IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE NO. 2008-WC-01091-COA

WILLIE L. BROWN — APPELLANT

VERSUS

ROBINSON PROPERTY GROUP, LIMITED PARTNERSHIP D/B/A HORSEHOE CASINO AND HOTEL — APPELLEE

AND

ZURICH AMERICAN INSURANCE COMPANY — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI AND THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION

BRIEF OF THE APPELLANT

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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. Willie L. Brown, Appellant;
2. Robinson Property Group, Limited Partnership D/B/A Horseshoe Casino and Hotel, Appellee;
3. Zurich American Insurance Company, Appellee;
4. Lawrence J. Hakim, Esq., Attorneys for Appellant;
5. George Dent, Esq., Attorney for Appellees.

This the 24th day of October, 2008.

LAWRENCE J. HAKIM
MS BAR NO. [redacted]

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STATEMENT OF THE ISSUES

WHETHER APPELLANT, WILLIE L. BROWN'S DOCUMENTED RIGHT ULNAR NEUROPATHY, CUBITAL TUNNEL SYNDROME AND BILATERAL CARPAL TUNNEL SYNDROME AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT AND ARE THEREFORE COMPENSABLE

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On or about April 21, 2003, Appellant, Willie L. Brown, (hereinafter "Brown"), filed a Petition to Controver/B5-11, alleging a June 1, 2001 work injury to his right elbow. Brown subsequently alleged a December 28, 2001, bi-lateral carpal tunnel syndrome. Both claims were denied in their entirety by the Appellees.

On or about March 3, 2005, Brown filed a Motion to Compel Medical Treatment or in the alternative, for a bifurcated hearing. On April 8, 2005, the Administrative Judge granted Brown's Motion for a Bifurcated Hearing. Consequently, a hearing was held in Batesville, Mississippi, May 5, 2005. At hearing the issues were confined to the following:

1. Whether Brown sustained a work-related injury in the form of a right upper extremity cubital tunnel syndrome and severe ulnar neuropathy arising from his work on or about June 1, 2001;

2. Whether Brown sustained a work-related bi-lateral carpal tunnel syndrome occurring on or about December 28, 2001, as a result of repetitive work he performed for the Appellee;

3. The amount of Brown's average weekly wage on the date of the alleged work injuries;

4. Assuming compensability, the reasonableness and necessity of the medical treatment Brown received for his alleged work injuries;

5. Whether or not Brown has reached maximum medical improvement, and if so, when;

6. Assuming compensability, the existence and extent of temporary disability attributable to the alleged work injuries.

At hearing the parties stipulated that Brown did not report a work-related injury until he began treatment with Memphis, Neurosurgeon, Gary Kellett, M.D., on February 21, 2002.

On or about June 21, 2005, the Order of the Administrative Judge was rendered, finding as follows:

1. Brown's average weekly wage was calculated at $396.62;

2. Brown met his burden of proof, proving that he sustained a June 1, 2001 injury to his right elbow causing a right cubital tunnel syndrome and sever ulnar neuropathy;

3. That Brown was entitled to temporary total disability benefits in the amount of $264.55 per week from December 28, 2001 until June 28, 2002;

4. That the treatment Brown received to-date for his right cubital tunnel syndrome and sever ulnar neuropathy were reasonable and necessary;

5. Brown failed to meet his burden of proof that he sustained a work-injury in the form of bi-lateral carpal tunnel syndrome occurring on or about December 28, 2001, as a result of repetitive work he performed for the Employer, allegedly because of insufficient evidence to establish a casual connection between Brown's bi-lateral carpal tunnel syndrome and his work activities.

On or about July 7, 2005, Brown filed his Petition for Review of Order of the Administrative Judge, limiting review to that aspect of Her Honor's Order, finding insufficient evidence to establish a causal connection between Brown's bi-lateral carpal tunnel syndrome and his work activities.

On or about July 12, 2005, Appellees filed their Cross-Petition for Review. On or about February 13, 2006. the Mississippi Workers' Compensation Commission heard Oral Argument and on February 22, 2006, issued its Order, reversing in part and affirming in part the Order of Administrative Judge to-wit: the Commission (erroneously) concluded Claimant had failed to meet his burden of proof of showing that he sustained a right upper extremity injury in the course and scope of his employment and that his testimony was (allegedly) untrustworthy.

On or about March 1, 2006, Brown filed his Notice of Appeal. On January 5, 2007, the Circuit Court of Tunica County, Mississippi issued its Order, affirming the Decision of the Full Commission, which Brown duly appealed.

B. BACKGROUND FACTS

Brown, at the time of his hearing was 48 years old. (R-9) Brown has a high school decree and limited advance education. (R.10) Brown began working with the Appellee, December 10, 2000, as a slot cashier. (R. 11-12) Brown described his work duties as follows:

> "I worked in a cage... and we had what we call a jet sorter. I stand before a window and a jet sorter, when guests bring in coins that they have collected out of the machines from half dollars to nickels and quarters, and the jet sorter sorts. When they bring me the cup I poured the coins off in the jet sorter and it separates it. whether it's nickels, quarters or half. When one bag gets full I pick up on bag - - do this for eight hours."
>
> (R. 12, 9-17)

Brown described how he used his hands:

> "I take one bag off. I close it, I pick it up. The bag of coins weigh about 50 to 80 pounds I would say, a guess at it. And I pick them up and I stack it over here in a pile. I put another one back..."
>
> (R. 12, 19-22)
>
> "Well, you pick up the bag with your hands. You have to pick them up with two hands because of the weight."
>
> (R. 13, 3-4)
>
> "I don't remember if it was a zipper, but it's a little closure that you have to close together."
>
> (R.13, 11-12)
>
> "That's what I'm doing, closing the bag up because I'm right-handed. Everything I do is with my right hand."

(R.13, 15-16)

"It just all depends on how busy we were. Say if it's on a Friday night, Friday and Saturday nights, I probably have to do that anywhere from 25 to 50 times."

(R. 13, 20-22)

"Per hour, I'm just guessing. I would say –"

(R. 14, 6)

"My recollection, I would say - - you got to remember, it's been three years ago. I would say we do - - yes, at least. At least 25 bags."

"I'm standing at a desk, like a table. So I have to reach down and pick up the bag from the jet sorter, set it up on the table, then close it up."

(R. 15, 12-15)

Q. Now tell us more about the bags. The jet sort would fill the bags with coins; is that correct?

A. That's correct.

Q. And then you would pick the bag up from the jet sort and put it on the table in front of you? Do I understand that?

A. That is correct.

Q. You would close the jet sort with your right hand? Is that what you've said?

A. I would close the back.

Q. What would you do next?

(R.17, 18-29)

A. I put another bag on there and get ready to assist my guests. Then I would stack all of these bags up. I'd have to pick these bags up and stack them up –

(R. 18, 1-3)

"Okay. I was picking the bags off the table after getting them off of the jet sort. And usually what I'd do, though, as I recall, I would stack them to the left side."

"So I can have room to work on my jet sort. I stack them on the floor."

(R. 18)

Q. Okay. What would you do with these bags?

A. Well. after I get so many bags then we have to do what we call buy out.

(R. 21-23)

"What I have to do is reach and get them for them, throw them to them. I throw the bags to this person, and what she or he does, they would count them up how many bags I had and pay me for that. I would put that money back in my drawer."

(R18, 19)

"Well, I was trained on the floor, and what training on the floor means, I go to the booth. I work with someone and I go to the booth, get a couple of bags of coins and take them to the machine on my shoulder and fill the machine up with coins. Whether it was a half dollar machine or a quarter machine or a nickel machine, I would get those bags from the booth, say A Booth, C Booth, D Booth, and take them to the floor and fill the machine up."

(R. 19, 7-14)

"I'm going to the booth, I'm going to the window, and I get, say, fifty cent bags - - usually we get two bags because usually the dollar machines has to have two bags of coin. And I have a coworker work with me. In most cases they would get one bag and you would get the other bag, but if we're real busy one person has to carry two bags. We carry these bags to the machine, set them on this little stool that the guests sit on when they want to play the machine and we open up the bags and take the nags and pour them over into the machine."

(R. 19, 20)

"You just pour them out. You just take a knife and cut the bag and pour them out."

(R.20, at 13)

Q. What were these bags made out of, if you recall?

A. Some strong stuff. You couldn't cut them with your hand. You couldn't tear them with your hand.

Q. You'd have to use a knife?

A. Have to use a knife or either an ink pen to open it and then you pull it open with your hand.

Q. Which hand would you use?

A. I'm always going to use my right hand because I'm right handed.

It could be - - depending on how busy we are, it could be anywhere from ten to twenty times per hour or - - yeah, depending on how busy we were.

(R. 20, 21)

Q. Can you describe for Judge Harthcock, for her Honor, was this slow paced work or otherwise?

A. Fast pace work.

(R. 21, at 12,14)

"... if I was working on A Floor, then I would fill the machines on A Floor only. If I was working on B Floor, then I would fill the machine son B Floor only."

(R. 22)

"Well, it's just a fast pace work. Like I say, if you're busy, you have to make coins real fast. You have to - - make change real fast. Change the jet sorter out real fast so you can assist your customers."

"Pick up the bag ... and close it up and put it on this table, close it up, put it down here. Take another bag, put it on there, do the same thing."

(R. 23)

"A guest would bring either a bucket or a cup to my window, and I would pick that cup up and pour the coins over in the jet sort with my hand, my wrist."

"And a customer may have played a half dollar machine or they may have played a quarter machine. And they'll bring it to you in one cup. Sometimes they have it separated in different cups or they'll bring it to you in one cup and you'll pour it over in the jet sort. The jet sort does the sorting for you. That's why it's called that, a jet sorter."

(R. 25)

Brown described the mechanism of injury as follows:

> "She [one of Brown's co-workers] was opening the [slot] machine and at that particular time one of the guests - - because the machines are back to back. It's got a little aisle you walk down. One of the guest of was asking me for assistance.... so I turned around to give that particular guest change. While I was doing that my co-worker obviously didn't realize that I had turned my back to assist a customer so they opened the machine. When the machine door came opened, which I would say it is a steel door, steel or iron, it swung open, because if you don't catch it or you don't hold it to open, it'll just swing open and hit a guest or whoever. It hit me on my elbow."

(R. 26) Brown testified that the metal door hit him on his funny bone. (R. 29)

Brown initially experienced sharp pain for approximately 10 to 15 minutes, which gradually decreased. (R. 29) However, three to four weeks later he began to experience a tingling in his hand, arm and fingers, along with an aching pain. (R. 30) Because the pain was intermittent, Brown did not report them until September in which he told Regina Barnes in Human Resources that he was experiencing problems with his hand and arm and that same was interfering with his work duties. (R. 30-31)

Brown testified that neither Regina Barnes, nor the Appellee took his complaint seriously. (R. 31) Because the symptoms continued and Brown started to have headaches, he contacted his immediate supervisor, Patrish Rush and told her he was going to see his doctor. (R. 31) Claimant saw Dr. William Drewry with Family Physicians Group. (R. 31; Exhibit 2)

Brown first saw Dr. Drewry, December 28, 2001, reporting that he was "under a lot of stress at work" and also presented with complaints of intermittent numbness in the right hand and some weakness and muscle wasting in the right hand and further complaints of the right arm getting tried. Dr. Drewry ordered an EME Nerve Conduction Study, which was performed February 11, 2002. and showed severe ulnar neuropathy on the right side, most likely cubital

tunnel syndrome, mild cubital tunnel syndrome on the left ulnar nerve; mild to moderate carpal tunnel syndrome on the right side; mild carpal tunnel syndrome on the left side. Consequently, Dr. Drewry referred Brown to Board Certified Memphis Neurosurgeon, Gary Kellett, M.D. (Exhibit 1).[1]

Dr. Kellet first saw Brown, February 21, 2002, and on the Patient Intake form the following was noted:

> Complaint: [right] arm pain.
> Injury: Bumped elbow at work?
> Duration: 8-9 months

The history Dr. Kellett took down was as follows:

> The patient is a 45 year old black male who has noted increasing shrinkage in his right arm. He has been noticing it over the last eight month period. He states that he injured his elbow one time, he thinks about the time that this began. It was associated with an injury where he struck his arm on a door. Since that time he has noted atrophy, numbness and parathesis in the ulnar distribution on the right side. He has actually not work now for the last couple months because of the pain, numbness and weakness in his arm.

Dr. Kellett's plan was to surgically decompress the ulnar nerve, which was performed, February 27, 2002. Post-op Dr. Kellett still noted marked atrophy in Brown's right hand and wrote: "Basically, I am seeing no change since he has had his decompression." On April 25, 2003, Dr. Kellett noted that Brown was not experiencing any significant improvement in his right extremity. Dr. Kellet's April 25, 2002, note states the following: "He [Brown] describes to me that the injury did occur on the job and I have not [sic] way to dispute that." Dr. Kellett ordered a follow-up EMG nerve conduction study, which was performed, June 19, 2002, and showed a severe right ulnar nerve injury and a moderate right carpal tunnel syndrome. Brown saw Dr. Kellett one final time on June 27, 2002:

[1] Dr. Kellett died in a plane crash, April 27, 2003.

Willie Brown returns today for a discussion of his condition. He stills has the numbness and weakness in his right, as well as atrophy. The EMG report did suggest that he had fairly severe ulnar neuropathy on that side, which I suspect is due to residual damage to the nerve. I have told him at this point that I feel the nerve may improve with time, but it is unlikely that he will get full in view of the marked nerve damage he is demonstrating. I have advised him that nothing more needs to be done from a neurosurgical standpoint, but with time he may show some benefit. He has asked me to place in the record the cause. I will state that since he had the onset at the time of the injury to his elbow on the door that this was the cause on his injury. In addition, he has asked that I state permanent restrictions. I will state that he should have a permanent thirty pounds weight lifting restriction with the right arm. I do feel however, that he can return to his regular duties with the restriction tomorrow. He will be considered at maximum medical improvement as of 28th June, 2002. He feels that the physical therapy did give some benefit. His PPI rating for the body as a whole will be considered ten percent (10%).[2]

SUMMARY OF THE ARGUMENT

The Mississippi Supreme Court and Court of Appeals have consistently declared that the Mississippi Worker's Compensation Act is to be construed liberally in favor of claimants in order to fulfill the beneficent purposes of the Mississippi Workers' Compensation Act and therefore doubtful cases should be resolved in favor of compensation and the injured worker should prevail when the evidence is even.

Under the applicable standard of review, this Court is duty bound to reverse if the Commission's decision is not based on substantial evidence, is arbitrary and capricious, is based on an erroneous application of law or interpretation of the law was beyond the power of the Commission to make or violates the statutory or constitutional right of the appellant.

[2] As the note further explains the rating was to the body as a whole. Dr. Kellett did not provide a separate impairment rating to the right upper extremity, although Brown would in fact warrant an impairment rating to his right upper extremity under the AMA Guidelines to the evaluation of permanent impairment 6th Addition due to the severe ulnar neuropathy, confirmed via the post-op EMG/Nerve Conduction Study.

Furthermore, if the Workers' Compensation Commission commits prejudicial error or misapprehends a controlling legal precedent, the appellate courts are not required to defer to the Commission, even on issues affect and witness credibility.

Finally, appellate review of the facts include a determination of whether the Commission was manifestly in error in its interpretation of the facts and the appellate court *must* reverse, if the Court on the basis of the entire evidence is left with a definite and firm conviction that the Commission made a mistake in its findings of the fact and application of the law to the facts.

Under the totality of the facts and medical evidence, Brown proved with a preponderance of the evidence that he suffered compensable injuries to his bilateral upper extremities and furthermore reported on the job, problems he was experiencing with his upper extremities to his employer. No witnesses came forward to refute the fact that, (a) Brown suffered significant upper extremity injuries while on the job, (b) he reported those problems to his employer, and (c) his treating neurosurgeon causally connected the right ulnar neuropathy/cubital syndrome to an acute trauma Brown sustained on the job on or about June 1, 2001.

Finally, Brown testified without rebuttal, that the work he performed was highly repetitive in nature and involved the highly repetitive use of his bilateral upper extremities.

In denying Brown's claims, the Commission abandoned "common knowledge, common experience, and common sense" and rendered a decision that, on its face, is arbitrary and capricious and <u>not</u> based on substantial evidence since there was <u>no</u> rebuttal lay or medical evidence to refute the subject claims.

ARGUMENT

I. STANDARD OF REVIEW

The Workers' Compensation Act is to be construed liberally in favor of claimants, likewise for paying benefits for a compensable injury, and in order to fulfill the purposes of the Workers' Compensation Act, doubtful cases should be resolved in favor of compensation. Union Camp Corp. v. Hall, 955 So. 2d 363 (Miss. Ct. App. 2006) *citing* Sharpe v. Choctaw Electronics Enterprises, 760 So. 2d 1002 (Miss. 2000).

Based on the broad policy considerations under girding the Workers' Compensation Act and the liberal construction to be given the compensation statutes, the injured worker should prevail when the evidence is even. Id. at 371

An appellate court must reverse a decision of the Commission if, a.) said decision is not based on substantial evidence, b.) is arbitrary or capricious, c.) is based on an erroneous application of the law, d.) was beyond the power of the Commission to make, or e.) if it violates a statutory or constitutional right of the Appellant. Smith v. Jackson Construction Co., 607 So. 2d 119, 1124 (Miss. 1992); Piney Woods Country Life School v. Young, 946 So. 2d 805 (Miss. Ct. App. 2006)

A decision is said to be based on substantial evidence if it is not clearly erroneous and contrary to the overwhelming weight of the evidence. Piney Woods Country Life School 946 So. 2d at 807.

Even though the Commission is the ultimate fact finder, the appellate court will reverse when the findings of the Commission are based on a mere scintilla of evidence that goes against the overwhelming weight of evidence. DiGrazia v. Parkplace Entertainment, 914 So. 2d 1232 (Miss. Ct. App. 2005).

The substantial evidence rule is sufficiently flexible to permit an appellate court to examine the record as a whole and where such record reveals that the Order of the Commission is based on a mere scintilla of evidence and is against the overwhelming weight of the evidence, the court will not hesitate to reverse. Smith v. Commercial Trucking Co., Inc., 742 So. 2d 1082, 1085 (Miss. 1999).

An appellate court has the power to broaden the Commission's authority to meet the beneficent purpose of the Workers' Compensation Act. Smith v. Commercial Trucking Co., 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 witness credibility. Barber Seafood, Inc. v. Smith, 911 So. 2d 454 (Miss. 2005).

If the Commission misapprehends a controlling legal precedent, no deference is due. ABC Mfg. v. Doyle, 749 So. 2d 43, 45 (Miss. 1999).

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).

The legal effect of evidence and conclusions drawn from the evidence present questions of law, "especially when the facts are undisputed or the overwhelming weight of the evidence reflects them." University of Mississippi v. Smith, 909 So. 2d 1209, 1218 (Miss. Ct. App. 2005).

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

II. APPELLANT, WILLIE L. BROWN'S DOCUMENTED RIGHT ULNAR NEUROPATHY CUBITAL TUNNEL SYNDROME AND BI-LATERAL CARPAL TUNNEL SYNDROME AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, AND ARE THEREFORE COMPENSABLE

The starting point for analysis of where, how and why the Mississippi Workers' Compensation Commission committed reversible error begins with Miss. Code Ann. § 71-3-7:

> **Liability for Payment of Compensation:** Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease. An occupational disease shall be deemed to arise out of and in the course of employment when there is evidence that there is a direct causal connection between the work performed and the occupational disease.

In order to establish entitlement to benefits under Mississippi Workers' Compensation statute, Brown bears the burden of proving by preponderance of the evidence the following elements of his claim:

1. An accidental injury occurred;
2. Arising out of and in the course of employment, and;
3. A causal connection between the injury and claim disability.

Hedge v. Leggett & Platt, Inc., 641 So. 9, 13 (Miss. 1994).

> The Claimant is competent to prove his own claim, and his testimony may be accepted without corroboration. It may be acted upon, although disputed by other witnesses, and if not untrustworthy, must be taken as conclusive proof of the fact.... When the employee-claimant testifies that he sustained an accidental injury and his testimony is uncorroborated by other witnesses, but is also uncontradicted, the mere fact that he has an interest in the outcome of the claim is not alone, and without more a sufficient basis for rejecting his testimony. *This is especially so when the Commission fails to assign specific reasons in its findings for disbelieving the Claimant as a witness in his own behalf*, unless, of course, the uncontradicted testimony is patently incredible on the record as a whole.

Dunn, Mississippi Workmen's Compensation Third Addition §264 (citations omitted) (emphasis added)

Furthermore, even though the testimony may be some what ambiguous as to casual connection, all that is necessary is that the medical supports a casual connection. Moore v. Ind. Light and Accid. Inc., Co., 788 So. 2d 106, 112 (Miss. 2001)

Once a compensable injury is proven under Workers' Compensation Law, the employer can "rebut only with evidence that rises above mere speculation or possibility."

Spencer v. Tyson Foods, 869 So. 2d 1069, 1075 (Miss. Ct. App. 2004)

The Mississippi Workers' Compensation Commission, in order to give a liberal construction to the medical evidence and to resolve doubtful cases in favor of compensation and rather than arbitrarily and capriciously resolve these issues against the Claimant, is instead called

upon to apply "common knowledge, common experience, and common sense" when weighing the evidence. Janssen Pharmaceutical Inc. v. Stewart, 856 So. 2d 431 (Miss. Ct. App. 2003).

In the instant case the Administrative Judge got it *half* right: while she failed to find a casual connection between Brown's bi-lateral carpal tunnel syndrome, despite the fact that "common knowledge, common experience, and common sense" would establish a connection between the extremely repetitive nature of Brown's work and his resulting carpal tunnel syndrome, she at least got it right as to the ulnar neuropathy/cubital tunnel syndrome.

Unfortunately the Commission, jettisoning decades of case law which required it to examine the instant claim fairly, went 0 for 2 on the issues. First of all, the Commission claims at paragraph two of its "findings of fact" that Brown did not report this injury to the employer as required by Miss. Code Ann. §71-3-35 (1972) (as amended). Not only is this "finding" contradicted by another finding made by the Commission (and discussed below), but it also constitutes an absolute *error of law* made by the Commission. The law in the state of Mississippi is that failure to provide notice of an injury does not preclude compensation. The statute cited by the Commission itself states, "Absence of Notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice."

As the leading treatise explains:

> This provision for notice to the employer within thirty days of injury starts with language and the time limitation is a bar to a claim. As the statute goes on, it is clear that instead of requiring the giving of notice, it speaks to the employer having knowledge of the occurrence. Even then, absence of knowledge is of no consequence unless the Employer shows actual prejudice due to the "employee's failure to give notice."
>
> "The cases have interpreted the statute as *not* imposing a requirement for the formal giving of notice; recognizing that knowledge can be charged to the Employer if a work place superior has actual knowledge; recognizing that the

> Employer has a burden of showing lack of knowledge was a substantial hindrance to its ability to investigate pertinent matters such as work connection and extent of liability."

Bradley & Thompson, Mississippi Workers' Compensation §7:1 (citations omitted) (emphasis added).

The record demonstrates the Appellees failed to show any prejudice.

Further, Brown, who it should be noted is not a medical professional, indisputably provided notice to his employers of, if not an actual injury, on the job problems he was having with his right upper extremity. Therefore this "Finding of Fact" by the Commission is suspect at best.

The Commission also alleges under its "findings of fact" that,

> "Claimant did not relate a right elbow injury to medical professionals until after he had allegedly sustained repetitive motion injuries to both upper extremities and sought medical treatment for the repetitive motion injuries."

This frankly is nonsensical and is a perfect example of the Commission's failure to exercise "common knowledge, common experience and common sense."

First of all, and as noted above, Brown is not a medical professional, nor is there any evidence that he retained the requisite degree of medical sophistication to be able to make the connection between a bang on the elbow and the later development of a full blown ulnar neuropathy requiring invasive surgery. In fact, it was a board certified neurosurgeon, Gary Kellett, M.D., who made the connection. Dr. Kellett was obviously satisfied that the bang on the elbow, as reported by the Claimant, was sufficient to have given rise to the ulnar neuropathy. (The medical literature also documents connections between the type of intensely repetitive upper extremity use Brown engaged in and ulnar neuropathies as well.)

It is more than entirely plausible, it is a matter of plain common sense to realize that Brown was not aware of a connection between the acute traumatic injury to his elbow and the resulting nerve damage until same was pointed out to him by Dr. Kellett.

Under its "Findings of Fact" the Commission also alleges:

> Of particular significance to the Commission is the fact that in September, 2001, some three months after the alleged right elbow injury, the Claimant sought assistance from the Casino's Human Resources Department, reporting to one of the Human Resource Officers, Regina Barnes, that *injuries to his right arm and hand* were interfering with the duties of his employment, but failed to relate these injuries as "work" injuries. This peculiar reporting was repeated in December, 2001, when the Claimant spoke directly with his supervisor, Patrice Rush, reporting right arm pain, headaches, and advising Ms. Rush that he was seeking medical treatment for same, but not reporting the right arm pain as a "work" injury.

(emphasis added) Again, the above "finding of fact" is inherently contradictory; On the one hand the Commission admits that, a.) Brown received injuries to his right arm and hand; b.) those injuries were interfering with his duties of employment, and c.) Brown reported the injuries to his supervisors. However, because Brown failed to utter the magical word "work-related" the Commission therefore arbitrarily concludes that Brown's injuries were not work related.

However, the Mississippi Supreme Court and Court of Appeals have held that the failure to utter the magical words is not fatal to a Claimant's worker's compensation claim. "We should not be concerned with the recitation of certain "magic words", but focused upon "the real substance of what the witness intended to convey, ..." Metalloy Corp. v. Gathings., 2006-WC-01627-COA (09/04/07) at ¶12. Thus, the only thing "peculiar" is the Commission's flawed reasoning.

Similarly, the Commission's Findings of Fact also contains the following:

> All medical testimony of causation depends entirely upon the history related by the Claimant to the medical professionals. There were simply no history to June

> 1, 2001, work injury when it related to anyone prior to February 21, 2002, when it was related to Dr. Gary Kellett.

Again, the Commission contorts itself with regard the first sentence. To say that most opinions on causation are based to some extent on the history provided to them by the patient is to overstate the obvious. The undersigned is not aware of any reported decision where an injured worker enjoyed the luxury of having the treating physician be an eye-witness to the work-injury. With regard to the second sentence in "findings of fact" number 5, there is less than a two month gap in treatment between Brown's first visit with Dr. William Drewry on December 28, 2001, and when he, under questioning from Dr. Kellett on February 21, 2002, discussed his on the job injury. In other words, because Brown did not relate the injury to his elbow to the symptoms in his right upper extremity to his first doctor, (a general practitioner), but did to the very next doctor, (a neurosurgeon), he saw *less* than two months later, the Commission, for some reason, (perhaps an arbitrary and capricious reason?) twists this out context.

Finally, the Commission rather vaguely concludes:

> "In examining the testimony of the Claimant as a whole, we find it untrustworthy. Moreover, the *tenor* of the Claimant's entire testimony is simply not trustworthy. A reading of his testimony at the hearing leaves the Commission with the *impression* that the Claimant is evasive in manner and leaves us to conclude that this Claimant conveniently recalled an injury when it serves its needs."

(emphasis added) It is interesting to note that the Commission fails to concretely cite specific instances in the record of where Brown was "evasive", but instead speaks vaguely of the "tenor" and an "impression." As the Administration Agency, tasked with the role of fact finder, the Commission is required to do more to determine the facts underlying a claim than speak vaguely of "tenor" and impressions. "In general, findings of fact must rest on probabilities rather than possibilities. and not conjecture or speculation..." Bradley and Thompson, Mississippi Workers' Compensation §6:33. The Commission's Order is surprising since taken as a whole the

Claimant's testimony is in fact trustworthy and the mechanism of his work-injuries is utterly consistent with the medical opinions and medical records, as well as "common knowledge, common experience and common sense."

In short, it would appear that the Commission went out of its way to deny these claims. Its decision is not based on substantial evidence, but in fact is arbitrary and capriciousness.

CONCLUSION

Appellant, Willie L. Brown proved with a fair preponderance of the evidence that he suffered work-related injuries to his bi-lateral upper extremities. His testimony was not untrustworthy or incredible on its face. The Mississippi Workers' Compensation Commission failed to give any benefit of the doubt to Brown, or give a liberal interpretation to the Mississippi Workers' Compensation Act in order to carry out the beneficent purpose of the Act. Instead, the Commission arbitrarily and capriciously, and without substantial evidence, booted Brown's claim and his badly disabled arm out the door. Accordingly, a full reversal of the Commission's decision is warranted.

RESPECTFULLY SUBMITTED, this the 24th day of October, 2008.

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CERTIFICATE OF SERVICE

I, **LAWRENCE J. HAKIM**, Attorney for the Appellant herein, do hereby certify that I have this day mailed, proper postage prepaid, a true and correct copy of the above and foregoing Motion to for Enlargement of Time to:

1. Honorable Albert B. Smith, III
   Tunica County Circuit Court Judge
   P. O. Drawer 478
   Cleveland, MS 38732

2. Honorable George Dent
   Greer, Pipkin & Russell
   Post Office Box 907
   Tupelo, MS 38802-0907
   Attorney for the Appellees

This the 24th day of October, 2008.

_____
LAWRENCE J. HAKIM