

**IN THE COURT OF APPEALS OF MISSISSIPPI
CASE NO. 2007-WC-2270**

CONNIE RADFORD

APPELLANT

V.

CCA-DELTA CORRECTIONAL FACILITY

APPELLEE

AND

ZURICH AMERICAN INS. CO. OF ILLINOIS

APPELLEE

**ON APPEAL FROM THE
MISSISSIPPI WORKERS' COMPENSATION COMMISSION**

BRIEF OF THE APPELLANT

**LAWRENCE J. HAKIM, ESQ.
MS BAR NO. [REDACTED]**

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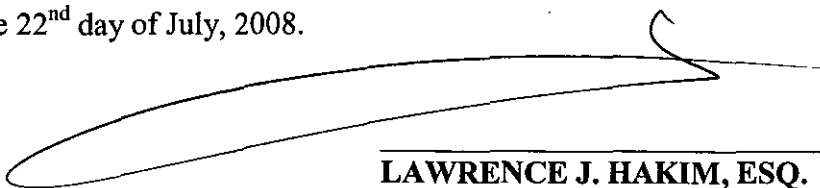
APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Connie Radford, Appellant;
2. CCA-Delta Correctional Facility, Appellee;
3. Zurich American Insurance Company of Illinois, Appellee;
4. Lawrence J. Hakim, Esq., Attorney for Appellant;
5. F. Hall Bailey, Esq., Attorney for Appellees;

This the 22nd day of July, 2008.



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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION COMMITTED REVERSABLE ERROR AS A MATTER OF LAW AND FACT IN FINDING THAT CONNIE RADFORD DID NOT SUFFER A MENTAL INJURY ARISING FROM AND IN THE COURSE AND SCOPE OF HER EMPLOYMENT;
- II. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION INCORRECTLY WEIGHED THE MEDICAL EVIDENCE IN THE CASE;
- III. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IGNORED THE CREDIBLE AND OVERWHELMING LAY AND MEDICAL EVIDENCE IN RULING AGAINST CONNIE RADFORD;
- IV. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION FAILED TO FOLLOW MISSISSIPPI LAW AND RESOLVE ISSUES OF DOUBT IN FAVOR OF CONNIE RADFORD;
- V. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION UTILIZED INCORRECT LEGAL STANDARDS AND/OR OTHERWISE COMMITTED LEGAL ERRORS;
- VI. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY TOWARDS CONNIE RADFORD.

I.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Claimant/Appellant, Connie Radford ("Connie"), filed her Petition to Controvert alleging a mental injury, occurring on or about February 10, 2000. A Hearing, lasting five days, was initially held in the Grenada County Courthouse, in Grenada County, Mississippi on November 18, 2004, and finally concluded on January 10, 2005, at the Mississippi Workers' Compensation Commission in Jackson, Mississippi. The record was closed on March 23, 2005.

Issues for determination by the Administrative Judge were as follows:

1. Whether Claimant has a work injury in the form of post-traumatic stress syndrome and major depression resulting from the cumulative effects of her work environment necessitating the initiating of medical treatment on February 10, 2000;
2. Assuming compensability, the existence and extent of temporary disability attributable to Claimant's alleged work injury;
3. Assuming compensability, whether Claimant has reached maximum medical improvement; and if so, when;
4. Assuming compensability, the reasonableness and necessity of medical the medical treatment Claimant received for her alleged work injury;
5. Assuming compensability, the existence and extent of permanent disability attributable to Claimant's work injury.

The sole stipulation at hearing was Claimant's average weekly wage on the date of the alleged work accident. On April 27, 2005, the Administrative Judge, Honorable Tammy Harthcock, entered a 48 page ORDER OF ADMINISTRATIVE JUDGE, finding that; a.) Connie met her burden of proof by showing with clear and convincing evidence that she sustained a work-related injury in the form of post-traumatic stress disorder and major depression, resulting from the cumulative effects of her work environment necessitating the initiation of medical treatment on February 10, 2002; b.) that Connie's average weekly wage on the day of her work injury was \$403.19, as stipulated; c.) that Connie has not yet reached maximum medical

improvement and that she remained in a state of complete disability and unable to psychologically handle any work situation at the present time; and, d.) finding that certain medical treatment was reasonable and necessary and had been provided in accordance with Mississippi Workers' Compensation Law. (Order of the Administrative Judge at P. 47)

Judge Harthcock accordingly ordered the Employer/Carrier to pay temporary total disability benefits at \$268.93, (two-thirds of Connie's average weekly wage), from June 9, 2000 and continuing until Connie reached maximum medical improvement, and to provide, pay for, and furnish to Connie all reasonable and necessary medical services as the nature of her injury or the process of her recovery requires.

On or about May 17, 2005, the Employer/Carrier filed their Notice of Appeal to the Full Commission, which heard Oral Argument, January 9, 2006. On or about January 11, 2006, and only three days after Oral Argument, the Mississippi Workers' Compensation Commission issued a five page "Full Commission Order" reversing and vacating the Order and Opinion of Administrative Judge, and denying and dismissing Connie's worker's compensation claim.

On or about January 19, 2006, Connie filed her Notice of Appeal of the Full Commission Order.

On September 12, 2007, the Circuit Court of Leflore County affirmed the Full Commission Order.

II.

STATEMENT OF THE FACTS

Claimant/Appellate, Connie Radford ("Connie") was born November 11, 1956. (R. 14) Connie came from a dysfunctional background: Her father was a verbally, emotionally and sexually abusive alcoholic, who caused Connie's mother's death and sexually abused Connie when she was a child. (R. 15-17) Connie was first married at the age of fifteen, and her husband was seventeen. (R. 17) That marriage lasted only a month. (R. 18) As a teenager, Connie was kicked out of the house by her father, and she dropped out of high school at that point. (R. 18) Connie married a second time as a teenager and her second husband was physically and mentally abusive to Connie. (R. 19) As Connie testified,

"I had three children, Your Honor, to take care of. I worked. I took beatings. I lived him for twelve years because he had myself-esteem down so low that no one would have me because I had three children and I could not provide for them, but I did."

(Id.) Connie testified that she got custody of her younger sister Dawn. (R. 18) Connie eventually received a Divorce and *successfully* turned her life and circumstances around:

"...I had the determination that I was not going to be the person my father was. I bettered myself. I went and got my GED. I worked. I provided for three children with no help from my two natural born children between him and me. I provided for my sister. I sent them to school. I clothed them. I loved them. I played with them. They were my life. They still are my life. I worked hard. At every job I worked at, I did my best. I put everything I had into my job. I am a very loving person. I like to help people. I like to laugh and joke and I did so, up until the year of what happened to me at Delta Correctional Facility."

(R. 20) Connie married a third time, but that marriage ended in divorce due to her spouse's infidelity. (R. 22) However, Connie and her ex-husband remain good friends. (Id.) Connie married her current husband, Donald Radford, Sr. in 1989 and had this to say about her marriage relationship to Mr. Radford:

“We have a loving, caring relationship. We are best friends. We have three children, two of which are my biological children and he has a daughter which is my daughter also. I am the type of person that can love other people. I am a mother that loves all three of my children equally.”

(R. 22-23) Connie worked in a variety of fields before going to work for the Appellee. Her jobs included work in a bakery and a garment factory. (R. 24) Connie was the type of person who would go out of her way to try and please people and make peace. (Id.) Connie further testified, *without rebuttal*, that prior to going to work for the Appellee, she had never been fired from any of her previous jobs nor asked to leave. (R. 25)

Connie began working with the Appellee in September, 1996, starting out as a records clerk and eventually becoming supervisor over records. (R. 26-27, 33) Connie’s employment with the Appellee was idyllic: she had a wonderful working relationship with Warden Grant, head of the Appellee’s facility, as well as with his wife. (R. 29) In fact Warden Grant so trusted Connie that he entrusted the care of his wife, who was sick with Lupus. Connie testified as follows:

“Your Honor, not only did Warden Grant and Mrs. Janie have a working relationship, we had a friendship outside of the working. We had – supper with them. We would go out to supper with them. We laughed and talked. I don’t know what went wrong with that relationship.”

(R. 31) The irrefutable evidence is that Connie not only had a working relationship with the majority of her co-workers, including Warden Grant, but she consistently received outstanding performance appraisal summaries. (R. 35-42; Exhibit 9) Said performance appraisal, filled out by Warden Grant, contained comments such as the following:

“Ms. Radford is an industrious and willing worker, and extremely accurate in all that she does, placing great emphasis on details. Eager to stay abreast of the latest changes in CCA policies and procedures and MDOC policies and procedures. Ms. Radford is a self starter. She is a dedicated professional who thrives on new challenges. She is an asset to this facility and CC8.”

"Ms. Radford has an outstanding records department. She quickly grasped essential elements of a problem, using great initiative and keen logic in seeking solutions."

"Ms. Radford does not believe in idle time or unfinished projects, manages own time and that of others to best possible advantage, completes large volume of work each day."

"Ms. Radford is a dedicated professional who thrives on new challenges and responsibility, a continuing source of new ideas."

"Ms. Radford is especially adapt in dealing with inmates and co-workers. She understands the worth and dignity of each individual... I, the Warden, trust Ms. Radford's judgment."

(R. 37, 38-40; Exhibit 9)

Connie was such an outstanding employee for CCA that she also received an "Employee of the Quarter Certificate", dated September 23, 1997, in recognition of Connie's "dedication to the company, comment to exceptional personal performance, and the ability to work well with others." (R. 42-43; Exhibit 10)

Connie reminisced about the first phase of her employment with CCA:

"Yes, sir, I was very proud of myself for what I had achieved in my life concerning the background of my life."

(R. 43) Unfortunately, Connie's highly positive work environment changed when assistant warden, Jacqueline Banks, transfer to the Delta Correctional Facility became permanent. (R. 44) The problems initially began when Banks started to demean Warden Grant in front of Connie. (R. 44-45)

Connie testified that Banks told Connie that she [Banks] was jealous of the working relationship Warden Grant had with Connie. (R. 46) Gradually Connie became the target of Banks' harassment and ridicule. (R. 47) Specific examples of Banks' harassment of Connie were:

Banks would laugh at Connie and ridicule her in front of Connie's co-workers. (R. 48)

Banks would refuse to sign Connie's timesheets. (R. 47)

Banks would totally ignore Connie and instead would meet with a subordinate employee underneath Connie. (R. 48-49)

Banks would put down Connie's husband. (R. 50)

Banks would cuss Connie and make subtle threats of violence against her. (R. 50)

Banks told another employee that, "Warden Grant would not be in there much longer, if she had anything to do with, and my ass was out of there." (R. 50-51)

Banks accused Connie of not doing her job properly and referred to Connie as a "two-faced bitch" in front of her co-workers. (R-51-52)

Banks would scream at Connie in front of her co-workers. (R. 52)

Banks would demean Connie's work performance. (R. 66)

Unfortunately, Connie did bring this to Warden Grant's attention, but rather than rectify or in anyway correct this situation, he simply asked Connie to ignore Banks and to stay away from her. (R. 57) Connie followed Warden Banks advice, and that did not solve the problem as "Ms. Banks kept on harassing, making comments." (R. 57-58)

Finally, things got so bad for Connie that she had to file a grievance on Banks. (R. 59; Exhibit 11) In conjunction with the grievance Connie filed, a PSN (Problem Solving Notice) meeting was held.¹

In the PSN meeting, Connie testified that the following exchange took place:

"She [Banks] told me in the PSN meeting that she would go all the way around the compound not to come in contact with me, that she didn't like me, she never had liked me, that was not her job when she came there. I proceeded to tell Warden Grant – Warden Banks that that was sad because she could be a very likable person."

¹ Per CCA rules and regulations, all PSN meetings were to be tape recorded and this particular one was no exception. However, even though the tape of this particular PSN was requested in discovery, it was never provided to Appellant's counsel. (R. 60)

"She [Banks] told me that she didn't want me to like her, that's not why she was there. There was a tape recorder there, this was taped. Yes, sir, all PSNs were taped. There was a tape recorded place on the table. I do not know what happened to the tape. I had told my attorneys that it was taped, and if we had the tape everything would be told."

The grievance Connie filed on Banks was the first that she had ever filed, as Connie had never had a problem with her co-workers prior to the arrival of Banks. Id. (R. 62)

The grievance form that Connie filed accused Banks of:

"Continued harassment, racial slurs and remarks, threatening of job and interference of performed job duties."

(R. 63: Exhibit 12) The remedy Connie sought in her grievance was:

"Harassment and racial slurs and threatening of job and interference of performing job duty, to stop, and no retaliation to me or my husband in filing this."

(Id.) The grievance was prepared in May, 2000, but not received by the Employer in Nashville until June, 2003. (R. 65)

Another example of Bank's harassment of Connie was:

"She [Banks] told me if I would keep my, excuse me, ass, out of the conference room in the morning and do my job, that is what I needed to do, and I responded by telling Warden Banks, that I did do my job."
(R. 66)

It finally became all too much for Connie to handle and in January, 2000, she was forced to seek medical treatment, initially from Batesville General Practitioner, David Ball, M.D., because:

"I was experiencing low self-esteem to myself, that I wasn't performing my job duty, that I thought I was. Warden Grant always praised me, that everything I did and then it changed, just all of a sudden it changed."

(Id.)² Dr. Ball prescribed medication for Connie and took her off work for a short period of time. (R. 67) When Connie returned to work, she was found that she was placed under Warden McLaurin and that she was no longer working directly under Warden Grant. (R. 67) This made Connie highly distraught;

“I couldn’t figure out what I had done so wrong at that point in time with the years that I had worked there. For Warden Grant, I never once had a problem. I could not understand what I had done wrong.”
(R. 67, 68)

Because of the severity of Connie’s mental injury and the persistence of same, Dr. Ball referred Connie to Memphis, Tennessee, Psychiatrist, Melvin Levitch. (R. 68:Exhibit 13)³

Because of the severity of Connie’s condition, Dr. Levitch had her hospitalized at a psychiatric facility in Memphis. (R. 68: Exhibit 14) Connie described symptoms she was undergoing at the time she was hospitalized by Dr. Levitch:

“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 to where I got, and it was taken away from me and I don’t know why.”
(R. 70)

Connie went on to elaborate that she felt she had lost the trust and care that Warden Grant had for her. (R. 71) Connie admitted that she saw Warden Grant as a father figure, but that he had let her down and betrayed her as her natural father had done. (R. 71)

With regard to her image of herself, Connie stated:

“She [Banks] made me feel like I was useless, that I didn’t know what I was doing and I started believing after Warden Grant, it was like – he was taking – it was a jealousy here between her as far as mine and Warden Grant’s relationship was. It felt like I couldn’t do it anymore. I felt like I had let the Warden of the Penitentiary down.”

² Ironically, Connie received a highly positive performance review less than a month before she saw Dr. Ball in February, 2000. (R. 67)

³ Dr. Levitch has been Board Certified in the field of psychiatry for 33 years.

"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."

"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 came 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. I tried to do my job under Warden McLaurin, but I could not stand the looks I got from the man that I had respected so much."

(R. 72-73)

Despite the harassment and loss of her self-esteem, Connie attempted to maintain her job, until she eventually had her breakdown precipitated in part by the communication of threats to her job. (R. 75-76) Connie's mental and emotional health totally deteriorated, "Because I had lost my self-esteem in myself and what I was trying to accomplish, make something out of my life for my family, for my boss, and all of a sudden I felt like I had been used, abused and thrown away." (R. 76) The last days on her job were characterized by an inability to concentrate and by constant crying. (R. 77)

Connie believed Banks was out to get her and was punishing her. (R. II. 12)

"Ms. Banks brought my self-esteem down ... She made me believe I couldn't do my job, she told me. She made sly remarks to me. She would walk down, like, the halls with some of the administration staff and walk by me and say something and just die laughing. I cried a lot in my office."

(R. II. 13) As a result of her work situation, Connie attempted to commit suicide. (R. 79)

As a result of the suicide attempt she was hospitalized by Memphis, Tennessee, psychiatrist, Melvin Levitch, M.D.

As a result of her psychological work injury, Connie was granted Social Security Disability. (R. 82-83) At the time of her hearing, Connie was on Seroquel, Valium, Clopin,

Lexpro, Lepacal, and Prevacid. Connie has ongoing problems with nightmares and anxiety attacks. (R. 86)

Connie was terminated by the Employer when her medical leave ran out. (R. 86-87) Approximately six to seven months after she was terminated her husband, who was also employed at the CCA-DCF was terminated as well. (R. 86) Connie is still under Dr. Levitch's care, (R. 88), and still experiences a negative impact on her life as a result of her psychological injury. (R. 88-91)

Since her termination, Connie has had two strokes and has been diagnosed with a heart condition. (R. 92) However, there is no evidence that these conditions, in and of themselves are disabling to Connie. (R. 95-96)

Following Connie's termination the Employer completed a termination report dated November 15, 2000, which alleged that Connie was "discharged for a physical condition." (R. 99-100)

Connie's husband, Donald Radford corroborated Connie's testimony:

Q. Based, again, on your direct observation and experience, what was [Banks] conduct or behavior with regard to your wife?

A. She was very unprofessional. She picked at Connie. She would walk into a room and speak to myself or Paula Melton or Warden Grant, but she would never acknowledge that Connie was sitting there with us. I mean, that she would speak to everyone else but Connie. An the wardens and I would go out to carry people to lunch or something and when we came back, she [Banks] would run back to Connie's office and tell Connie that a waitress or something was flirting with me, trying to cause trouble. She just kept on and kept on doing that to her.

She just kept on picking at her. I went to Warden Grant, and I said, "Warden Grant, either stop it or I'm going to stop it." He said, "Don't worry about it, she's not going to be here long, we're going to deal with it." (R. II at 54-55)

Donald Radford also confirmed Warden Grant's inaction with regard to Banks harassment of Connie:

Q. Did Warden Grant ever take this seriously?

- A. In my opinion no, he did not. He called it a cat fight, and you know, that is what bothers me so bad about it, Warden Grant could have stop the whole stuff.

He could have told Jackie Banks, leave her alone, or, you know, just don't say nothing to her. I mean she didn't work for Jackie Banks. She worked for Mr. – Warden Grant. She [Connie] busted her butt for Warden Grant and he let her [Banks] dog her out every time. She [Banks] wouldn't do it when Mr. – Warden Grant was present. She would wait until he was gone to a wardens meeting or then whatever and then she would dog Connie out.

(R.II at 55) Donald Radford notified the Employer that due to what was happening to Connie at the hands of Banks, Connie was now seeking medical treatment. (R.II 63-64)

Paula Melton testified on behalf of Connie. Ms. Melton was compliance coordinator for the Employer herein from 1996 to 2000. Ms. Melton confirmed and corroborated when Warden Grant was not there, ... it was horrible. It was absolutely horrible. I mean, we hated it.

Q. Why?

A. “Because the things she [Banks] would do. She would just – come in my office, if Connie wasn't in there, Connie's office was one over from mine. If she had – Jacqueline Banks would come in there, if I was on the phone with corporate or another facility, someone asking questions about ACA, she would just sit there. She [Banks] would – there was an incident involving a faxed order for an inmate to be released for a court appearance, that was supposed to be handled in Connie's department and wasn't.”

(R. II at 108) However, with regard to Connie, ... it was just, like, [Banks] (R. II at 112)

Significantly, Ms. Melton went to Warden Grant with her concerns about Connie and Banks. (R. 116)

“[Banks] belittled Connie. She would acknowledge other staff members and speak to us, if we were all walking along and Connie was right there, she would say hey to me and hey to the other person, but nothing to her at all.”

Q. Did you ever see her do that to any other employee?

A. No.

(R. II at 118) Connie's sister, Dawn Porter, also testified. Ms. Porter worked with the employer herein, along side her sister, Connie, and had direct knowledge of the following:

“[Banks] would belittle her and [Banks] would come into the office and we would all be sitting there and Ms. Radford would be sitting in there and [Banks] would come in there

and turn her back to Radford and speak to the rest of us and she wouldn't speak to Ms. Radford, and she would go in Ms. Radford's office and then when Ms. Banks came out, Ms. Radford would be crying."

(R. II at 121) Ms. Porter also testified that Banks picked on Connie more than she picked on the rest of her co-workers. (R. II at 125)

One of Connie's co-worker's, Officer Fred Randall, testified by way of deposition, which was entered into evidence in this matter. (Exhibit "15")

Officer Randall corroborated the fact that Banks was verbally abusive and that she harassed Connie. (Exhibit 15 at p.14,16-17; 21)

Officer Phillip L. McLaurin also testified by way of deposition and though evasive, nonetheless confirmed that, "There was friction between Ms. Banks and Connie Radford." (Exhibit 17 at 31)

Perhaps the most telling testimony obtained at hearing was that of Connie's co-worker, Betty Logan. Despite her obvious and understandable reluctance to testify, Logan all but confirmed that Banks was out to get Connie.

Q. Do you ever recall making a statement to Ms. Radford about, you better watch your back", or something along those lines;

A. I did... I went in that morning, I felt bad. I just told her wasn't everyone her friend. She needed to be careful, you know, who she talked to, what she said, I think the main reason why I said that, sometimes the receptionist down front would say, have you heard, have you heard, you know. It's he say, she say, he say, she say, and I knew, of course she worked for Warden Grant. But still, you know, I just wanted her to be careful because there were people saying they had a chip on their shoulder because Ms. Banks came in, and I never heard Mr. Radford or Ms. Radford, either one, say anything to that effect, that they had a chip on their shoulder... and she ask if I was talking about Ms. Banks and I told her no, I said, --*I didn't say no, I said I am just not calling any names...*I didn't want anything to get back to Ms. Banks because things were being said, you know, I just wouldn't have anything to get back to Ms. Banks and come back on Ms. Radford.

(R. III at 26-28) (Emphasis Added)

Betty Logan also admitted over hearing Banks complain about and accuse Connie of taking advantage of Warden Grant. (R. III at 37)

When questioned at hearing, Warden Grant acknowledged that Connie informed him of what was happening to her. (R. 61) In a round about way, Warden Grant also acknowledged that Banks demeaned Connie, and treated her in a way that was inappropriate under the circumstances. (R. 62)

Warden Grant conceded that Connie was very upset due to Banks' behavior towards her. (Id.)

Warden Grant confirmed Connie's testimony about the close relationship that had grown between the Grant's and Radford's and in particular, between Connie and Warden Grant's wife. (R. 67-68)

Warden Grant admitted that, "The rumor mill was getting it back to me that I was showing partiality towards Mrs. Radford and Mr. Radford..." (R. 69)

Particularly revealing is this piece of testimony from Warden Grant:

"Connie was very [sic] an emotional-type person. She let little things bother her a whole lot. Connie just had to - - just a hard road. And Connie, she was, you know, like I said, she was a super employee, but her - - I reckon her biggest problem was dealing with people, so to speak."

(R. 74) This last comment of Warden Grant's, is contradicted by Warden Grant's own fully positive assessment of Connie's abilities to deal with her co-employees and the facilities inmates contained in her work evaluation that he completed.

Warden Grant conceded that there was probably times that she told me that [Banks was abusing Connie], and I told her, "Mrs. Radford, you got to put it in writing." (R. 82)

Under cross-examination, Warden Grant characterized Banks' abusive behavior towards Connie as "a clash of personalities." (R. 93)

While Warden Grant could not remember sitting in on a meeting involving one of the Leflore County Board of Supervisors, discussing Banks' abusive treatment of the staff, he did concede that Robert Moore, President of the Leflore County Board of Supervisors, discussed with him the complaints they were receiving concerning the way Ms. Banks was treating the staff. (R. 95)

Warden Grant conceded that Connie was highly upset and crying over the fax situation involving Banks and Cassandra Swines. (R. 99)

SUMMARY OF THE MEDICAL EVIDENCE AND TESTIMONY
OF CONNIE RADFORD'S TREATING PHYSICIANS

Connie first treated with Dr. David Ball, a general practitioner in Batesville, Mississippi, in 1989. (Exhibit "5 & 6") In 1996, Dr. Ball prescribed Elivel for Connie, who was complaining of problems with her nerves due to the fact that her husband was out of a job and they had creditors. However, there is no indication (and no evidence otherwise) that there was ever a refill and Connie did not see Dr. Ball again until February 10, 2000, nearly four years later.

On February 10, 2000, Dr. Ball diagnosed Connie with "situational stress and depression". On May 15, 2000, however, Dr. Ball took the following history:

[Connie] is being harassed by her supervisor, who shouts obscenities at her in front of other workers. She has gone to the warden (works at prison), who will not say anything to the assistant warden (who is the problem).

Dr. Ball again diagnosed Connie with job stress and actually advised her to seek legal assistance.

On May 24, 2000, Dr. Ball later completed paperwork for Connie's disability application. On said application, he diagnosed her with disability due to stress, depression and anxiety. In his

June 7, 2000, note Dr. Ball records that Connie was “shaking and tearing up”. Because of her condition, he referred Connie to Memphis, Tennessee, Psychiatrist, Melvin Levitch, M.D.

It should be noted that Dr. Levitch has practiced for 39 years and has been board certified in the field of psychiatry for 33 years. He began treating Connie, June 9, 2000, and noted that Connie was having conflicts with an assistant warden at work. That said assistant warden [Banks] spoke to Connie in a loud voice and used profanity towards her. Connie described herself as emotionally traumatized in front of her co-workers by Banks. Connie also told Dr. Levitch that Warden Grant did not intervene or stop the harassment. (Exhibit “1”)

By August, 2000, Connie’s condition had gotten so severe that Dr. Levitch had her admitted to a psychiatric hospital for post-traumatic stress syndrome and for major depression. In his deposition, Dr. Levitch testified:

[Connie] was not doing well. She had recurring thoughts about the abuse at work, reliving the episodes in her mind, day and night, felt like she was there, was staying on edge, crying, not eating, not sleeping, and began to have *suicidal* thoughts.

(Exhibit “1, at pg. 13) By the time his deposition had been taken, Dr. Levitch had had Connie hospitalized four times. He also had her treated with medication and therapy.

At the time of her hearing, Connie was not at maximum medical improvement and had been temporarily totally disabled since the date he began treating her. Dr. Levitch opined that Connie’s post-traumatic stress disorder was, in his own words, “One of the worst cases that I have seen.” He clearly and unequivocally opined that Connie’s condition was caused by her work experience at the employer. As he explained, “Her trouble began a long time ago. She was able to cover it over and keep encapsulated...” However, the harassment and abuse Connie suffered at work “flipped her”.

Dr. Levitch further explained that even though Connie's condition was pre-existing, the mental trauma she sustained at work was "pretty significant" to disable her emotionally. Dr. Levitch was aware of Connie's past history of emotional, physical and sexual abuse, as well as her two failed marriages and financial struggles, but Dr. Levitch also noted that Connie had been able to "live through that and did not relapse into mental illness." (Id. at 16)

Dr. Levitch further stated:

[S]he was able to function in this situation with apparent ease until [she] began to feel threatened by an authority figure with abuse, verbally, and being demeaned in front of other workers. And even her maybe father figure did not come to her rescue. All these complicated factors fit together in like a jig-saw puzzle, and when they began to come down it was like a house of cards. It just all fell apart.
(Id. at 40)

SUMMARY OF THE ARGUMENT

An appellate court is charged with determining whether there has been an error of law by the Workers' Compensation Commission and the Court is not obligated to defer to the Commission; rather judicial review of errors of law is *de novo*.

An appellate court has the duty to review all of the facts in the records and determine whether: a.) the facts substantiate the Order of the Commission; and, b.) whether the Commission was manifestly in error in its interpretation of those facts.

Finally, a finding by the Mississippi Workers' Compensation Commission will be clearly erroneous when even though there is slight evidence to support it, the appellate court on the basis of the entire evidence is left with a definite and firm conviction that a mistake has been made by the Commission.

Under Mississippi Law Claimant met her burden of showing by clear and convincing evidence that she sustained a compensable mental/mental work injury and is currently totally

An appellate court has the power to broaden the Commission's authority to meet the munificent purpose of the Workers' Compensation Act and there is a broad public policy behind the act to provide the necessary treatment to restore the injured worker to health and productivity. 742 So. 2d at 1087.

If the Workers' Compensation Commission commits prejudicial error, the appellate court does not need to defer to Commission decisions on issues of fact and credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454 (Miss. 2005).

Where the Commission merely affirms the Administrative Law Judge's decision, the appellate court must examine the findings of fact made by the Administrative Judge as those of the Commission. McDowell v. Smith, 856 So. 2d 581 (Miss. Ct. App. 2003).

An appellate court is charged with determining whether there has been an error of law made by the Workers' Compensation Commission and judicial review of errors of law is *de novo*. Weatherspoon v. Croft Metals, Inc., 881 So. 2d 204 (Miss. Ct. App. 2002).

A finding of the Workers' Compensation Commission is clearly erroneous when although there is slight evidence to support it, the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Worker's Compensation Act and where only a scintilla of evidence supports the Commission decision the Appellate Court must reverse. Mississippi Dept. of Transp. v. Moye, 850 So 2d 114 (Miss. Ct. App. 2002).

Finally, an Appellate Court has a duty to review the facts contained in the record of a Worker's Compensation proceeding, and to determine whether those facts substantiate the Order of the Commission; Appellate review of the facts will determine whether the Commission was

manifestly in error in it's interpretation of those facts. Flake v. Randall Reed Trucking Co., 458 So. 2d 223 (Miss. 1984).

B. THE FULL 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

In the instant case the Commission totally ignored the medical opinions and testimony of Connie's *treating* psychiatrist, Melvin Levitch and instead erroneously gave controlling weight to the medical opinion of the Employer/Carrier's expert, Mark Webb, M.D., who only saw Claimant *one time*, and only at the request of the Employer/Carrier⁴. In so doing, the Commission committed prejudicial error.

The Workers' Compensation Commission is entitled to favor the testimony of the treating physician over a physician who has seen the Claimant only once. South Central Bell Telephone Co. v. Aden, 474 So. 2d 584, 593 (Miss. 1985); Mueller Copper Tube Co., Inc. v. Upton, 930 So. 2d 428 (Miss. Ct. App. 2005). The opinion of a claimant's treating physician, "...is without question of great importance..." Richardson v. Johnson Elec. Automotive, Inc., 962 So. 2d 146, 152 (Miss. Ct. App. 2007).

In a recent decision the Mississippi Court of Appeals examined the issue of how to weigh conflicting medical evidence and testimony. Stewart v. Singing River Hosp. System, 928 So. 2d 176 (Miss. Ct. App. 2005), Cert. Denied May 4, 2006. In Stewart, Claimant, Janie Stewart, was injured October 31, 1996, when she attempted to sit in a chair, which rolled out from under her causing her to fall to the floor, landing on her buttocks and striking her head. 928 So. 2d at 178.

⁴ It is interesting that the Commission also ignored the testimony and opinions of Appellee's *other* psychological expert, Dr. Judith Lyons, whose testimony as a whole supported Connie.

Stewart initially experienced “slight discomfort”, before her neck and low back pain gradually worsened. Id. Because of her injury Stewart eventually underwent back surgery at her L4-L5 and L5-S1 levels. Id. Post-operatively Stewart’s back pain again worsened and she requested a referral from her back surgeon to Dr. Jeffery Laseter. Id. While under Dr. Laseter’s care and treatment Stewart underwent physical therapy and successive work restrictions until Dr. Laseter finally opined, that Stewart; “Could not work at any activity full-time” and stated, “That she had reached maximum medical improvement for her condition.”; that he had attempted to find her a part-time position with the hospital, but that the Singing River Hospital System did not have any part-time positions; and that Stewart was permanently and totally disabled and “will not be able to work in any type of work capacity.” 928 So. 2d at 179.

The Employer/Carrier’s rehabilitation expert concluded (incorrectly as the Court of Appeals noted) that even though Dr. Laseter believed that Stewart was permanently and totally disabled, Dr. Laseter still said it was possible for Stewart to perform some sedentary work. Id.

At hearing the Administrative Law Judge found that Stewart had suffered an admittedly compensable injury resulting in permanent and total disability, finding “that Dr. Laseter’s medical opinion as the treating physician was “more compelling.” Id.

The Mississippi Workers’ Compensation Commission reversed the opinion of the Administrative Judge and as the Court of Appeals observed, “Apparently gave no consideration to Dr. Laseter’s opinion.” Id. Stewart appealed to the Circuit Court, which affirmed the Decision of the Commission and Stewart appealed to the Court of Appeals.

In reversing the Commission, the Court of Appeals also noted *inter alia* the Commission based its decision on the medical records and opinions of both Stewart’s back surgeon, as well

as Dr. Terry Smith, a Neurosurgeon, who provided an Employer Medical Examination. In disagreeing with and reversing the Commission on this issue the Court of Appeals stated:

“In *Johnson v. Ferguson*, 435 So. 2d 1191, 1193-95 (Miss. 1983), the Mississippi Supreme Court held that the decision of the Commission was against the overwhelming weight of the evidence when it disregarded the testimony of the Claimant’s treating physician and instead relied on the Employer’s expert. In addition to citing *Ferguson*, this Court in *Clements v. Welling Truck Service, Inc.*, 739 So. 2d 476, 478 n1, cited Larson’s Worker’s Compensation Law §80-24(b) n 83.1, for noting that *Ferguson* is one of many cases standing for two “self evident propositions” that treating physicians’ opinions carry more weight than those of physicians’ who examine a Claimant solely for purposes of testifying and opinions of treating specialist carry more weight those of general practitioners.” Accord, *South Central Bell Telephone Co. v. Aden*, 474 So. 2d 584-593 (Miss. 1985).

928 So. 2d at 183-184

The instant case is distinguishable from the recent Court of Appeals Decision in *Richardson v. Johnson Elec. Automotive, Inc.*, 962 So. 2d 146 (Miss. Ct. App. 2007) In *Richardson* it is clear the Commission closely read and considered the testimony and records of Dr. Joseph Hillman before concluding that same were unreliable.

However, in the instant case as in *Stewart*, the Administrative Judge considered Dr. Levitch’s records, but the Commission in reversing the Administrative Judge totally failed to consider Dr. Levitch’s records, opinion and testimony. In other words, Dr. Levitch was not found to be incredible, unqualified, unreliable or otherwise non-competent as an expert witness, nor were his records, opinions or testimony ever called into question on any ground, evidentiary or otherwise⁵.

In contrast, the Commission solely relied on Dr. Webb’s opinions. However, Dr. Webb’s testimony is in conflict with the established facts of the case, and therefore unreliable. For

⁵ The Commission Order does not even mention Dr. Levitch or Dr. Lyons.

instance, Dr. Webb blithely and without any grounds whatsoever opined that Connie “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.”

Such a statement is extraordinary in view of the following facts: despite the most dysfunctional of upbringings, Connie made a successful entry into the work world⁶; Connie displayed the ability to be an outstanding mother and wife; according to the individual with the most reliable information, being her supervisor, Warden Grant, Connie was an outstanding employee as evidenced by her work evaluations. In fact, the Appellee’s other expert, Dr. Judith Lyons, was “impressed with the way Connie functioned in life.”

In short, the Commission committed prejudicial error when it failed to consider the medical opinions and testimony of Dr. Levitch and even that of Dr. Lyons.

The decision of the Full Commission does not even acknowledge or identify Dr. Melvin Levitch, let alone discuss any of his opinions or testimony. They are simply ignored! Instead the Commission callously observes in footnote 2 on page four of its decision:

Dr. Mark Webb poignantly observed Ms. Radford “made mountains out of molehills, and she turned a situation into a very complex situation because of her maladaptive traits and the way she looks at the world.”

The Commission decision simply does not even address the role Dr. Levitch played as Connie’s treating psychiatrist, nor does it discuss his findings, recommendations or conclusions. Such an omission in and of itself warrants reversal.

⁶ Perhaps the most compelling argument is the fact that Connie never experienced the type of psychological duress or breakdown in any of her past employments. This fact alone should demonstrate the extraordinary nature of the abuse that was targeted toward her, and that her mental injury was precipitated by more than the ordinary incidents of her employment.

Had the Commission applied its “common knowledge, common experience, and common sense” as it is directed to do, a different result would have obtained in the instant case. Janssen Pharmaceutica, Inc. v. Stuart, 856 So. 2d 431, 436 (Miss. Ct. App. 2003).

The teaching and pronouncements of law contained in the Aden, Mueller, Stewart, and even the Richardson, decisions could not be any clearer: The Commission is simply not allowed to ignore the testimony and opinions of a Claimant’s treating physician in favor of a one time medical examination performed at the behest of the Employer/Carrier. Moreover, Dr. Levitch’s findings are not required to be precise, complete and unequivocal, and if any doubt exists regarding the sufficiency of this medical evidence, the benefit of the doubt goes to the Claimant consistent with the liberal interpretation of the Workers’ Compensation Act. Siemens Energy & Automation, Inc. v. Pickens, 732 So. 2d 276, 286 (Miss. Ct. App. 1999).

**C. UNDER MISSISSIPPI LAW, CONNIE RADFORD SUFFERED
A WORK-RELATED MENTAL INJURY FROM WHICH SHE
IS TOTALLY DISABLED**

Mississippi recognizes three distinct mental trauma/mental injuries:

1. Mental trauma leading to a physical injury;
2. Physical injury leading to mental injury;
3. Mental trauma leading to a mental injury.

Bradley & Thompson Mississippi Workers’ Compensation, §4:17 – 4:19

The instant case is what is referred to as a *mental-mental* injury. In order to prove the compensability of mental-mental injury the injured worker must show clear and convincing evidence that the contributing work force stress resulted “from more than the ordinary incidents of employment and there must be an untoward event (or) unusual occurrence that contributes to the mental or emotional injury.” Id.

Based on Mississippi Case Law, the Commission should have affirmed the Order of Administrative Judge and found this to be a *compensable* mental-mental claim. In Mid-Delta Home Health, Inc. v. Robertson, 749 So. 2d 379 (Miss. App. 1999), the Mississippi Court of Appeals held that factors such as an increased work load, derisive comments by supervisor, and increasingly demanding, thoughtless and insensitive supervisor was a compensable mental-mental injury.

In Kemper National Insurance Co. v. Coleman, 812 So. 2d 1119 (Miss. App. 2002), the Mississippi Court of Appeals held that an unreasonably increased work load in an attempt by a supervisor to terminate a Claimant's employment was an untoward event/unusual occurrence. In Borden, Inc. v. Eskridge, 604 So. 2d 1071 (Miss. 1991), the Mississippi Supreme Court held that a deliberate course of conduct by a supervisor to demote and belittle a Claimant was more than the ordinary incidence of employment and were untoward events and unusual occurrences. See also Dunn, Mississippi Workers' Compensation §114 (Supp. 1990)

The alternative argument the Employer/Carrier has raised in this matter is the fact that the Claimant had an alleged pre-existing mental condition. However, the law is also clear that as with the aggravation of a pre-existing physical injury, the aggravation of a pre-existing psychological condition is compensable.

In line with the normal compensation principal that aggravation of a pre-existing weakness or disease is a compensable injury, it is clear that the majority rule is not weakened by the fact that the Claimant may have had a pre-existing neurosis or latent nervous weakness on which the employment acted without physical trauma to produce the ultimate injury. This was the standard rule when a physical trauma precipitates a prior condition, and it should be no less so when the stimulus is non-physical. There appears to be no reported decision in which compensation was denied in this type of case solely because there was a pre-existing neurotic tendency.

Larson's Workers' Compensation Law, Vol. 3 §56-04 [3] 2002. *See also*, Miller Transporters, Limited v. Reeves, 195 So. 2d 95 (Miss. 1967).

To its partial credit, the Commission does acknowledge that Connie "unquestionably has psychiatric problems which demand medical attention ..." However, the Commission totally contradicts itself in the face of the overwhelming weight of the evidence that Connie not only had a sterling work record with her prior employers, but had a sterling work record with the employer herein until Banks began harassing her.

The Commission makes the astonishing statement:

Furthermore, Ms. Radford claims a series of confrontations and abusive encounters with Deputy Warden Banks led to her psychological undoing; yet, there is an abundance of credible evidence which shows Deputy Warden Banks did not treat Ms. Radford unfairly or abuse her in anyway. It has not been clearly and convincingly established that Deputy Warden Banks, or Chief Warden Grant for that matter subjected Ms. Radford to a series of untoward extraordinary employment related events, as Ms. Radford claims.

For the Commission to make such a statement in the face of the overwhelming lay, medical and corroborative evidence is the clearest evidence that the Commission acted arbitrarily and capriciously in this matter. The Commission acknowledges that Connie in fact has psychological problems that as the Commission states, "demand medical attention". However, the Commission does not address where those psychological problems arose, or what mechanisms, if any, triggered them to the point where she needed "medical attention".

The evidence is un rebutted that prior to the transfer of Ms. Banks and her harassment, demeaning and belittling of Connie, Connie had an exemplary work record with the Employer herein. Moreover, there is no evidence at all that Connie ever had any type of psychological, psychiatric, emotional or mental problems that in anyway interfered with the performance of her duties with any of her prior employers either.

The Commission had overwhelming evidence that was clear and convincing to find that Connie had suffered an on the job work-related mental trauma that resulted in a disabling mental injury and therefore was compensable.

CONCLUSION

Based upon the above and foregoing facts, argument and authority, the Mississippi Workers' Compensation Commission committed reversible error as a matter of law, and acted arbitrarily and capriciously in this matter.

Accordingly, the decision of the Commission should be reversed and the decision of the Administrative Judge reinstated.

RESPECTFULLY submitted, this the 22nd day of July, 2008.

**CONNIE RADFORD
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CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Appellant herein, do hereby certify that I have this day forwarded regular mail, a true and correct copy of the above and foregoing **Brief of the Appellant** to:

1. Honorable Ashley Hines
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2. Honorable F. Hall Bailey
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Respectfully submitted, this the 22nd day of July, 2008.


LAWRENCE J. HAKIM