

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2007-WC-2270

CONNIE RADFORD
CLAIMANT/APPELLANT

VS.

CCA-DELTA CORRECTIONAL FACILITY
EMPLOYER/APPELLEE

AND

ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS
CARRIER/APPELLEE

Appeal From The Circuit Court of Leflore County, Mississippi

BRIEF OF APPELLEES

Oral Argument Requested

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AND ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS

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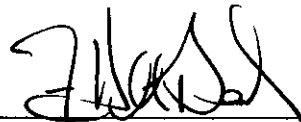
APPELLEE

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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 disqualification or recusal.

1. F. Hall Bailey and Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Counsel for Appellees
2. CCA-Delta Correctional Facility, Appellee
3. Zurich American Insurance Company of Illinois, Appellee
4. Lawrence J. Hakim, Charlie Baglan & Associates, Counsel for Connie Radford Appellant and
5. Connie Radford, Appellee.



ATTORNEY OF RECORD FOR
CCA-DELTA CORRECTIONAL FACILITY AND
ZURICH AMERICAN INSURANCE COMPANY
OF ILLINOIS

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STATEMENT OF THE ISSUES

1. The findings of fact and conclusions of law set forth within the January 11, 2006, Order of the Commission are supported by substantial evidence.
2. The finding within the January 11, 2006, Order of the Commission that Connie Radford did not meet her burden of proving her mental/mental claim by clear and convincing evidence is supported by the record.
3. The January 11, 2006, Order of the Commission finding that Connie Radford's mental condition was not proximately caused by her employment at the Delta Correction Facility is supported by the record.
5. The January 11, 2006, Order of the Commission finding that Connie Radford failed to prove by clear and convincing evidence she suffered a work injury in the form of post traumatic stress syndrome and major depression resulting from her employment at Delta Correctional Facility is supported by the record.

I. STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Commission Below

This case involves a mental/mental claim through which the claimant, Connie Radford seeks to recover workers compensation benefits for an emotional condition, unaccompanied by a physical injury, which she relates to her employment at the Delta Correctional Facility in Greenwood, Mississippi. Through her Petition to Controvert filed on September 11, 2000, the claimant alleges that she suffered a mental/mental claim as a result of her employment at Delta Correctional Facility. On September 19, 2000, Delta Correctional Facility and its workers compensation carrier (hereinafter referred to jointly as "DCF") filed an Answer denying that the claim was compensable under the Mississippi Workers Compensation Act ("MWCA"). Following four days of hearing, one held in Grenada in November, 2004 and three held in Jackson in January, 2005, Administrative Judge Tammy Harthcock entered an Order on April 27, 2005, finding that Radford met her burden of proof in showing that her mental claim was work-related and awarding her temporary total disability benefits from June 9, 2000, to date.

DCF appealed to the Full Commission on May 17, 2005. On January 11, 2006, after reviewing the record and hearing oral argument from the parties, the Full Commission reversed the Order of the Administrative Law Judge after having found that Connie Radford, "who unquestionably has psychiatric problems which demand medical attention," had failed to meet "her burden of proving by clear and convincing evidence that she was subjected to extraordinary incidents of her employment with Delta Correctional Facility which caused, contributed to, or aggravated her mental condition." R. 102. Radford appealed the Order of the Commission to the Circuit Court of Leflore

County on January 19, 2006. The Circuit Court of Leflore County affirmed the Full Commission Order on September 12, 2007, holding that

[i]t is clear from the facts of this case that the decision of the Commission was supported by the substantial evidence, was not clearly erroneous, and was not contrary to the overwhelming evidence. It is also clear that Mrs. Radford failed to show by clear and convincing evidence that her mental or psychological injury was caused by something more than the ordinary incidents of her employment.

R. 103-04.

Following the affirmance by the Circuit Court of Leflore County, Mississippi, Radford filed a timely appeal to this Court.

B. Statement of Facts

Connie Radford was employed at Delta Correctional Facility, a private prison facility owned and operated by Corrections Corporation of America ("CCA"). She was initially hired in September 1996 as a records clerk and later promoted to the job of records supervisor, the job she held at all times relevant to this claim. Fellow employees at Delta Correctional Facility included the claimant's husband, Donald Radford, who was the prison's Chief of Security, and her sister, Dawn Porter.

There were typically three wardens at the prison, a head warden and two deputy wardens. When DCF initially opened in 1996, Warden Brush was the Chief Warden and Donald Grant was one of two Deputy Wardens. Shortly after the prison opened, Warden Brush had a heart attack, and Warden Grant was asked to serve as Acting Chief Warden. During this time, Warden Grant appointed Donald Radford as Acting Deputy Warden, filling the position Grant had vacated. Donald Grant was ultimately named as the permanent Chief Warden at Delta Correctional Facility.

Donald Radford applied for the permanent appointment as Deputy Warden at Delta Correctional Facility and had been led to believe that he was going to be appointed to that position. However, the job was given to Jackie Banks, a Deputy Warden working for CCA at a Texas facility. When Warden Banks moved to Greenwood to take over the job as Deputy Warden of Security, Donald Radford returned to his previous job as Chief of Security at the prison.

When Warden Banks arrived, she was not openly received by Donald Radford, his wife and their closest friends at the prison facility. There was some resentment that she had been given the job as Deputy Warden over Donald Radford.

While Warden Grant was a deputy warden at Delta Correctional Facility, one of the departments he oversaw was the Records Department where Connie Radford worked as records supervisor. When Warden Grant began serving as Acting Chief Warden, and filled his old job position with Donald Radford, he did not believe that it was appropriate for Connie Radford to report directly to her husband. For that reason, Grant changed the normal chain of command to have Connie Radford to continue to report directly to him, even though he was Chief Warden. Typically, only the Deputy Wardens would report directly to the Chief Warden. R. 491, 492. Later, when Warden Banks took over as Deputy Warden of Security, Warden Grant made no change and retained the status quo of Connie Radford reporting directly to him. This was initially fueled by the fact that it was believed that Warden Banks was only going to be at Delta Correctional Facility for an interim period of time before she was transferred out to another job. At that time, it was believed that Donald Radford would then be promoted to the position of Deputy Warden of Security. However, it was later learned that

Warden Banks would remain at Delta Correctional Facility fulltime and that Donald Radford would be up for the position of Deputy Warden at the Tallahatchie Correctional Facility, which was also owned by CCA. R. 481, 482.

Warden Grant was also a close personal friend of the Radfords. Grant would socialize with the Radfords away from the prison facility. Later, when Grant's wife became seriously ill with a condition that would eventually take her life, Connie Radford would voluntarily stay with her to help Warden Grant. Their friendship began when Grant was asked to hire Donald Radford by a Mississippi prison official. Grant agreed to do so, but only after he had received special permission to do so from the State of Mississippi Corrections Department based upon a prior incident that occurred when Mr. Radford had been employed at the State Penitentiary in Parchman, Mississippi. R. 489.

Radford's claim is that she suffers from post-traumatic stress resulting in mental/emotional injury arising out of the conduct Deputy Warden Banks, which she alleges to have been harsh and abusive. Radford alleged that on one occasion Banks refused to sign her time sheet. R. 46. Another incident occurred when Radford walked past Banks and a group of employees. After Radford passed by the group, she heard the group begin laughing, presumably at her. Radford also complained that whenever she would "write up" Cassandra Swims, who was records clerk under Radford's supervision and also one of Banks' good friends, Banks would have the reprimand "thrown out". R. 48. On another occasion, Banks reportedly told Radford that she thought her "chief [Mr. Banks] could take your chief [Mr. Radford]." R. 49. As for abusive language, Radford said that Banks would curse her, other employees and

inmates. R. 49. Radford gave no specific examples other than stating that she overheard Banks refer to her as a "bitch" when talking to other employees. R. 49, 51.

The seminal event that allegedly gave rise to Radford's emotional condition occurred on May 11, 2000, a date on which Warden Donald Grant was out of town. By way of background, on days when Warden Grant left town, he would appoint one of the deputy wardens to serve as the acting chief warden for the prison in Grant's absence. On this particular date, Warden Banks was serving as Chief Warden.

A dispute arose early that morning between Cassandra Swims, Records Clerk, and Connie Radford, who was Swims' supervisor. Apparently, a facsimile had been sent to the prison the previous day shortly before 5:00 p.m., advising that a certain prisoner would be picked up to be transported to court for a hearing. Ms. Swims had failed to check the facsimile machine before she left, and the facsimile was found on the machine the next morning by Ms. Radford. This greatly disturbed Connie Radford, who directed her ire toward Swims and openly chastised her for not checking the facsimile machine the day before leaving the prison.

During the course of this dispute between Connie Radford and Cassandra Swims, Warden Banks got involved¹ and basically told Radford that she should not be criticizing Swims, since neither Swims nor Radford were to go into the room to check the facsimile machine because of a prison policy that this room was off limits. R. 434.

¹ There is additional history here that is noteworthy. Connie Radford was noted by many to have been a tough taskmaster when it came to her handling of Cassandra Swims, who reported directly to the claimant. In the past, Radford, who is white, had "written Swims up" for various offenses that Swims, who is black, believed to have been minor or unjust. Radford would become further irritated when she believed that Warden Banks, who is black, would step in and protect Swims from Radford's complaints.

Apparently, there had previously been a issue with employees having unfettered access to the facsimile machine where sensitive personnel information would regularly be faxed to Warden Grant and the other deputy wardens from CCA's home office. R. 487-88. Because there had been instances where administrative personnel had picked up and read facsimiles containing sensitive information, Warden Grant had issued a directive that his secretary was responsible for checking the facsimile machine and distributing any documents received. The facsimile machine was off limits to other administrative personnel. R. 487-88.

While this seems to be a trivial issue, it instigated an argument between Connie Radford and Warden Banks during which both individuals raised their voice to the other. Banks basically asserted that she was the Acting Chief Warden and that neither Swims nor Radford was to check the facsimile machine. Radford declined to accept Banks' directive, arguing that this was not the way that Warden Grant would handle things, that she had not seen any such memo regarding limited access to the facsimile machine, and that she was not required to take orders from Warden Banks. Later that day when Warden Grant called the prison to see how things were going, the incident was reported to him. Warden Grant advised that he would handle the matter upon his return to the prison.

When Warden Grant returned, his effort to resolve the dispute was less than successful. He held a meeting with Warden Banks and Connie Radford. According to both Grant and Banks, Radford did most of the talking, and the meeting eventually broke down with no resolution. R. 486, 438. After the meeting, Radford was visibly upset and went back to her office where she stayed for a short time. She then went to

Wardens Grant and McLaurin and told them she was going home. Radford testified that she was upset because she felt betrayed by Warden Grant, who in her view had taken sides with Warden Banks over her. R. 114-15.

Sometime after this meeting, Warden Grant decided that it was best if he no longer had Connie Radford report directly to him. He was aware that there was talk at the prison that he showed favoritism toward Connie and Donald Radford, which was undermining his leadership at the prison. Warden Grant even acknowledged during his testimony that he did some "soul searching" and was forced to admit that he probably was showing favoritism toward the Claimant. Accordingly, he decided that he would rearrange the chain of command and have the Records Department Supervisor (Connie Radford) report directly to Deputy Warden Philip McLaurin who, in turn, would oversee the Records Department and report directly to Warden Grant in regard to matters relating to that department. Grant testified that this move had nothing to do with Radford's job performance. Nor did it have anything to do with Warden Banks. R. 493. While the chain of command was rearranged, there were absolutely no changes to the responsibilities of the Records Department or any other matters relating to the job held by Connie Radford, the Records Supervisor.

When Radford returned to work on May 15, she found out that Warden Grant had changed the chain of command and reassigned her to report directly to Warden McLaurin. While the news that the chain of command had been rearranged would be less than significant to most, this news absolutely devastated Connie Radford. As Radford stated during the hearing:

I cared enough about my boss friend, my job, my duties, the people in the facility, and all of a sudden I was thrown away for something that I do not to this day understand why.

R. 117.

She further stated that:

I knew when Warden Grant took me out from under him that he had lost all respect of me, and all that I had done for him and believed in him and trusted in him, yes, it crushed me.

R. 118.

Radford gave further insight as to why the news crushed her so, stating on direct examination:

A. I could not sleep. I lost all respect in things. I didn't -- I was so low that everything that I had built up was gone in my life. I had a ninth grade education and I worked so hard to get where I got, and it was taken away from me and I don't know why.

R. 69.

Q. What do you mean it was taken away from you?

A. The trust, the caring that Warden Grant had for me.

Q. Can I ask you a question, Connie? I don't want this to upset you, and I want you to be real honest. Did you in some ways see Warden Grant as almost a father figure, maybe a surrogate father, the father you never had?

A. Yes.

Q. Do you feel like this father figure you felt you had finally found let you down or betrayed you just as your first father had done?

A. Yes.

Q. Do you still feel that way today?

A. I love Warden Grant.

Q. You're crying now?

A. Sir?

Q. You're crying?

A. Yes, sir.

Q. Why are you crying?

A. Because I care about that man. I don't know what I did.

R. 70.

By the witness: Your Honor, I worked so hard to bring myself up, and when I started to work for Warden Grant my self-esteem was so high because he made me feel that way.

A. I loved my job. I did the best I could do for Warden Grant. I followed his rules. I tried to make sure that everything Warden Grant wanted done was done. I never hesitated on anything he told me to do. I did it right then. No matter what I was doing, I stopped and did what Warden Grant wanted me to do and then all of a sudden that was taken away from me. I was not allowed to work under him – when I came back from the hospital I was replaced. He threw me away. When I come back I was working under someone else, Warden McLaurin. I didn't even know until I came in and I was told that I didn't work under Warden Grant no more, he was not my boss, Warden McLaurin was. And I tried to do my job under Warden McLaurin, but I could not stand the looks that I go from the man I respected so much.

R. 71-72.

Connie Radford said that it all started the day Warden Grant had the meeting with her and Jackie Banks. According to Radford's account, that was the day when she felt like she had been "used, abused and thrown away," after all she had done for Grant.

R. 114. According to Radford, when Warden Grant took Warden Banks' side following the facsimile machine incident, it absolutely crushed her. Being transferred to report directly to Warden McLaurin made Radford feel like everything she had worked so hard to achieve had been taken away from her. R. 115. It was at that time that she felt that Grant had "lost all trust and faith [in her] and just threw [her] away." R. 117.

Connie Radford worked for three days after learning that the Records Department had been reassigned to report directly to Warden McLaurin, before she walked off the job on May 17, 2000. R. 117. After leaving work on May 17, 2005, Radford ended up at the office of Dr. Melvin Levitch, a psychiatrist practicing in Memphis, Tennessee. She was subsequently hospitalized and began a series of treatments with Dr. Levitch, who ultimately diagnosed her as suffering from post-traumatic stress disorder. Dr. Levitch testified during his deposition, which was taken in November 2002, over two years prior to the hearing, that in his opinion Radford had yet to reach maximum medical improvement and was still temporarily totally disabled at that time. Radford never sought to return to her job with Delta Correctional Facility. Nor has she sought employment elsewhere since voluntarily leaving her job with Delta Correctional Facility.

DCF had Radford undergo an independent medical examination performed by Dr. Mark Webb, a psychiatrist practicing in Jackson, Mississippi. Following his evaluation, Dr. Webb submitted a report in which he summarized his findings as follows:

In summary, Ms. Radford is suffering from dysthymia and histrionic personality traits. Both of these illnesses date back to her childhood. Neither of these are disabling nor were they prolonged or exacerbated by her employment. Her difficulty at work was that she was not able to get along with some people at work due to her preexisting, maladaptive personality traits. Also, there were a lot of other stresses going on in Ms. Radford's life, such as financial and difficulty with her daughter's husband. She got so mad at one point that she wanted to kill her daughter's husband. Ms. Radford should continue treatment with Dr. Levitch; however, it is not work-related. Ms. Radford's employment at the Delta Correctional Facility did not cause any psychiatric injury or illness nor did it prolong or exacerbate her preexisting psychiatric illnesses.

Employer/Carrier Exhibit 3.

Finally, Dr. Judith Lyons, a clinical psychologist employed by Veterans Administration Hospital and University Medical Center in Jackson, Mississippi, with a specialty in treatment and research of post-traumatic stress disorder, testified at the hearing on behalf of the DCF. Dr. Lyons sat in during the entire four days of the hearing and testified last, after observing all the prior witnesses who testified. It was her opinion that Radford was not suffering from post-traumatic stress disorder as previously diagnosed by Dr. Levitch. Dr. Lyons noted that for purposes of reaching her ultimate opinions in this case, she assumed that all of the claimant's allegations concerning things done by Warden Banks and others at the Delta Correctional Facility were true.² Even making this assumption, Dr. Lyons was of the opinion that Radford was not suffering from post-traumatic stress disorder.³ Dr. Lyons testified that this was her initial opinion upon reviewing the medical records and depositions prior to the hearing and sitting through the hearing confirmed this. In particular, Dr. Lyons pointed out that someone with post-traumatic stress disorder would react nothing like how Radford reacted during the hearing. One example was that Dr. Lyons did not see the incidents related in support of Radford's claim as being the type of stressor that would lead to post-traumatic stress disorder. She noted that post-traumatic stress was a vivid and specific event in one's mind, much like a videotape that keeps replaying and replaying, with the subject waking up with it replaying in her mind, or just popping into her mind during the middle of the day when she was doing something else. R. 544, 545.

² Dr. Lyons noted that while she assumed all of Radford's allegations against Banks and others at Delta Correctional Facility to be true, there was ample testimony to the contrary.

³ Radford boldly states within a footnote in her brief that Dr. Lyon's testimony "as a whole supported Connie." Nothing could be further from the truth. But if there be any question as to side Dr. Lyon's supports, DCF encourages this Court to read the entire transcript of her testimony. R. 532-609.

Dr. Lyons further noted that a person suffering from post-traumatic stress disorder would do everything she could to avoid anything that would remind them of the situation, and when she was forced to be reminded of the situation, it would be intolerable. Dr. Lyons noted that the claimant was able to sit through the testimony of Warden Banks the very day Dr. Lyons testified with no problem. She said that if Radford had been suffering from post-traumatic stress disorder, sitting in the hearing room and listening to Warden Banks testify would have been a "really intolerable situation" for Radford. R. 545.

Dr. Lyons also noted that it was important to observe the Radford's baseline personality and then see what things upset her. In watching her throughout the entire hearing, Dr. Lyons noted that the only time Radford would get emotional was when someone discussed an issue about a friendly relationship that went sour. If the events involving Warden Banks were the stimulus to Radford's condition, then one would expect Radford to become emotional when Banks was testifying about the specific incidents or just when Banks entered the hearing room. But that was not the case. Instead, what Dr. Lyons (and everyone else who attended the hearing) saw was that Radford would break out and openly weep when there was discussion relating to her relationships. This is true mainly in regard to Warden Grant, but was also present in regard to testimony given by Rose Woodall, a coworker. R. 547-48. It was here that Dr. Lyons noted that the claimant's emotional condition had nothing to do with her relationship with Warden Banks, but seemed mainly to revolve around Warden Grant, whom she perceived as a father-figure. R. 548.

Dr. Lyons testified that it was her opinion that Radford was suffering from a personality disorder known as a borderline disorder which has been defined as a personality disorder marked by a long standing pattern of instability in interpersonal relationships, behavior, mood and self image that can interfere with social or occupational functioning or cause extreme emotional distress. R. 551-562. One of the ways a person, particularly a child, deals with a traumatic event or stress is by developing what is called a character disorder or a personality disorder. R. 551. Basically, when a person is confronted with an unimaginable situation, particularly in that person's formative years, the person does the best he or she can to get through that. When a child grows up in a chaotic family situation, the child develops patterns that keep them safe in chaotic situations. However, these patterns are not adaptive to a normal situation. What you find is that the child often develops a borderline personality disorder as one variant personality disorder when living through the type of abusive childhood Radford experienced. Dr. Lyons noted that

it becomes critically important for the person to identify who is a safe relationship and who they can count on kind of at the exclusion of all others. It's sort of an us against the world type of thing and so you get into what's called splitting is the psychiatric term for it where people are either all good or all bad and it's hard to have any areas of grey in between and you learn to deal with the world in that way. You try to find a safe person and you latch on to them and you try to fend off anything that you see that threatens that.

R. 552.

Dr. Lyons noted that when she originally reviewed Connie Radford's file and medical records, she was of the opinion that Radford suffered a variance of personality disorders that included histrionic, borderline and sematic features. However, after

sitting through close to 20 hours of the hearing, she felt that the borderline feature was the most prominent of the three disorders affecting Radford. (Lyons, p. 128-29).

Dr. Lyons concluded that it was her opinion that Radford's mental condition was not caused by her employment at Delta Correctional Facility or by the related incidents involving Warden Banks. R. 542-43, 562-64.

The history of Radford, giving rise to Dr. Lyons' diagnosis of borderline personality disorder and also referred to by Drs. Levitch and Webb, is nothing short of horrific. The history included the following:

- As a youth, Radford had heart murmurs and was diagnosed as having 3 holes in her heart at age 9. R. 549.
- Radford described her father as being the town drunk. (Exhibit CL-1; R. 549.
- Along with his drinking problem, Radford's father was also abusive to his wife and children, including Radford. R. 14, R. 549; Exhibit CL-1; Exhibit E/C-2).
- Radford testified that when she was 14 years of age her mother died of an aneurism caused by blows inflicted on her head by Radford's father. R. 14. Dr. Levitch said that the mother died "mercifully" to avoid the abuse from her husband. (Exhibit CL-1).
- After Radford's mother died, her father turned his attention to her. Not only did he begin physically beating Radford, he raped her on at least two occasions. R. 15; Exhibit E/C-2; Exhibit CL-1; R. 549.
- Radford told stories about times when her father shot at his children and would throw them out of the house and they had to sleep in a ditch outside because they had nowhere else to go. (Exhibit CL-1; R.549.
- When Radford was 16 years old, her father forced her to get married, basically running her out of the house. R. 16; Exhibit E/C-2.
- While Radford's first of four marriages was thankfully short-lived, her second marriage turned out to be a nightmare, as her husband raped and physically abused her prior to their divorce. R. 19; Exhibit E/C-2.

- Radford divorced her third husband after she discovered that he was having an affair. R. 21.
- Radford had a hysterectomy in 1988, but was unable to take hormone replacement medication due to a blood clot she experienced following knee surgery in 1985. Radford testified at hearing that she was finally able to begin taking hormone replacement medication around 2003. R. 142).
- Radford testified that during her adult life, she made amends with her father just prior to his death, serving as his caretaker during the three years before his death in 1995. R. 69, 131.
- Shortly after her father's death, Radford and her husband filed bankruptcy. R. 133.
- Around the time that she was caring for her father, Radford's husband, Donald Radford, was suspended from his job as a guard at Parchman. Exhibit E/C-2.
- In March, 1996, Radford sought medical care from the Batesville Clinic for her "nerves" based on complaints that her husband was out of work and the creditors were closing in. She was given a prescription for an anti-depressant. R. 132; Exhibit E/C-6.
- Donald Radford also apparently had a heart attack during this time.
- During the course of her treatment with Dr. Levitch, Radford related that she wanted to kill her son-in-law because of how he was treating her daughter. Radford advised Dr. Levitch that her son-in-law was having an affair with her step-daughter [Donald Radford's daughter]. (Exhibit CL-1; R. 137; Exhibit E/C-2.
- There were issues about stress in her life concerning custody of a nephew. Exhibit CL-1; R. 550.
- Radford's financial problems continued when Donald Radford was later terminated by Delta Correctional Facility. Exhibit CL-1; R. 550.
- During her sessions with Dr. Levitch, Radford discussed her anger and concern relating to fears that her husband, Donald Radford, was having an affair. Exhibit CL-1.

- In September, 2000, Radford advised Dr. Levitch that she was having flashbacks and terrible feelings of anger and guilt related to her history of being severely traumatized by a very abusive family, especially her father, most of her childhood. Exhibit CL-1.
- In September, 2000, Radford complained to Dr. Levitch that her older brother had lung cancer. Exhibit CL-1.
- In January, 2002, Radford fell head over heels 20 feet down a staircase, breaking coccyx and injuring low back. This accident happened two weeks after she had undergone gall bladder surgery. Exhibit E/C-4.
- Radford reported to Dr. Levitch that her sister had been diagnosed with bipolar disorder.⁴ Exhibit CL-1.
- After Radford's daughter's marriage broke up when her son-in-law had an affair with her step-daughter, Radford reported to Dr. Levitch in September, 2002 that the step-daughter had moved in with Radford and her husband, putting Connie Radford in a very "trying situation." Exhibit CL-1.
- In November, 2002, Radford reported that her car was about to be repossessed. Exhibit CL-1.
- In August, 2003, Radford lost control of a vehicle she was driving and struck a bridge abutment, suffering loss of consciousness at the scene, along with a fractured right humerus and left distal fibula and sustaining a lung contusion. R. 143.
- Following surgery in August, 2003, Radford developed another blood clot, similar to the one she developed in 1985 after her knee surgery. Exhibit E/C-).
- In September, 2003, Radford suffered a stroke with numbness and weakness on the left side. R. 144.

⁴ The records also indicated that the Radford's sister was sexually molested by her father during their youth.

II. SUMMARY OF THE ARGUMENT

The Worker's Compensation Commission is the entity to whom fact finding is entrusted in a disability compensation claim, and its findings are to be upheld if they are supported by substantial evidence. In this mental/mental case, Radford had the burden of proving by clear and convincing evidence that her emotional injury was caused by her employment and that the cause was something more than the general stresses and wear and tear of the workplace.

The Commission found that Radford, "who unquestionably has psychiatric problems which demand medical attention," had failed to prove by clear and convincing evidence that her mental condition was caused by her employment at Delta Correctional Facility. The Commission noted that they could not find that the restructuring of a chain of command – one which did not change Radford's responsibilities, wages or status but merely required her to once again report to a Deputy Warden, rather than the Chief Warden - was anything more than an "ordinary incidence of employment." As the Commission poignantly noted, "Mrs. Radford's expectations based up her relationship to Mr. Grant, and not his actions, are what we deem extraordinary." R. 103.

The Commission's findings were supported by both lay and expert testimony. There was conflicting expert medical testimony which the Commission resolved in the DCF's favor. That was the Commission's role and responsibility as the ultimate fact finder, and its findings must be upheld.

III. ARGUMENT

A. The Mississippi Workers' Compensation Commission is the Finder of Fact and Its Findings Are to Be Upheld If Supported by Substantial Evidence.

In a workers' compensation case, the appellate court reviews not the circuit court's decision nor the administrative law judge's decision, but the ruling of the Workers' Compensation Commission itself. Barnes v. W.S. Newell, Inc., 949 So. 2d 823, 825 (Miss. App. 2006); Belcher v. Choctaw Maid Farms, Inc., 785 So. 2d 312, 313 (Miss. App. 2001). The standard of review to be applied is the substantial evidence test. Total Transp., Inc. Of Mississippi v. Shores, 968 So. 2d 400, 403-404 (Miss. 2007) (citing Walker Mfg. Co. v. Cantrell, 577 So. 2d 1243, 1245-47 (Miss.1991)). The substantial evidence test is "limited and deferential," and asks "whether there exists a quantum of credible evidence which supports the decision of the Commission." Id. (citing Hale v. Ruleville Health Care Ctr., 687 So. 2d 1221, 1224-25 (Miss.1997)).

The deferential substantial evidence standard of review is applied to the Commission's ruling because the Commission, *not* the Administrative Law Judge, is the finder of fact. Natchez Equip. Co. v. Gibbs, 623 So. 2d 270, 271-274 (Miss. 1993). "The Commission is free to accept or reject the ALJ's findings, so long as the Commission's actions are based on substantial evidence." Id. (citing Day-Brite Lighting v. Cummings, 419 So. 2d 211, 213 (Miss. 1982)). In this case, the Commission rejected the ALJ's view of the facts. (record cite). In reviewing such a decision, a court "will not make a determination of the preponderance of the evidence, 'the assumption being that the Commission, as the trier of fact, has previously determined which evidence is credible, has weight, and which is not.'" McGowan v. Orleans Furniture, Inc., 586 So. 2d 163,

164-170 (Miss. 1991)(citing Metal Trims Industries, Inc. v. Stovall, 562 So. 2d 1293, 1297 (Miss. 1990)). Instead, a court must affirm the Commission if the Commission's decision is supported by substantial credible evidence, even if a court's own view of the facts would cause it to rule differently. See South Central Bell Telephone Co. v. Aden, 474 So. 2d 584, 589 (Miss. 1985).

In a case in which the claimant seeks compensation for a psychological or mental injury, the burden of proof is heightened, and the claimant must prove the connection between the injury and her employment by clear and convincing evidence. Sibley v. Unifirst Bank for Sav. ex rel. Resolution Trust Corp., 699 So. 2d 1214, 1218 (Miss. 1997). In the workers' compensation context, the Mississippi Court of Appeals has defined clear and convincing evidence as

that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case. In fact, "[c]lear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level."

Hospital Housekeeping Systems, Inc. v. Townsend, 2008 WL 2809060, 7 (Miss. App. 2008). Therefore, when reviewing a decision of the Commission that denies the employee benefits for a mental injury, an appellate court must ask whether substantial evidence supports the finding that the employee's proof did not rise to the high level of clear and convincing.

In this case, the Commission found that the claimant Radford did not show by clear and convincing evidence a connection between her mental injury and her

employment. The issue before this Court, therefore, is whether the Commission's decision is supported by substantial evidence. If there is conflicting evidence, the Commission is entitled to have its resolution of that conflict upheld. Radford, however, asserts that the Commission erred because there was substantial evidence to support *her* view of the facts. As the Mississippi Supreme Court in Sibley held, however, the issue is whether there is substantial evidence to support the Commission's decision, *not* whether there is substantial evidence to support the claimant's view. Sibley, 699 So. 2d at 1219.

B. The Commission Found that Claimant Radford Failed To Prove Causation By Clear and Convincing Evidence

BOP To recover compensation benefits for a psychological injury unaccompanied by physical trauma, an employee must show by clear and convincing evidence that (1) the employee endured extraordinary incidents of employment and (2) that those incidents caused, contributed to, or aggravated the employee's mental condition. Bates v. Countrybrook, Living Ctr., 609 So. 2d 1247, 1249 (Miss. 1992); Borden, Inc. v. Eskridge, 604 So. 2d 1071, 1073-74 (Miss. 1991); Fought v. Stuart C. Irby Co., 523 So. 2d 314, 318 (Miss. 1988). The Worker's Compensation Commission found that Radford was unable to show clear and convincing evidence of either element necessary for recovery. These findings were supported by substantial evidence, and therefore, under this Court's deferential standard of review, the Commission should be affirmed.

The Commission's first reason for reversing the ALJ was because the events that Radford claimed "crushed her" were not extraordinary occurrences or events. Under Mississippi case law, "[t]he mental injury must be caused by some unusual occurrence

or untoward event in order to be compensable." McElveen v. Croft Metals, Inc., 915 So. 2d 14, 19 (Miss. Ct. App. 2005). Mississippi does not compensate a disability resulting from the "general stress or normal human wear and tear of the workplace." McElveen, 915 So. 2d at 19. Furthermore, even events that the employee categorizes as "harassments" may reasonably be considered the ordinary incidents of employment. Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317-319 (Miss. 1988).

The Commission determined as the trier of fact that Radford's mental problems were not caused by any extraordinary occurrence at her place of employment. The Commission noted that Radford viewed Warden Grant's change in the chain of command as a "personal indictment" which "crushed her." (Commission Order, p. 3). That change in the chain of command, said the Commission, appeared "perfectly advisable" and not out of the ordinary to the Commission, and thus could not be characterized as an "extraordinary work connected incident" for which benefits might be available. See Fought, 523 So. 2d at 318. R. 103.

The Commission's finding that the change in command was not an extraordinary event is supported by substantial evidence in the record and should be affirmed. After its review of the record, the Commission noted that Warden Grant and his wife and Radford and her husband had a friendly and social relationship. When Warden Grant was promoted to Chief Warden, Radford's husband was appointed acting Deputy Chief. (Commission Order, p. 2). Radford claimed that Warden Grant promised her husband a permanent promotion to Deputy Warden, and when Jackie Banks got the job instead, "she was not welcomed by the Radfords." R. 101. Warden Grant retained Radford reporting to him because the Records Department would otherwise have reported to her

husband while he served as temporary Deputy Warden, and Grant retained that supervisory structure even after Jackie Banks was named Deputy Warden. Eventually, according to the Commission findings, Warden Grant determined that "his friendship with the Radfords compromised his ability to be an effective leader and he knew there was talk at the facility concerning his perceived favoritism toward Mrs. Radford and her husband." R. 101-02. In response, Warden Grant changed the chain of command and placed the Records Department, and Radford, under the supervision of Deputy Warden Philip McLaurin. R. 102.

The Commission found that the steps Warden Grant took to restore the original chain of command for the Records Department were reasonable, and it was Radford's expectations, rather than Warden Grant's actions, which were "extraordinary." R. 103. The above discussed evidence supports the Commission's findings. Moreover, the Commission's findings were bolstered by the testimony of Dr. Mark Webb who observed that Radford

made mountains out of mole hills, and she turned a situation into a very complex situation because of her maladaptive traits and the way she looks at the world.

R. 103, n. 2.

With regard to the claims that the confrontations with Jackie Banks led to Radford's psychological undoing, the Commission found that there was an abundance of credible evidence to show that Deputy Warden Banks did not treat Radford unfairly or demean or abuse her in any way.

With the burden squarely on Radford to prove her claim, the Commission found that she had not clearly and convincingly established that either Deputy Warden Banks or Chief Warden Grant had subjected Radford to a series of untoward or extraordinary

employment related events. Since Radford failed in meeting her burden of proving an essential element of her claim, the Commission denied her claim and reversed and vacated the Administrative Law Judge's Order of April 27, 2005.

C. There is Substantial Record Evidence to Support the Commission's Decision

In reaching its decision that no causal connection existed between Radford's undisputed mental injury and her employment, the Commission reviewed record testimony of three physicians. The testimony was conflicting, and in fact, Radford claims that the Commission erred by relying on the testimony of the two medical experts offered by the DCF over the testimony of her treating physician. As the Supreme Court has held, however, it is not this Court's responsibility to re-decide the factual question of which medical case was more persuasive. Instead, this Court must only decide if there is substantial evidence that supports the conclusion reached by the Commission. See, e.g., South Central Bell Telephone Co., 474 So. 2d at 589 (Miss. 1985). A quick review of the medical evidence found within the record reflects that the Full Commission Order is amply supported by the record before this Court.

Dr. Melvin Levitch, a psychiatrist practicing in Memphis, Tennessee, treated Radford when she left Delta Corrections Facility in 2000 and diagnosed her with post-traumatic stress disorder, two years prior to the hearing. At the instance of the DCF, Dr. Mark Webb, a psychiatrist practicing in Jackson, Mississippi, performed an independent medical examination. Following his evaluation, Dr. Webb submitted a report finding that Radford was suffering from dysthymia and histrionic personality traits which dated back to the traumas of her childhood. Dr. Webb found that the illnesses were not disabling and that they had not been "prolonged or exacerbated by her employment." Dr. Webb

attributed Radford's difficulty at work to her inability to get along with certain people because of her "preexisting, maladaptive personality traits." Dr. Webb found that Radford should continue treatment with Dr. Levitch, that it was not work related but was rather related to her current and previous life stresses. Dr. Webb finalized his opinion with the following summary.

webb
(Ms. Radford's employment at the Delta Correctional Facility did not cause any psychiatric injury or illness nor did it prolong or exacerbate her preexisting psychiatric illnesses.)

(Employer/Carrier Exhibit 3).

The final physician to testify was Dr. Judith Lyons, a clinical psychologist employed by Veterans Administration Hospital and University Medical Center in Jackson, Mississippi, with a specialty in treatment and research of post-traumatic stress disorder, who testified on behalf of the DCF. Based on the records and testimony⁵ of Drs. Ball and Dr. Webb, and based on the testimony at trial, Dr. Lyons testified that Radford was not suffering from post-traumatic stress disorder as previously diagnosed by Dr. Levitch. Rather Lyons opined that Radford was suffering from a personality disorder known as a borderline disorder which has been defined as a personality disorder marked by a long standing pattern of instability in interpersonal relationships, behavior, mood and self image that can interfere with social or occupational functioning or cause extreme emotional distress. R. 551-652. Dr. Lyons concluded that it was her opinion that the Claimant's mental condition was not caused by her employment at Delta Correctional Facility or by the related incidents involving Warden Banks.

⁵ The medical records from Radford's general practitioner treating physician Dr. David Ball were introduced, but Dr. Ball was not called to testify.

The testimony of Drs. Webb and Lyons support the Commission's Order. That testimony conflicted with the testimony of Dr. Levitch who testified about treatment two years before the hearing. It was for the Commission to weigh the credibility of the expert testimony, and it found the testimony of Drs. Webb and Lyons more credible. It is not for the Court to reweigh that testimony.

In a markedly similar case, and in fact involving the testimony of one of the same physicians, the Mississippi Supreme Court upheld the Commission's Order in the face of the same arguments that Radford has made.

As to Sibley's contention that the Commission should not have relied upon the testimony of Dr. Lyons because she had not examined Sibley, but testified based upon her evaluation of Sibley's medical and psychiatric records and observation of the trial, discussion of several points is in order. Sibley relies upon Johnson v. Ferguson, 435 So. 2d 1191 (Miss. 1983), to support her contention that the Commission erred in relying upon the testimony of Dr. Lyons rather than that of her treating physicians, Dr. Wheatley and Dr. Guild, and the social worker, Sue Meng. Johnson is distinguishable from the case sub judice in that it involves an A.J. who relied upon the expert testimony of a doctor who did not perform a myelogram even though the physician admitted that such a test was the sole diagnostic tool available to rule out the possibility of a herniated disc. Id. at 1195. ...

Our rules of evidence state that " the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before a hearing." M.R.E. 703. In the case sub judice, Dr. Lyons based her opinion upon her observation of Sibley in the hearing and upon the medical and psychiatric records of her treating physicians. *The evidence was properly admitted; the only issue to be resolved was the weight to be given to the testimony, a responsibility given to the Commission.*

Sibley v. Unifirst Bank for Sav. ex rel. Resolution Trust Corp., 699 So. 2d 1214, 1219 (Miss. 1997)(emphasis added).

In 2004, the Mississippi Supreme Court, in determining whether the decision of the Commission is supported by substantial evidence, held that the Commission serves

as the ultimate fact finder in addressing conflicts in medical testimony and opinion. In its discussion, the Court quoted two earlier Supreme Court and Court of Appeals decisions which held that:

when examining conflicting opinions by medical experts, "we will not determine where the preponderance of the evidence lies . . . the assumption being that the Commission as trier of fact, has previously determined which evidence is credible, has weight, and which is not."

Hardaway Co. v. Bradley, 887 So. 2d 793, 795-796 (Miss. 2004).

Here as in Hardaway and Sibley, there was conflicting medical testimony from physicians with varying degrees of expertise in the field of post-traumatic stress disorder. One psychologist found that Radford had post-traumatic stress disorder; two found that she did not. The Commission was entitled to find the testimony of Drs. Webb and Lyons more persuasive under the Supreme Court decisions in Hardaway, and Oswalt v. Abernathy & Clark, 625 So. 2d 770, 772 (Miss.1993)(where two or more qualified medical experts reach different conclusions, court will not determine where the preponderance of the evidence lies when the evidence is conflicting, the assumption being that the Commission, as the trier of fact, has previously determined which evidence is credible, has weight, and which is not.) and the Court of Appeals decisions in Manning v. Sunbeam-Oster Household Products, 979 So. 2d 736, 741 (Miss. Ct. App. 2008)(same), Richardson v. Johnson Elec. Automotive, Inc., 962 So. 2d 146, 152 (Miss. Ct. App. 2007)(same); Ford v. Emhart, Inc., 755 So. 2d 1263, 1266 (Miss. Ct. App. 2000)(same), and Baugh v. Central Miss. Planning & Dev. Dist., 740 So. 2d 342, 344 (Miss. Ct. App. 1999)(same).

In this case, there is ample credible medical testimony in support of the decision handed down by the Commission. Accordingly, the Full Commission Order was supported by substantial evidence and must be affirmed by this Court.

D. Radford's Argument that the Commission Failed to Consider Testimony of "Treating" Physician Is Without Merit

Radford argues within her brief that the Commission "arbitrarily failed to consider Connie Radford's treating physician's testimony and opinions, as well as the opinions and testimony of Dr. Judith Lyons. DCF questions just how Radford somehow reaches such a determination based upon the fact that there is no detailed account of the testimony of Dr. Levitch or Dr. Lyons within the Commission's decision. Moreover, it should be noted that the only specific reference to Dr. Webb within the Commission decision is found within a footnote, which states: "Dr. Mark Webb poignantly observed that Mrs. Radford "made mountains out of mole hills, and she turned a situation into a very complex situation because of her maladaptive traits and the way she looks at the world." R. 103.

The lack of specific reference to a physician or a detailed account of their involvement, treatment and opinions within a Commission's opinion cannot be equated to the Commission's failure to consider their testimony. And even if that were the case, there is no way Radford can single out Levitch's testimony as neither the testimony of Drs. Webb or Lyons was addressed by the Commission's decision, with the single exception of the reference to Dr. Webb within a footnote, which is quoted above.

The key issue presented by this appeal is not whether this Court can accurately read the tea leaves in order to accurately determine what type consideration the Commission gave to the varying medical experts; but instead, the issue before this

Court is whether the Commission's Order is supported by substantial evidence. And as previously noted, the answer is overwhelmingly affirmative. Both Dr. Webb and Dr. Lyons testified that Radford's medical condition was not causally related to her employment at Delta Correctional Facility. Dr. Webb specifically stated that Radford's employment at Delta Correctional Facility "did not cause any psychiatric injury or illness nor did it prolong or exacerbate her preexisting psychiatric illnesses." Ex. 3. Dr. Lyons, a clinical psychologist who specializes in treatment of post-traumatic stress disorder victims at the Veterans Administration Hospital in Jackson, Mississippi, testified that Radford was not suffering from post-traumatic stress disorder (as Dr. Levitch has opined). In her opinion, Radford suffered from a personality disorder known as a borderline disorder, which was not caused by her employment at Delta Correctional Facility or any of the related incidents involving Warden Banks. Regardless of whether this testimony by Drs. Webb and Lyons is cited within the Commission Order, it is found within the record and constitutes substantial evidence in support of the Commission's findings.

Radford cites *Stewart v. Singing River Hosp. System*, 928 So. 2d 176 (Miss. Ct. App. 2005) for proposition that this Court can determine that the Commission failed to consider the testimony of Dr. Levitch. In particular, Radford places emphasis on language within Stewart decision that addresses *Johnson v. Ferguson*, 435 So. 2d 1191 (Miss. 1983), a decision that references weight the Commission should place on testimony of treating physician. Presumably, Radford would represent that in any case where Commission opts for ruling that is contrary to a claimant's choice of physician,

they are guilty of failing to consider the claimant's physician of choice. This was not the intent of the *Stewart* and *Johnson* decisions.

In *Manning v. Sunbeam-Oster Household Products*, 979 So. 2d 736 (Miss. App. 2008), the Mississippi Court of Appeals debunked Radford's theory when they stated that

[w]e see no reason why a physician examining a patient in an independent medical examination requested by an employer and carrier is not "treating" the patient. Therefore, we reject this distinction between treating and non-treating physicians.

979 So. 2d at 741.

The Manning court went on to review the medicals within record and concluded that "the administrative law judge relied on the facts about her abusive childhood revealed during cross-examination and to her treating physicians." *Id.* at 744-45. After discussing some specifics within the record, this Court concluded that "based upon our standard of review in this case, we cannot say that the testimony of these physicians did not provide substantial evidence that the psychological problems suffered by Manning were unrelated to her work injury and, therefore, non-compensable." *Id.* at 745.

Just as in *Manning*, the Commission relied upon the facts of Radford's abusive childhood and tumultuous adult life revealed during her cross-examination and to her treating physicians in finding that there was substantial evidence that the mental problems suffered by Radford were unrelated to her employment. Accordingly, the decision of the Commission should be affirmed.

CONCLUSION

Under the law, Radford had to prove by clear and convincing evidence a connection between her employment and her injury, and further that her mental injury was caused by something more than ordinary incidents of employment. The Commission was entitled under Mississippi law to weigh the conflicting testimony of both lay and expert witnesses and to find the evidence to be more credible and persuasive which supported a finding that Radford did not suffer a psychological injury as a result of her employment and that the activities of which she complained were merely the ordinary incidents of employment. The Commission's decision was supported by both lay witnesses and by expert medical testimony. As such, it is supported by substantial evidence and must be upheld.

For these reasons and those cited in the appeal notice to the Commission, Appellees CCA-Delta Correctional Facility and Zurich American Insurance Company of Illinois, move the Court to uphold the decision of the Workers' Compensation Commission that Connie Radford did not prove a work-related injury by clear and convincing evidence and that she is not entitled to benefits for her mental/mental claim.

This the ___ day of October, 2008.

Respectfully submitted,

CCA-DELTA CORRECTIONAL
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees CCA-Delta Correctional Facility and Zurich American Insurance Company of Illinois to

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This the 6th day of October, 2008.



F. Hall Bailey