IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELPHI PACKARD ELECTRIC SYSTEMS **APPELLANT**

V. **NO. 2007-WC-00820**

EARNIL BROWN **APPELLEE**

ON APPEAL FROM THE
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

APPELLEE'S BRIEF TO THE SUPREME COURT

Roger K. Doolittle
Suite 500
460 Briarwood Drive
Jackson, Mississippi 39206
(601) 957-9777

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DELPHI PACKARD ELECTRIC SYSTEMS — EMPLOYER AND SELF-INSURED/APPELLANT

V. — NO.2007-WC-00820

EARNIL BROWN — CLAIMANT/APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made so that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The Honorable Tomie T. Green, Circuit Court Judge for Hinds County, Mississippi
2. Delphi Packard Electric Systems, Employer/Appellant
3. Mr. Andrew D. Sweat and Ms. Jennifer H. Scott of Wise Carter Child & Caraway, attorneys for Appellant
4. Mr. Earnil Brown, Appellee
5. Mr. Roger K. Doolittle, attorney for Appellee
6. The Honorable James Homer Best, Administrative Judge for Mississippi Workers' Compensation Commission
7. Lydia Quarles, former Commissioner, Mississippi Workers' Compensation Commission
8. Ben Barrett Smith, former Commissioner, Mississippi Workers' Compensation Commission
9. Barney J. Schoby, former Commissioner, Mississippi Workers' Compensation Commission

This 11th day of October, 2007.

By: _____
Roger K. Doolittle (MBIN[redacted]
Attorney for Appellant

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STATEMENT OF ISSUES

1. Whether the decision and findings of fact by the Mississippi Workers' Compensation Commission are supported by substantial evidence and are not contrary to the overwhelming weight of the evidence or clearly erroneous.

2. Whether the Mississippi Workers' Compensation Commission was correct as a matter of law in determining that Claimant had proven his claim for permanent partial disability and loss of wage earning capacity.

STATEMENT OF THE CASE

This matter is before the Mississippi Supreme Court on the appeal of the Employer/Appellant from the decision of the Circuit Court of Hinds County affirming the decision of the Mississippi Workers' Compensation Commission which found in favor of the Claimant.

STATEMENT OF STIPULATIONS

At the hearing on the merits the parties stipulated that:

(1) The Claimant suffered compensable injuries to his cervical spine and to his lumbar spine on February 11, 1999; and,

(2) The Claimant's average weekly wage on February 11, 2003 was $931.20.

STATEMENT OF FACTS

Testimony of Earnil Brown

The Appellee, Earnil Brown testified that he began work for the Appellant in 1973. (P 8, l. 19) He worked continuously for the Appellant, missing time only for vacation and when he was in pain. (P 8, l. 25-28)

Mr. Brown had first injured his neck several years ago. (P 10, l. 25) He returned to work with the Appellant at the same or higher wages then before that injury. (P 10, l. 24 to P 11, l. 3) All of the jobs he held at the Appellant's place of business required manual labor and lifting. (P 11, l 23 - 29)

On February 11, 1999, Appellee again injured his neck lifting a reel of terminals over his head. (P. 12, l. 20 - 23) Until the event of February 11, 1999, the Appellee was able to continue to perform the duties of his job. (P. 12, l. 28 to P. 12, l. 1) Between

February 11 and September 1, 1999, the Appellee missed some days with his back and neck. (P 14., l. 9 - 15) The Appellee finally ceased work on September 1, 1999.

Eventually, Appellee selected Dr. Kenneth Vogel as his choice of physician. (P. 14, l. 11-23) Dr. Vogel told the Appellee that he needed surgery on his neck and the Appellant/Employer/Self-Insured paid for that surgery under workers' compensation. (P. 15, l. 3 - 8) Dr. Vogel later told the Appellee that he needed surgery on his back and the Appellee asked the Appellant to pay for that. (P. 15, l. 17 - 23) The Appellant/Employer/Self-Insured refused to pay for the back surgery.

Dr. Vogel referred the Appellee to Dr. Jones. (P. 15, l. 25-29) At the hearing the Appellee identified a list of medications that he was taking at the time of the hearing. (P 16. 15 - 22) Appellee testified that he continued to have back pain. (P. 17, l. 24-25) Appellee testified that he cannot perform any of the jobs he has performed in the past while working for the Appellant. (P. 17, l. 28 to P. 18, l. 1)

Before working for the Appellant, the Appellee had worked for Borden's Ice Cream. (P. 18, l. 2 - 4) Appellee loaded ice cream trucks manually, lifting from 30 to 50 pounds. (P. 18, l. 8- 16) He cannot do that now. (P. 18, l. 20)

Appellee asked Mr. Weakly (field supervisor of industrial relations for the Appellant) about a job. He was told he had too many injuries and too many accidents. (P. 19, l. 4-8) That the Appellant did not have anything for him to do. (P. 21, l. 10-11)

Appellee has not been able to work while following Dr. Jones instructions. (P. 21, l. 17 to 24) Appellant takes medication for pain every day. (P. 21, l. 25 - 27) Appellee wanted the Appellant to pay for Dr. Jones treatment of him. (P. 21, l. 28 to P. 22, l. 1)

At the time of the hearing Appellee was 51 years of age and had two years of college. (P. 23-29)

Since he left the Appellant's place of business, Appellee had not applied for a job anywhere else. (P. 33, l. 7-10)

Testimony of Jessie Adams

The Appellant called Jessie Adams to testify as to the exertion requirements of the Appellee's position with Appellant. After direct examination Mr. Adams testified that he had known the Appellee for years and that the Appellee was a pretty truthful man and he had never known him to lie or be dishonest. That the Appellee was a good and earnest worker. (P. 38, l. 11-21)

Testimony of Curtis Weakly

Mr. Weakly testified that he was the field supervisor of industrial relations. (P. 39, l. 15-18) He denied ever telling the Appellant that he could not return to work. (P. 40, l. 13-18) However, Mr. Weakly also testified that Appellant/Employer/Self-Insured has the Appellee classified as totally and permanently disabled from work. (P. 42, l 3) That the Appellant's workers' compensation department would be aware of his medical status and that the Appellant had never offered the Appellee a job. (P. 42, l. 7 to P. 43, l. 8)

Testimony of Dr. K. E. Vogel

Dr. Vogel testified through certified copies of his medical records. At page 7 of exhibit G, Dr. Vogel stated that the Appellee had suffered a 5% impairment to the body as a whole and had permanent restrictions to avoid those activities which required him to lift, push or pull greater then 35 pounds or bend repeatedly, flex or hyper-extend the neck. Also, in a "Statement of Employee's Physician" form, completed by Dr. Vogel, and found at page 19 of Exhibit G 3, Dr. Vogel gives a history of Appellee suffering "L S l leg" pain since a work injury of 2/99. In said "Statement of Employee's Physician" form, Dr. Vogel also writes that the cause of the Appellee's problems are a work injury and that he proposes treatment by a LS (lumbosacral) IDET procedure.

Testimony of Dr. Robert Smith

Dr. Smith testified through certified copies of his medical records. In a four line letter Dr. Smith stated that the Appellee was released to light duty work and that he felt that the Appellee had a temporary aggravation of a pre-existing condition. However, the short letter (1) referred to a previous dictation which has never been produced and (2) did not state to which of the Appellee's injuries, neck or back, that this opinion applied . Unfortunately, Dr. Smith died before this opinion could be clarified as to which of the Appellee's injuries he was referring, the neck or the back. This is important as the other of Appellant's expert gave differing opinions as to the causal connection of the neck and back.

Testimony of Dr. Faeza Jones

Dr. Jones testified through certified copies of her medical records. Dr. Jones is a clinical psychiatrist. Dr. Jones was of the opinion that the Appellee was suffering a major depressive disorder, with psychotic features. In a November 6, 2002 letter, sent to Roger K. Doolittle, Dr. Jones specifically stated that the Claimant was being treated for a Major Depressive disorder, second to Chronic Pain Syndrome. On December 5, 2002, in her records under Commission affidavit and admitted as Exhibit CL-10 Dr. Jones opined:

> Mr. Earnil Brown is being treated for Major Depressive disorder, secondary to Chronic Pain Syndrome. He remains on medication and is receiving Psychotherapy. He is totally disable (100%) to perform any type of work. He is not able to return to work or other normal activity. He has received his maximum recovery potential.

Testimony of Dr. Robert McGuire

Dr. McGuire testified through certified copies of his medical records and a deposition. He felt that the Appellee's injury did not significantly contribute to his back condition. He did limit the Claimant to lifting no more then 15 - 20 pounds and gave an

impairment of 10% to the body as the whole. Dr. McGuire in his deposition at (P. 18, lines 20 to Page 19, line 16) broke his rating down to 5% for the neck and 5% for the back. And while Dr. McGuire testified that while he did not think the lifting injury of February 1999, contributed to the permanent disability to the back, he did think that the on the job lifting injury of 1999, contributed by aggravation to the impairment of the neck. In fact, Dr. McGuire specifically testified that the lifting injury of February 1999 aggravated the Appellee's neck. (P. 23, l. 24-25) Dr. McGuire also testified at the end of his deposition that the Appellee should remain under the care of his long-term, treating physician, Dr. Vogel.

Testimony of Dr. Mark Webb

Dr. Webb's opinion was despite the fact that Appellee had worked for over 20 years for the Appellant and had no prior psychiatric problems until his on the job injury, that the on the job injury had nothing to do with his depression. Further, that the current depression was the result of long term personality traits which did not exert themselves during the 20 years which the Appellee worked for the Appellant. That if was not the injury it would have been something else.

STATEMENT OF LAW

STANDARD ON REVIEW

Under Mississippi law, the Workers' Compensation Commission is the ultimate finder of facts in compensation cases, and as such, its findings are subject to normal, deferential standards upon review. The ALJ is not the ultimate finder of fact, but rather "the individual who conducts the hearing and hears the live testimony, such as it is." *Walker Mfg. Co. v. Cantrell,* 577 So. 2d 1243, 1245-47 (Miss. 1991). The Commission is free to accept or reject the ALJ's findings, so long as the Commission's actions are based

on substantial evidence. *Day-Brite Lighting v. Cummings,* 419 So. 2d 211, 213 (Miss. 1982). Appellate courts are bound by the decision of the Mississippi Workers' Compensation Commission, if the Commission's findings of fact and order are supported by substantial evidence. *Day-Brite Lighting v. Cummings,* 419 So. 2d 211, 213 (Miss. 1982). This is so, even though the evidence could convince the appellate Court otherwise, were it the fact finder. The Commission serves as the ultimate fact finder in addressing conflicts in medical testimony and opinion. It is only in rather extraordinary cases that an appellate court should reverse the findings of the Commission.

The "substantial evidence" scope of judicial review of administrative agency decisions is that the courts may interfere only where the agency action is arbitrary and capricious. Arbitrariness and caprice are in substantial part a function of the presence *vel non* of credible evidence supporting the agency decision. Where there is substantial evidence, a reviewing court has no authority to interfere with the decision of the Commission. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1245-47 (Miss. 1991).

It is the sole responsibility of the Commission to determine the credibility of the witnesses before it and, when conflicts in credible evidence arise, to determine where the preponderance of the evidence lies. The Court must affirm its decision so long as it is supported by substantial evidence. *Richardson v. Johnson Elect. Auto.*, 2006-WC-01598-COA (Miss.App. 8-7-2007) (page number not yet available)

The standard of review in workers' compensation cases is limited and deferential: The ***substantial evidence test*** is used. See *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1245-47, (Miss. 1991). The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. This Court will overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact. *Georgia Pac. Corp. v. Taplin*, 586 S. 2d 823, 826, (Miss. 1991). Reversal is proper only when a

Commission order is not based on substantial evidence, is ***arbitrary or capricious, or is based on an erroneous application of the law***. *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119,1124, (Miss. 1992). *Weatherspoon v. Croft Metals, Inc.*, 853 S2. 2d 776, 778, (Miss. 2003) (emphasis added). In *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 , (Miss. 1997), the Court stated: The function of an appellate court in an appeal from rulings of the Workers' Compensation Commission is to determine whether there exists a quantum of credible evidence which supports the decision of the Commission. It is not the role of the appellate courts to determine where the preponderance of the evidence lies when the evidence is conflicting, given that it is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not. *Metal Trims Industries, Inc. v. Stovall*, 562 So. 2d 1293 (Miss. 1990). *Total Transportation Inc. v. Shores*, 2005-CT-01951-SCT (Miss. 9-20-2007) at page 6.

CAUSATION

The test under the Act is whether a work-related injury caused or significantly contributed to, aggravated or accelerated a pre-existing condition. A doctor's inability to pinpoint the exact physical cause of an employee's disability did not alone defeat the employee's claim for compensation, given the beneficent purpose of the Workers' Compensation Act, where there was uncontradicted testimony that the employee was injured while performing his job. *Trest v. B. C. Rogers Processors, Inc.* 592 So. 2d 110, 113 (Miss. 1991) Certainty is not a requisite in deciding a workers' compensation case, but, rather the reviewing court considers reasonable medical probabilities. In other words, medical findings sufficient to show a compensable disability are not required to be precise, complete and unequivocal. *Georgia-Pacific Corp. v. Gregory*, 589 So. 2d 1250, 1254 (Miss. 1991)

PAIN

Compensation may be allowed for disabling pain in the absence of positive medical testimony as to any physical cause whatever. When the patient complains of pain, the doctor usually takes the fact of pain for granted and the absence of physical findings to account for the pain will not necessarily bar compensation. In such cases, evidence of an accident followed by disabling pain and the absence of evidence as to the cause of the pain from objective medical findings may be sufficient as a basis for compensation, in the absence of circumstances tending to show malingering or indicating that the claimant's testimony as to pain is inherently improbable, incredible, unreasonable or untrustworthy. *Morris v. Lansdell's Frame* Co., 547 So. 2d 782, 785 (Miss. 1989). *See also* Imperial Palace Casino v. Wilson, 960 So.2d 549, 555. (Miss.App. 2006).

CLAIMANT'S OPINION

Any witness including the Claimant, who has evidentiary facts within his personal knowledge, gained through any of his senses, is competent to testify. A nonprofessional witness may describe personal injuries. Physical pain, weakness, exhaustion and the like are matters one may testify about. Such a non-expert witness may testify as to his own health or physical condition and objective physical symptoms and may state simple inferences drawn by him from his own subjective sensation as to his physical condition, such that he became ill or had been troubled with nervousness, was under the influence of drugs or had a bad cold. One sustaining a back injury has been allowed to testify that pain was suffered as a result of the injury and that the resulting condition prevented work activity. *Mississippi Workers' Compensation, Dunn, Third Edition, Paragraph 278.* Indeed, mere estimates of the medical or functional loss may have little value when compared with lay testimony by the claimant that he suffers pain when attempting use of the member and that he has tried to work and is unable to perform the usual duties of his

customary employment. *Herman McGowan v, New Orleans Furniture, Inc.* 586 So. 2d 163, 166 (1991).

JORDAN/THOMPSON PRESUMPTION

Pursuant to Miss. Code Ann. § 71-3-3(i), when there is a finding of permanent partial disability, the claimant bears the burden of making a prima facie showing that he has sought and been unable to find work in the same or other employment. The presumption arises where a claimant with a permanent injury is not offered work by the former employer and then proves reasonable efforts to obtain work from other available employers. *Thompson v. Wells-Lamont Corp.*, 362 So.2d 638, 640 (Miss. 1978). *Jordan v. Hercules, Inc.*, 600 So.2d 179, 183 (Miss. 1992); *Pontotoc Wire Products Co. v. Ferguson*, 384 So.2d 601, 603 (Miss. 1980). *Hale v. Ruleville Health Care Center* 687 So.2d 1221 (Miss. 1997) *Entergy Mississippi, Inc. v. Robinson*, 777 So.2d 53, 56 (Miss.Ct.App. 2000). Once the Claimant proves these factors then the presumption arises that the Claimant is permanently and totally disabled and the burden shifts to the Employer and Carrier to prove the availability of employment suitable to the Claimant's impaired condition within the Claimant's locale.

JOB SEARCH

Proof of a job search is not always necessary where there is an admittedly compensable injury and one's injury results in a significant limitation of one's ability to perform one's job. *University Of Ms. Medical Center v. Rainey*, 926 So.2d 938, 940 (Miss.App. 2006)

When a claimant has been removed from work and declared totally disabled based on competent medical evaluation, there is no requirement that the claimant go against

medical advise and seek employment. *Stewart v. Singing River Hosp. System*, 928 So.2d 176, 185 (Miss.App. 2005)

LIBERAL CONSTRUCTION

The workers' compensation law is to be liberally construed, resolving doubtful cases in favor of compensation so the beneficent purposes of the act may be accomplished. *General Electric Company vs. McKinnon*, 507 So 2d 363, 366 (Miss 1987) *McCary v. City of Biloxi*, 757 So.2d 978, 981(Miss. 2000)

WAGE EARNING CAPACITY

In *Smith v. Picker Service Company*, 240 So. 2d 454, 456 (1970) the Mississippi Supreme Court explained that:

> "The statutory test is calculated by comparing actual earnings before the injury with earning capacity after the injury. The two items are not the same. *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 61 So. 2d 789 (1953).
>
> ... Earning capacity is a more theoretical concept. The test is one of capacity. The trier of fact, the Commission, must make the best possible estimate of future impairment of earnings, on the strength of both actual post-injury earnings and any other evidence of probative value on the issue of earning capacity. This is essentially a question of fact for the Commission.
>
> 2 Larson, Workmen's Compensation Law (1952), Section 57.21, states the recognized approach to this problem, as follows: "It is uniformly held, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of actual post-injury earnings equaling or exceeding those received before the accident. The position may be best summarized by saying that actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings."

effort to effect a cure or to give relief from pain, has more credibility then a litigation expert who sees the Claimant only once, and then only for the purpose of testifying for the defendant in court.

The Courts have acknowledged that the Workers' Compensation Commission is entitled to favor the testimony of a treating physician over a physician who had seen the claimant only once. *Mueller Copper Tube Co., Inc. v. Upton*, 930 So. 2d 428, 437 (Miss.Ct.App. 2005)

Even while eroding, *Aden* the Court of Appeals has acknowledged that a treating physician's opinion is without question of great import and again acknowledged that it is the sole responsibility of the Commission to determine the credibility of the witnesses before it and, when conflicts in credible evidence arise, to determine where the preponderance of the evidence lies and that the court must affirm its decision so long as it is supported by substantial evidence. *Richardson v. Johnson Elect. Auto.*, 2006-WC-01598-COA (Miss.App. 8-7-2007) (page number not yet available,)

INCONSISTENT EXPERT TESTIMONY

Where a combined reading of a doctor's deposition and his records reveals discrepancies and contradictions, the trier of fact is entitled to disregard the doctor's testimony. *Richardson v. Johnson Elect. Auto.*, 2006-WC-01598-COA (Miss.App. 8-7-2007) (page number not yet available, about four or five paragraphs from the end of the decision)

BURDEN SHIFTING

The law is clear that once the claimant has made a prima facie case of total disability, the burden shifts to the employer to show that the employee's efforts were not reasonable or constituted a mere sham. *Siemens Energy*, 732 So.2d at 283-84(130). *Adolphe Lafont USA v. Ayers*, 958 So.2d 833, 839 (Miss.App. 2007)