

IN THE SUPREME COURT OF MISSISSIPPI

WADE SHORT

APPELLANT

V.

NO. 2008-CT-01224-SCT

**WILSON MEAT HOUSE, LLC
AND
BRIDGEFIELD CASUALTY INSURANCE COMPANY**

APPELLEES

SUPPLEMENTAL BRIEF OF APPELLANT

**APPEALED FROM THE CIRCUIT
COURT OF COPIAH COUNTY,
MISSISSIPPI**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Wade Short, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Wade Short, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Wilson Meat House, LLC, Appellee;
4. Bridgefield Casualty Insurance Company, Appellee; and
5. Peter L. Corson, Esq., Counsel for Appellees.

THIS the 22 day of March, 2010.



JOHN HUNTER STEVENS

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TABLE OF AUTHORITIES

CITATIONS

None.

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INTRODUCTION

COMES NOW the Appellant, by and through his attorney of record, and files this Brief in response to the Order of the Mississippi Supreme Court of March 1, 2010. Appellant would provide the following Brief in support of the Opinion of the Mississippi Court of Appeals and respectfully requests on Writ of Certiorari provide and reflect that the Court of Appeals rendered the correct and appropriate decision based on law and facts.

DISCUSSION

Whether the Mississippi Workers' Compensation Commission abused its discretion in denying Mr. Short's June 11, 2007 Motion to Supplement the Record.

As a preface for addressing whether or not the Mississippi Workers' Compensation Commission abused its discretion, there must be some discussion of the appropriate procedural provisions of the Act and procedural Rules of the Commission in order to adequately discuss why and how the Mississippi Workers' Compensation Commission abused its discretion. It is difficult to determine exactly what the intent and purpose behind the Commission's outright denial of the Motion to Supplement as the Commission's one page Order reflects no basis therein or factual determination whatsoever despite the fact that this case involved medical issues not even part of the

record before the Administrative Law Judge and reflects a condemnation of the applicable rules and reflects why the Commission mis-applied or failed to consider the clear intent and purposes of the procedural rules. Unfortunately, all we have from the Full Commission is the following language:

“Finally, before the Commission also is the Claimant’s Motion to Supplement the Record which we have considered and hereby deny.”

(R. 39)

The Commission as the finder of fact is required by the Rules to properly review the record and consider all facts. In this case, unfortunately, the Commission failed to adequately apply the applicable rules and statutory authority to the facts.

First, it is important to note that primarily the claimant was penalized for trying to properly apply the benevolent purpose and intent of the Act to reflect that the claimant could properly obtain benefits without starving himself and his family after having a severe, significant surgery. The claimant filed a Petition to Controvert on August 29, 2006, 20 days after his surgery. The claimant, a long term, loyal employee of the employer, after the injury which occurred in December, 2005, continued to work until he returned to the University of Mississippi Medical Center emergency room in July of 2006, wherein the doctors there assessed his condition so serious that he was immediately scheduled and had surgery on August 9, 2006. Subsequently, he retained the services of an attorney who promptly filed a Petition to Controvert. Utilizing the Rules of the Commission and before engaging in the discovery process, the claimant filed a Motion to Compel payment of benefits including payment of temporary total disability and medical on November 7, 2006. (R.7) After an initial conference before the Administrative Judge, the Administrative Judge made a determination to have a hearing solely to determine whether or not an injury occurred on-the-job. This issue dealt with not so much the medical issues concerning the extent of disability and causation as it did in

what actually occurred on-the-job in December, 2005 so that medical treatment could be authorized and paid for by the carrier. This is the issue and only fact all six witnesses testified about at this hearing. It was solely a compensability hearing. The claimant had just had surgery, was ongoing treatment and was not at maximum medical improvement. It was also obvious that this issue was recognized as a benefit issue by the employer and carrier. In fact, in addition to the claimant, five other witnesses were called, all of which were dealt with significantly with only the issues of whether or not an injury occurred on-the-job. All testified not about disability and/or medical issues, but instead factually what had happened involving the injury and involving whether or not the injury occurred during the process of moving a desk. As such, the complete hearing dealt solely with the witnesses' testimony and the evidence reflects this issue. The only medical evidence produced at the hearing involved evidence concerning not with the diagnosed condition (not disputed) but instead the history given by the claimant and medical evidence of what caused the claimant's pain. This started with the initial emergency room physician on December 12, 2005, whereby the claimant stated "this pain occurred when the symptoms occurred after lifting an object at work". (See emergency department records, p. 1 dated December 12, 2005 by attending physician, Robert Galli.) Subsequent medical evidence provided on December 12, 2005, indicated "MRI shows disc herniation centrally at C5,C6 & C6,C7 & facet hyper". (See p. 5 of UMC's records) In addition, the December 14 motion record reflects X / wk S/P lifting heavy desk, saw local M.D. (See p. 8 of UMC records) The same record reflects pain provoked by lifting. Subsequently, in the same emergency room document on December 12, 2005, the claimant was provided a return to work excuse dated 12-5-05 indicating "no lifting over 5 lbs. until cleared by neurosurgeon".

The employer acknowledged Wade Short brought this work certificate in shortly thereafter

and requested light duty work. The numerous witnesses testified that at no point was the claimant ever provided any light duty work and instead continued to work for approximately seven months until his condition and pain got so bad he was seen again by the emergency room physicians at UMC. This was approximately July 31, 2006. Again the claimant gave a history of onset of bilateral hand numbness on December, 05 heavy lifting. (See history of the physical examination for outpatient surgery). All of these records were part and portion of the record at the compensability hearing. What was not part of the record was a medical opinion of the physician stating that the herniated disc was consistent with the history of lifting. (R. 30)

In light of the fact that the claimant was a long-term employee and illiterate, the issue of whether or not he notified the employer and carrier and whether or not he had an injury on-the-job is feasible to assume that the issue for the Administrative Law Judge and subsequently the Commission involved what actually occurred with his lifting a desk. Obviously, the overwhelming facts as correctly found by the Court of Appeals is despite many witnesses' testimony, there is no factual evidence to dispute the claimant's position that he hurt his back and neck while lifting the desk.

Subsequent to the ruling of the Administrative Law Judge, it became apparent that the Administrative Law Judge, instead of only reviewing the facts and witnesses, had decided that the claimant should have had medical proof that the herniated disc was caused by the lifting incident. This was not only problematic at the time but because of the hearing which was had at the request of the Judge, (basically as an emergency hearing) the claimant was not availed the opportunity to provide this type of causation opinion which was not directly related to treatment from the physicians. As such, relying on Rule 8, which liberally is construed to allow not just the claimant

but all parties to supplement the record before a Full Commission Decision, claimant relied on these rules to request and was provided a report from the physician confirming that the herniated disc was, in fact, caused by claimant's lifting of the desk. In addition, it is important to note that the benevolent and liberal construction of the Act in favor of the claimant allows for relaxed rules of evidence and allows and promotes that the Full Commission review all evidence in order to make a determination as to compensability. Of course, construed liberally in favor of a claimant, especially one that is a 20-year employee and illiterate. Claimant's attorney was merely trying to utilize the intent and purpose of the Act to obtain a swift recovery so that the claimant would not starve to death after his surgery during a recuperation period, and his medical treatment would not be jeopardized due to lack of payment.. Obviously, the claimant had no money whatsoever and no financial funds coming in because of his inability to work since July.

Unfortunately, since the Commission did not detail the basis of its ruling, we know and must assume that they refused to even consider and obviously did not consider the findings of the medical evidence in the Motion to Supplement and instead utilized the ruling of the Administrative Law Judge in denying the claim, also without a complete record. Obviously, based on the Administrative Law Judge's findings, had he had this report, his ruling would have been different. To refuse to even consider this record and considering that this was not a full blown hearing after discovery, it was instead an evidentiary hearing solely to make a determination of whether or not an injury occurred on the job, it is not only prejudicial but inconsistent with the Rules for the Commission by its failure to even consider the evidence.

It is important to note that in the employer and carrier's objection to the motion to supplement the record they made no effort to depose the physician, made no effort to even question

the authenticity or validity of his opinion and basically had no evidence which would show prejudice the employer and carrier. In fact, had the employer and carrier adequately investigated the claim and even requested the records after seven months before the claimant admittedly produced a light duty work excuse, instead this employer put the claimant back to work in full duty on his job which compounded and worsened his condition necessitating the immediate surgery.

Simply put, the ruling in this case, as correctly found by the Court of Appeals, goes to the basic intent and purpose of the Workers' Compensation Act. Over 50 years ago, when the Workers' Compensation Act was enacted, in taking away the basic rights of an injured employee to sue at common law, the legislature recognized the need for an injured employee, especially one who is illiterate to allow the process to work smoothly and enable him to get quick, efficient benefits for a legitimate injury. The intent of the Act and the rules are meant to utilize every effort and procedure available to try to get benefits to a claimant quickly. That is simply what the claimant hired his attorney to do and was simply the process that he had hoped would occur in this case. The fact that the Workers' Compensation Commission would summarily affirm the findings of the Administrative Law Judge without even considering legitimate medical evidence unequivocally showing the claimant's injuries came about from his job is a disheartening failure of the system.

This Court has the authority and the ability to correct this wrong and to further recognize that a liberal construction is meant for this specific type of injured individual. This claimant is basically being penalized for trying to return to work, trying to avoid a surgical procedure, trying to get the job done, which is what he did for many, many years for this employer. Despite telling his medical providers how this injury occurred, he never even made an actual workers' compensation claim until after his surgery. He merely went to his employer and explained to him what had happened and

showed them a light duty work excuse which was ignored. This was correctly found by the Court of Appeals. There was no real evidence to refute the testimony of the employee. There was no real evidence to refute the numerous occasions where he told his medical providers how this pain started. There is no evidence in this record to refute that the claimant had a herniated disc. The employer and carrier did not even dispute this fact. The fact that the claimant requested an expedited hearing in an attempt to keep from starving to death should not be used against him by the Mississippi Workers' Compensation Commission.

CONCLUSION

There is no doubt the Workers' Compensation Commission abused its discretion in not considering the unrefutable medical evidence in the motion to supplement from a treating physician. This is a question of law which requires a *de novo* review as properly considered by the Court of Appeals. The Workers' Compensation Act designed and enacted over 50 years ago had a specific purpose to relieve society of the burdens of injured employees and their dependents who have suffered economic loss due to injury on the job. The undeniable basic purpose in taking away basic tort rights of employees injured on the job was to relieve society of the burden of supporting employees and their dependents who have suffered economic loss due to injury or death on the job. This was to pay benefits, regardless of fault. In taking away legitimate rights from an employee, the Act was to have liberal construction to carry out the beneficent purposes of the Act. This specifically, and most importantly, meant to provide relief in a swift, efficient manner so that a Claimant, such as the Claimant herein, can avoid total financial destitution. Mr. Short was denied the relief provided by these rules based on the abusive discretion of this Commission. The Court of Appeals correctly found that the Claimant should not be penalized for (according to the rules of the

Commission) seeking emergency relief from certain financial destitution.

The Workers' Compensation Commission is the true finder of fact, and for it to ignore medical evidence for these peculiar circumstances shows not only an abuse of discretion, but a complete disregard for the basic intent and construction of the Act by ignoring its own procedural rules that evidentiary issues should be relaxed, and all relevant evidence should be considered. It ignores procedural rules allowing for supplementation of due evidence so that the Commission can evaluate all facts to make a just decision. None of his medical expenses were being paid. The claimant filed a Petition to Controvert after his surgery and immediately pursued a motion to compel, despite still actively being treated by his physicians and not being released. The issues decided by the Administrative Law Judge dealt with factual issues of how this injury occurred, not medical causation. When it was determined that the Administrative Law Judge considered causation to be an issue, Claimant immediately provided accurate relevant evidence to substantiate causation. This evidence was ignored by the Commission. An abuse of discretion is an understatement. The Commission failed to consider its own rules.

The Appellant therefore respectfully implores this Court to fully and completely consider the ramifications of reversing the Court of Appeals Opinion. To do so would ignore the liberal construction of the Act, the benevolent purpose of the Act, and would perpetuate the Mississippi Workers' Compensation Commission to continue to ignore procedural rules that are meant to be relaxed and meant to be utilized to discovery and consider all facts as evidence.

The Court of Appeals correctly reviewed this issue as a question of law, and correctly found after a *de novo* review that the Commission failed to follow its own rules and, as such, the findings were correctly reversed.

Respectfully submitted, this the 22nd day of March, 2010.

WADE SHORT, CLAIMANT

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CERTIFICATE OF SERVICE

I, John Hunter Stevens, do hereby certify that I have this day mailed by United States Mail, postage prepaid, the above and foregoing document to:

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DATED, this the 22nd day of March, 2010.

John Hunter Stevens