

**IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2007-WC-02291-COA**

BERNITA J. WASHINGTON, APPELLANT/CROSS APPELLEE

VERSUS

**WOODLAND VILLAGE NURSING HOME d/b/a H. T. CAIN
And BRIDGFIELD CASUALTY INSURANCE COMPANY,
APPELLEES/CROSS APPELLANTS**

**APPEAL FROM THE CIRCUIT COURT OF
HANCOCK COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2007-0037**

**REPLY BRIEF OF APPELLANT/CROSS APPELLEE
BERNITA J. WASHINGTON
(Oral Argument Requested)**

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INSURANCE COMPANY**

APPELLEES/CROSS APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

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

Bernita J. Washington. (Claimant)

Appellant/Cross Appellee

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with the law firm of James K. Wetzel & Associates

Counsel for Appellant

Woodland Village Nursing Home d/b/a H. T. Cain (Employer)

and Bridgefield Casualty Insurance Company (Carrier)

Appellees/Cross Appellants

Karl R. Steinberger, with the law firm of

Williams, Heidelberg, Steinberger & McElhaney

Counsel for Appellees

Honorable Virginia W. Mounger

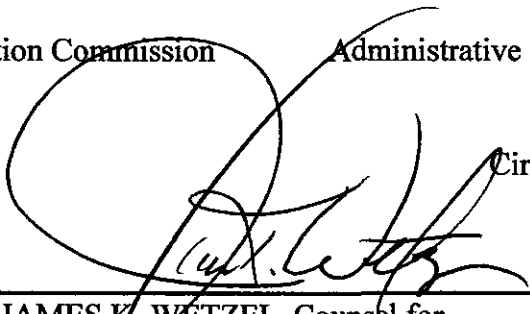
Mississippi Workers' Compensation Commission

Administrative Law Judge

Honorable Stephen B. Simpson

Hancock County Circuit Court

Circuit Judge



JAMES K. WETZEL, Counsel for
Bernita J. Washington, Appellant/Cross-
Appellee (Claimant)

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STATEMENT OF THE ISSUES ON CROSS-APPEAL

- I. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW AND FACT BY FINDING THAT CLAIMANT SUFFERED A WORK-RELATED INJURY ON DECEMBER 14, 2001**

- II. THE PUBLIC POLICY OF THE STATE OF MISSISSIPPI REQUIRES THE FORFEITURE OF CLAIMANT'S RIGHT TO BENEFITS UNDER THE WORKERS' COMEPNSATION ACT AS A CONSEQUENCE OF HER COMMISSION OF THE CRIME OF INSURANCE FRAUD UPON THE EMPLOYER AND CARRIER IN ORDER TO OBTAIN WORKERS' COMPENSATION BENEFITS**

ARGUMENT

The Employer, on its Cross-Appeal in this matter, advances two issues for consideration as set out above. The Claimant, in response to these two issues would remind this Honorable Court, that findings and orders of the Mississippi Workers' Compensation Commission are binding upon this Court and all appellate courts so long as the decisions are supported by substantial evidence. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). This is sometimes referred to as a "general deferential standard of review to the findings of the Commission." *See, Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243-45 (Miss. 1991).

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

An appellate court, such as this Court, must defer to an administrative agency's finding of fact if there is even a quantum of credible evidence which supports the agency's decision. *Hale v. Ruleville Health Care Center*, 687 So. 2d 1221, 1224 (Miss. 1997). This highly deferential standard of review essentially means that the Supreme Court and the Circuit Court will not overturn a Commission's decision unless said decision is arbitrary and capricious. *Id.*, at 1225. *Also see, Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

This Honorable Court has stated and held as follows:

We do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye towards determining how we would resolve the factual issues were we the trier of fact; rather, our function is to determine whether there is substantial credible evidence to support the factual determination made by the Commission. *South Central Bell Telephone Co. v. Aden*, 474 So. 2d 584, 589 (Miss. 1985).

Stated differently, this Supreme Court has stated it will reverse the Commission's order only if it finds that the order was clearly erroneous and contrary to the overwhelming weight of the evidence. *Myles v. Rockwell International*, 445 So. 2d 528, 536 (Miss. 1984). An appellate court, such as the circuit court, may not simply reweigh the evidence and substitute its decision for that of the Commission. Indeed the circuit court, as well as this Honorable Supreme Court, has a duty to defer to the Commission when its decisions can be supported. See, *Fought v. Stuart C. Irby, Co.*, 523 So 2d 314, 317 (Miss. 1988).

Whether the order of the Mississippi Workers' Compensation Commission is supported by substantial evidence, Claimant would admit that to be entitled to benefits under the Workers' Compensation Act, Claimant bears the burden of proving by a preponderance of the evidence each element of the Claimant's claim of disability. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 13 (Miss. 1994). Claimant, Bernita Washington, was required to prove that (1) an accidental injury occurred; (2) it arose out of the course of employment; and (3) a casual connection between the injury and the claimed disability. The Employer/Carrier in this Cross-Appeal argues that the substantial evidence does not support the Claimant's claim of a work-related injury when weighed against other "inconsistencies in the Claimant's testimony." The Employer/Carrier in this case is requesting this Honorable Court to reweigh the Commission's decision as the ultimate fact finder. As this Honorable Court is well aware, the Commission enjoys a

presumption that it made proper determinations as to the weight and credibility of the evidence and its factual findings are binding on this Court, as a reviewing court.

As this Honorable Court can readily ascertain, the question comes down to the "credibility of the Claimant." The administrative law judge and the Commission made proper findings of fact based upon the demeanor and credibility of the Claimant. The administrative law judge found that Claimant's testimony was credible; that she did sustain injuries while in the course and scope of her employment. There was absolutely no testimony that contradicted Ms. Washington was injured in any way other than on the job. There was no testimony from any independent witness that Ms. Washington could have injured herself in some other manner. The only other issue advanced by the Employer/Carrier in this matter is that "the insurance fraud which the Claimant committed, coupled with numerous other circumstances, cast serious doubts on the claim and the Workers' Compensation Commission should have rejected Claimant's testimony as untrustworthy."

The Employer/Carrier in this case is attempting to have this Honorable Court "reweigh the evidence". The Court is not to reweigh the evidence but only determine whether there is evidence to support the decision that was clearly set out by the administrative law judge and the Commission. Hence, the Employer/Carrier has not proven to this Honorable Court there was not substantial evidence to support the Commission's decision. As stated in Dunn, Section 272, Mississippi Workers' Compensation:

Evidence which is not contradicted by positive testimony or circumstances, which is inherently probable and credible or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected, even though the witnesses or party are interested; and unless uncontradicted evidence is shown to be untrustworthy, it is to be taken as conclusive and binding on the triers of fact. If unimpeached

testimony supported by all the circumstances in the case and if there are no substantial grounds within the record upon cogent and logical emphasis may be drawn to the contrary, the Commission may not base its decision upon speculation that the witness might have been mistaken or untruthful and something else might possibly occur." *See, Tanner v. American Hardware Corp.*, 119 So. 2d 380 (Miss. 1960); *Machine Products Co. v. Wilemon*, 107 So. 2d 114 (Miss. 1958).

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

The Cross-Appeal and Brief of the Employer/Carrier before this Honorable Court fails to make any allegation that the administrative law judge or the Workers' Compensation Commission made an erroneous finding of fact or claim that the testimony of the Claimant was not credible or deemed unworthy of belief. The Employer/Carrier attempts to extrapolate from the Claimant's conviction that this conviction in and of itself should be grounds to deny the Claimant's claim as compensable and does not in any way, shape or form set out anything factually in the record which was not supported by substantial evidence. Therefore, this case is a factual decision made by the Workers' Compensation Commission and that after a full review of the record, Claimant would submit to this Honorable Court that the Commission's decision is based upon substantial evidence that her injuries arose out of and in the course of her employment and that the Claimant did sustain her burden of proof on this issue.

The Employer/Carrier also advances that the “public policy” of the state of Mississippi requires forfeiture of the Claimant’s right to benefits under the Workers’ Compensation Act as a consequence of her insurance fraud upon the Employer. The Employer/Carrier allege the Workers’ Compensation Commission erred as a matter of law by finding the Claimant did not forfeit her right to workers’ compensation benefits, including medical and indemnity benefits, by having committed and being convicted of workers’ compensation insurance fraud. The Employer/Carrier in this Cross-Appeal have not cited one case from this Honorable Court that has ever held that any person who committed workers’ compensation fraud should forfeit their entire workers’ compensation claim, *i.e.*, medical and compensation benefits. The Employer/Carrier in this case has attempted to extrapolate one case, *McArn v. Allied Bruce-Terminex Co., Inc.*, 626 So. 2d 603, 607 (Miss. 1993), where this Honorable Court carved out a very narrow public policy exception to the long standing common law “Employment at Will” rule. The Mississippi Workers’ Compensation Act is a statutory act created by our Mississippi legislature and if the Mississippi legislature felt that an act of insurance fraud under our statute should require the injured worker to forfeit all of his/her rights and remedies under the Workers’ Compensation law, it is for the legislature and only the legislature to dictate such an outcome. The Mississippi legislature has had many occasions since 1948, when this Act was created, to provide a forfeiture provision if it so elected and to this date has not promulgated any amendment to the Workers’ Compensation Act which would provide such a forfeiture as requested by the Cross-Appellant herein. The Cross-Appellant argues strenuously that if the court fails to rule that the Claimant forfeited her rights to receive benefits by committing this level of out right fraud upon the Employer, the Court will essentially endorse bad acts. To the contrary, the Claimant in this matter, did commit one act of insurance fraud and she admitted

same. She has been convicted by the Circuit Court of Harrison County and has been sentenced. The Employer/Carrier will receive monetary restitution for those indemnity benefits that it paid during the period of time that Claimant willfully and fraudulently revised the medical reports of her treating neurosurgeon in order to receive temporary total disability benefits. The Claimant admitted under oath that she violated Mississippi law and has paid dearly as a result of same. This is not the proper case for this Honorable Court to use a "public policy" exception to the Mississippi Workers' Compensation Law. This Supreme Court is charged with the responsibility of interpreting the statutory law, not creating statutory law. Contrary to the request of the Cross-Appellant in this matter, this Court is not the forum in which to formulate public policy of the state of Mississippi with regard to workers' compensation fraud. The perfect place is in the Mississippi legislature which is responsible with (1) creating the Mississippi Workers' Compensation Law; and (2) providing provisions therein which address the issue of workers' compensation fraud. Therefore, this Honorable Court is urged to find that the Claimant has not forfeited her right to receive benefits in relation to this claim as the Cross-Appellant has failed to submit any jurisprudence from this Honorable Court or statutory law which would require this Court to follow the request of the Employer herein.

CONCLUSION

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

RESPECTFULLY SUBMITTED this the 21st day of May, 2008.

BERNITA WASHINGTON,
Appellant/Cross-Appellee


By:



JAMES K. WETZEL

I, James K. Wetzel, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to: Karl R. Steinberger, Esquire, with the law firm of Williams, Heidelberg, Steinberger & McElhaney, at their usual mailing address of P. O. Box 1407, Pascagoula, MS 39568-1407; to the Honorable Virginia Mounger, Administrative Law Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296-5300; and to the Honorable Stephen B. Simpson, Hancock County Circuit Court Judge, P. O. Drawer 1570, Gulfport, MS 39502.

THIS the 21st day of May, 2008.


A handwritten signature in black ink, appearing to read 'J. Wetzel', is written over a horizontal line.

JAMES K. WETZEL, ESQUIRE

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