, Line 1-16), and created a knot the size of a small egg in her left eyebrow. (R. p.39, Line 15-29; R. p.40, Line 2-14).

After the accident she went to security and made a report to Bobby Coleman. (R. p.29, Line 9-17) (R. p.31, Line 26-29; R. p.32, Line 1-8). Ms. Coleman took pictures of Iris' eye and face. (R. p.32, Line 10-11) (Excerpt Exhibit No. 3). Later, Employer filed its First Report Of Injury with the Workers Compensation Commission. (Exhibit No. 3).

The day after the accident, Iris' left eye was red and swollen. (R. p.44, Line 23-29). The knot and swelling lasted about a week and a half (R. p.45, Line 1-5), but the redness was still there at the time of her hearing on October 6<sup>th</sup>, 2005. (R. p.45, Line 6-28). She also experienced a black eye from the blow which lasted for a substantial period. (R. p.46, Line 7-15).

Iris continued to work for the Casino until 1999 and she received no further

medical attention or lost time from work as a result of the injury. (R. p.41, Line 13-25; R. p.42, Line 2-7) (Exhibit No. 3).

Prior to September of 2002, Iris had no idea or reason to know that she had suffered a serious injury to her left eye in the 1996 accident. (R. p.47, Line 2-27). In late 2002, the left eye teared up after it was bumped by her one year old child. This caused her to get an eye examination from Dr. Lee Johnson of Philadelphia, Mississippi (R. p.49, Line 7-29). Dr. Johnson diagnosed her as having a detached retina in her left eye (R. 50, L. 26-29); (R. p.51, L. 1-2); (Dr. Johnson's Dep. P. 9, L. 11-23) and sent her to see Dr. Joel Herring, a surgeon (R. p.51, Line 4-29). It was at that time Iris for the first time made the connection between her eye problems and the on the job accident of September 28, 1996 (R. p.50, Line 26-29; R. p.51, Line 1-15). Dr. Johnson opined that the underlying chronic scarring and detachment was caused by the accident of September 28, 1996 and that she was legally blind in the eye; (Dr. Johnson's Dep. P. 11, L. 5-17; P. 12, L. 19-25; P. 13, L. 1). (R. p. 12, Line 19-25; R. p.13, Line 1); (R. p. 13, L. 5-18).

Dr. Joel Herring is a medical doctor specializing in ophthalmology and retinal surgery. He first saw Claimant on September 26, 2002 on referral from Dr. Lee Johnson. On examination, he found a detached retina in the left eye with evidence of scarring and chronic demarcation lines with strong traction lines. (Dr. Herring's Deposition P. 7, Line 7-12). The area of the detachment was sequential and had begun at the edge of the eye and progressed over time. (Dr. Herring's Deposition P. 7, Line 16-24). The detachment resulted



from both chronic and acute problems and could have existed for years without detection. (Dr. Herring's Deposition P. 8, Line 1-24; Deposition P. 10, Line 7-24).

As to causation, Dr. Herring stated to a reasonable medical certainty the retinal detachment could have laid dormant for a number of years, from 1996 until 2002, but he was not definite that a correlation existed between the detachment and the September 28, 1996 accident. (Dr. Herring's Deposition P. 14, Line 8-15; Deposition P. 15, Line 19-24; Deposition P. 16, Line 1; Deposition P. 6, Line 9-21). He did say, however, that the trauma which caused the scarring in the eye predisposed it to detachments. (Dr. Herring's Deposition P. 22, Line 7-25; Deposition P. 25, Line 9-21). And further, that scarring is always chronic, and the scarring, not the acute problem, was the cause of the retinal detachment in this case. (Dr. Herring's Deposition P. 31, Line 6-13).

To clarify his position, Dr. Herring distinguished a progressive type of retinal detachment from an acute type of retinal detachment. He said a traction retinal detachment is progressive and has a scarring component to it. (Dr. Herring's Deposition P. 8, Line 11-18; Deposition P. 6, Line 9-25). On the other hand, he said a detachment known as rhegmatogenous moves at a faster rate and is considered to be an acute detachment. (Dr. Herring's Deposition P. 8, Line 13-15). To a reasonable degree of medical certainty he said Claimant had a combination of both elements, scarring combined with a rhegmatogenous component. (Dr. Herring's Deposition P. 8, Line 16-19; Deposition P. 6, Line 19-25). To emphasize that the retinal detachment was not caused by a bump in the eye by a child, Dr.

Herring said it is reasonable to assume Ms. Moore's scarring was asymptomatic until she was bumped in the eye and that incident caused her to notice the chronic problem that was laying dormant. (Dr. Herring's Deposition P. 20, Line 14-25; Deposition P. 22, Line 1-4; Deposition P. 6, Line 19-25). He felt it unlikely that the detachment was caused by the bump in the eye a few weeks before detection, because it was unlikely it could have happened in such a short period of time. (Dr. Herring's Deposition P. 19, Line 1-10; Deposition P. 20, Line 2-25; Deposition P. 6, Line 19-25).

Finally, Dr. Herring said the only reason he was not able to identify with reasonable medical probability the exact trauma causing the scarring and resulting detachment was because he did not examine Ms. Moore from the period of the accident to September 25, 2002. He said, however, it was a conceivable possibility that the accident of September 28, 1996 caused her present problems. (Dr. Herring's Deposition P. 26, Line 1-4).

### **Procedural Background**

In July, 2004, Iris filed her Petition to Controvert seeking lost wages and medical expenses for the disability from the loss of use of a scheduled member. Average weekly wage was estimated to be \$293.53. (R. P. 3, L. 24).<sup>1</sup>

Iris called Avis Cole, her sister, as a witness to the events on the day of the

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<sup>1</sup> Initially the date of the injury stated in the Petition to Controvert was January 10th, 1998, but this error was corrected when Employer's First Notice of Injury was produced through discovery, and it showed that the correct date of the injury was September 28, 1996.

accident and the condition of her eye on the day of the accident and the days immediately following the accident. (R. p.7, Line 2-29; R. p.8, Line 5-29; R. p.9, Line 1-27; R. p.10, Line 2-29; R. p.11, Line 1-12). Ms. Cole's testimony corroborated Iris' testimony regarding the accident and resulting injuries. She also corroborated the fact that Iris had sustained no injury to her face or head prior to September 28, 1996. (R. p.11, Line 13-27; R. p.12, Line 3-9).

Dr. Lee Johnson and Dr. Herring testified by deposition. Both related the detachment to the 1996 accident.

The full commission's order dated June 20<sup>th</sup>, 2006, affirmed the ALJ's denial of benefits, finding the claimant failed to prove a causal connection between her eye condition and the accident of September 28, 1996. The Circuit Court of Neshoba County, finding a *prima facie* case of disability, held the commission's decision to be arbitrary and capricious and reversed it on December 11<sup>th</sup>, 2006.

## **SUMMARY OF THE ARGUMENT**

The Circuit Court properly exercised its authority and reversed the Workers' Compensation Commission when the Order was not supported by substantial evidence. It reasoned that Claimant had proved a *prima facie* case when the testimony of Dr. Herring and Dr. Johnson related the detachment to the accident of 1996.

Contrary to the position of the Appellant, no re-weighing was necessary because employer presented no rebuttal evidence and under that circumstance the Court simply looked at the evidence and found the commission's decision contrary to the *substantial evidence* in the record.

Appellee acknowledges that Appeals Courts do not have the authority to reverse a decision of an Administrative Body where it is based upon *substantial evidence*. However, our law does require the Workers' Compensation Commission to base its Orders upon *substantial evidence* and in doubtful cases render judgment in favor of compensation. In the case at bar, the Claimant carried her burden and established a *prima facie* case. The burden then shifted to the Employer to produce affirmative evidence to rebut that case. The Employer failed to rebut the *prima facie* case thereby compelling the Circuit Court to act within its authority and reverse the commission's order.

## **THE ARGUMENT**

### **1. STANDARD OF REVIEW**

The standard of review in workers' compensation cases is well established. A decision of the Commission will be reversed only if it is not supported by substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. Weatherspoon v. Croft Metals, Inc., 853 So.2d 776, 778 (Miss.2003) (citing Smith v. Jackson Constr. Co., 607 So.2d 1119, 1124 (Miss.1992)). If the Commission's decision and findings of fact are supported by *substantial evidence*, then Appeals Courts are bound by them even if they as fact finders would have been convinced otherwise. Spann v. Wal-Mart Stores, 700 So.2d 308, 311 (Miss.1997) (citing Fought v. Stuart C. Irby Co., 523 So.2d 314, 317 (Miss.1988)). If an agency's decision is not based on *substantial evidence*, it will be deemed arbitrary and capricious. Thomas v. Public Employees' Ret. Sys. of Miss., 2005-CC-02184-COA (June 26, 2007).

### **II. THE CIRCUIT COURT ACTED WELL WITHIN ITS AUTHORITY IN REVERSING THE DECISION OF THE COMMISSION WHICH WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THEREFORE ARBITRARY AND CAPRICIOUS**

In a workers' compensation case, the claimant bears the burden of proving by a "fair preponderance of the evidence" each element of the claim. Bracey v. Packard Elec. Div., Gen. Motors Co., 476 So.2d 28, 29 (Miss. 1985). These elements are: (1) an accidental

injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the death or claimed disability. Miss. Code Ann. §§71-3-3 & 7 (1982); Hedge v. Leggett & Platt, Inc., 641 So.2d 9, 12 (Miss.1994). Once the claimant makes a prima facie case of disability, the burden of proof shifts to the employer. Pontotoc Wire Products Co. v. Ferguson, 384 So.2d 601 (Miss.1980); Thompson v. Wells-Lamont Corp., 362 So.2d 638 (Miss.1978). Doubtful cases should be resolved in favor of compensation. Poole vs. Westinghouse Electric Corp., 229 MS 830, 92 So.2d 209 (MS 1951); Dunn, Miss. Workers' Compensation, Sec. 32.

#### **A. An Accidental Injury, Arising Out Of And In The Course of Employment**

Mississippi's workers' compensation statutes compensate injuries "arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner." Miss. Code Ann. §71-3-3(b) (Rev.2000). The term "arising out of employment" simply means there is a causal connection between the employment and the injury. Singley v. Smith, 844 So.2d 448, 453 (Miss.2003). One is injured in the course of employment when an injury results from activity actuated partly by a duty to serve the employer or reasonably incident to the employment. Id.

The Circuit Court correctly found the existence of the Employer's First Notice of Injury, (Exhibit #3), to be sufficient proof of an on the job injury on September 28, 1996.

#### **B. Causal Relation**

A claimant does not have to prove with absolute medical certainty that his work-related injuries were the cause of his disability. Even though the testimony may be somewhat ambiguous, as to causal connection, all that is necessary is that the medical findings support a causal connection.” *Sperry- Vickers, Inc. v. Honea*, 394 So.2d 1380, 1385 (Miss. 1981). The medical evidence is sufficient if it supports, even if it does not fully prove, a finding of disability. The Mississippi Supreme Court has held that “disability need not be proved by medical testimony as long as there is medical testimony which will support a finding of disability.” *Hall of Mississippi, Inc. v. Green*, 467 So.2d 935,938 (Miss. 1985).

In the present case both Dr. Johnson and Dr. Herring related the detachment to the 1996 accident and injury. Dr. Johnson was medically certain, while Dr. Herring was medically certain only as to the chronic and traumatic nature of the injury. Moreover, Dr. Herring was certain that the detachment was not related to a bump in the eye by claimant’s baby. Taken as a whole this medical testimony supports a finding of causal connection and completes claimant’s burden to prove a *prima facie* case of disability.

Claimant having carried her burden to establish a *prima facie* case of causal connection, employer became duty bound to rebut it. *Wire Products Co. v. Ferguson*, Supra (at page 603). Rebuttal must be with affirmative evidence. Employer presented no rebuttal evidence in this case, and therefore the Circuit Court was correct in holding the Commission in error when it ruled contrary to claimant’s *prima facie* case.

## **CONCLUSION**

The Circuit Court was compelled to reverse the decision of the commission when it found a *prima facie* case of disability had been established and went un rebutted by the employer.

It is clear the Commission is the finder of facts in Workers' Compensation cases and reviewing courts cannot re-weigh the evidence in deciding the correctness of a Commission's decision. However, reviewing courts do have the authority to overrule and reverse a Commission's decision where it is not supported by substantial evidence or is contrary to the evidence in the record. The Circuit Court having found a *prima facie* case of disability from the evidence, correctly reversed the Commission's Order denying benefits.

For the reasons set forth above, the Appeals Court was within its authority when it reversed the Commission's decision and its Order should be affirmed.

Respectfully submitted, this the 12<sup>th</sup> day of July, 2007.

**IRIS MOORE, APPELLEE**

By: 

**JIM DAVIS HULL**

MS Bar No. 



**CERTIFICATE OF SERVICE**

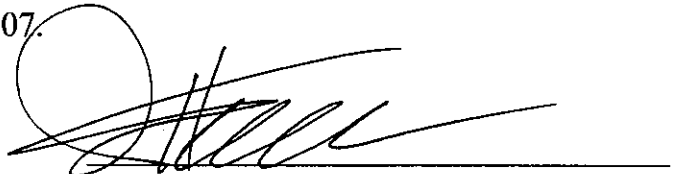
I, Jim Davis Hull, do hereby certify that I have this date mailed, via United States Mail, a true and correct copy of the Reply Brief of the Appellee to the following persons listed below:

Ms. Betty W. Sephton  
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This the 12<sup>th</sup> day of July, 2007.

  
Jim Davis Hull (MSB #2895)  
Attorney At Law