IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

APPEAL NO. 2008-WC-01097

EARL DEAN TAYLOR **CLAIMANT/APPELLANT**

VS.

FIRST CHEMICAL and NATIONAL UNION FIRE INSURANCE COMPANY **EMPLOYER-CARRIER/APPELLEES**

On Appeal from the Circuit Court of Jackson County, Mississippi;
The Honorable Dale Harkey, Circuit Judge, in *Earl Dean Taylor, Claimant vs. First Chemical and National Union Fire Insurance Company, Employer/Carrier*
Docket No.: 2007-00078 and MWCC Case No.: 0504516-J-2419-D

REPLY BRIEF OF APPELLANT, EARL DEAN TAYLOR

ORAL ARGUMENT REQUESTED

CATHERINE H. JACOBS
Attorney at Law
425 Porter Avenue
Ocean Springs, MS 39564
(228) 872-7004
FAX: (228) 872-7006
MS BAR NO.: [redacted]

ATTORNEY FOR CLAIMANT/APPELLANT, EARL DEAN TAYLOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute and Rules

I.

INTRODUCTION

As the Court is aware, the Claimant, Earl Dean Taylor, is appealing the decision by the Administrative Law Judge, Cindy Wilson, that he "failed to prove by a preponderance of the evidence that he suffered a work related injury on December 19, 2004." (R.E. 14, Tr. 33)[1] In so ruling, the only reason offered in support of her finding, is as follows:

> "The bottom line is that the testimony provided by the Claimant was simply not convincing, while that provided on behalf of the employer by Mr. Wilkins, was persuasive." Id.

In terms of the Claimant's injury, and how it occurred, there are no material inconsistencies between the testimony of Wilkins and the testimony of the Claimant.

Judge Wilson also relied upon the testimony of the medical witnesses, Dr. McCloskey and Dr. Wolfson, to support her finding that the Claimant's herniated cervical disk was not work related. From Dr. McCloskey's testimony on cross examination, she concludes that the injury could have been pre-existing because the Claimant had complained of left shoulder pain prior to December 19 injury. She then relies upon the testimony of Dr. Wolfson, the employer's medical examiner, to conclude that the disk herniation must have occurred after the work related incident because "according to Dr. Wolfson, it is extremely unlikely that an individual with an acute disk herniation that large would continue to work through a day, present to a meeting, and not complain of any neck

---

[1] As in our principal Brief, references to the record of the Workers' Compensation Commission are designated as (C.R. __) and references to the records from the Circuit Court are the usual (R.__). References to the transcript of the ALJ hearing are (ALJ Tr.__), and the Circuit Court transcript is the usual (Tr.__). References to the exhibits introduced at the ALJ hearing are referenced by (W.C. Exh. __). Claimant's deposition cites are designated (Depo. __).

pain. . . ." (R.E. 13, Tr. 11). It is the Claimant's position that the findings and reasons set forth in Judge Wilson's opinion are not consistent; the injury could not have occurred before and after the incident with the Scott air pack and there is nothing in the record to contradict the Claimant's account of the accident. To the contrary, the employer admitted that the accident arose out of the Claimant's employment in its answer. (C.R. 3)

II.

THE FACTS

A. THE MEDICAL EVIDENCE SUBSTANTIATES THE PLAINTIFF'S INJURY

In her opinion, Judge Wilson ruled that she did not believe the Claimant's cervical herniation was caused by the work related incident on December 19, 2004, when Mr. Taylor was removing a 40 to 50 lb. air pack from his back to place into a locker. Her ruling is contrary to the testimony of the Claimant's treating physician, Dr. McCloskey, who testified that it was his opinion, based upon a reasonable medical probability, that the incident of December 19, 2004, where the Claimant injured himself while removing a Scott air pack from his back, caused the injury to his neck, *i.e.*, a large herniation at C5-6. Dr. McCloskey never wavered from this opinion. (W.C. Exh. 2, p. 13) Judge Wilson rejected Dr. McCloskey's opinions as to causation because she found that he "had not reviewed Dr. Fineburg's medical records." (R.E. 14; C.R. 33) However, that was not Dr. McCloskey's testimony. Early in the deposition, he was asked:

> "Q. Do your records reveal that he had previously been seen by any other physicians?
> A. Dr. Fineburg and Dr. Wiggins." (W.C. Exh. 2, p. 7)

Later, on cross examination, the following dialogue took place between defense counsel and Dr. McCloskey:

> "Q. You know that Mr. Taylor was seeing Dr. Fineburg?
> A. Fineburg in Wiggins.
> Q. Are you aware that Dr. Fineburg ordered an MRI because of the shoulder pain?
> A. Of his shoulder?
> Q. Well, it would never happen.
> A. No.
> Q. Were you aware that he had asked Mr. Taylor to undergo an MRI?
> A. Well, I don't have that right in the front of my mind.
> Q. If you don't know, you can say you are not aware of that.
> A. I might have known, but I'm not - - I'm looking through here to see if I had any records from him. ..." (W.C. Exh. 2, p. 16, 17)

The dialogue quoted above constitutes the only discussion about Dr. Fineburg's records. It should be noted, however, that the questions posed to Dr. McCloskey were confusing, at best, because Dr. Fineburg never ordered an MRI of the Claimant's shoulder. To the contrary, this was done by Dr. Westbrook. (R.E. 44-46; W.C. Exh. 5) There is no question that the Claimant discussed with Dr. McCloskey his prior shoulder problems for which he was treated by Dr. Westbrook, as they are reported in Dr. McCloskey's notes as a prior rotator cuff injury. (R.E. 65; Exh. 3) Moreover, as previously indicated, Dr. McCloskey did have the records of Dr. Fineburg. (W.C. Exh. 3)

When Dr. McCloskey was asked by defense counsel if knowledge of a prior shoulder injury would change his opinion, McCloskey answered:

"Q. And would you agree with me that it's likely had an MRI been done in October of 2004, this herniation would have been found at C5-C6?

A. I think it's likely that some abnormalities would have been seen there. It's hard for me to imagine that he would have had what I saw him for. I mean, he's a man who, apparently before his accident in December, was not down and out, incapacitated by neck, bilateral arm and shoulder pain." (W.C. Exh. 2, p. 17)

Given that the Claimant reported his prior shoulder pain to Dr. McCloskey, and Dr. McCloskey's testimony that knowledge of prior shoulder pain would not change his opinion as to causation, Judge Wilson's rejection of his testimony is unsupported by the evidence.

The next medical evidence relied upon by the Administrative Law Judge is the testimony of the employer's medical examiner, Dr. Eric Wolfson. In her opinion, Judge Wilson implies that Dr. Wolfson was in a better position to evaluate the Claimant than his treating physician because he had the opportunity to review all of the records. (R.E. 13, C.R. 32) As her opinion indicates, she quotes Dr. Wolfson who indicated that in "some cases" independent medical examiners might be in a better position to address causation because they have the opportunity to review all of the records. Id. Certainly, this was not the case with Dr. Wolfson. He was not "independent" because he was working for the employer's carrier. Dr. Wolfson has given no indication that he reviewed all of the medical records in this case. To the contrary, he testified under oath that he relied upon information told to him by defense counsel, Robert Briggs, in rendering his opinion. He testified that in Dr. McCloskey's operative note, Dr. McCloskey described the Claimant's herniated disk as the biggest he had ever seen. However, there is no such statement in Dr. McCloskey's operative note. Dr. Wolfson indicates that he was told by Robert Briggs that the Claimant continued to perform heavy

work after his injury, and clearly, Dr. Wolfson relied upon that misrepresentation in giving his opinion as to causation. There is nothing in the record to support Briggs' statement to Dr. Wolfson that the Claimant continued to perform heavy work after this injury. The incident occurred one hour before the end of his shift. The Claimant testified that following his injury, he thought he had pulled a muscle and took it easy and rested throughout his Christmas holiday vacation, which lasted approximately one week. When he returned to his regular duties, he attempted to climb a ladder and could not pull himself up the ladder with his arms. He immediately reported the injury to his supervisor.

Obviously, Dr. Wolfson's evaluation of the Claimant was not one of those cases where the examining physician had been provided copies of all of the medical records of the Claimant and in fact, his opinion as to causation was based largely on hearsay. He reviewed Dr. McCloskey's records which contained Dr. Fineburg's records, and as the Judge noted, Dr. Fineburg's records contained those of his partner, Dr. Westbrook. (W.C. Exh. 3; R.E. 14; C.R. 33). Thus he reviewed the same records reviewed by Dr. McCloskey. Under the circumstances, the Claimant would respectfully suggest that the treating physicians' opinions are given some deference under the Workers' Compensation statutes and Dr. McCloskey's opinions regarding causation, are not outweighed by a doctor who was given unsupported information by defense counsel. The credible medical testimony clearly supports a finding that the Claimant's herniated disk at C5-6 was caused by the incident on December 19, 2004 when he injured himself while removing a Scott air pack.

The employer, in its answer to the Petition to Controvert, admitted that the incident was work related. Despite this admission, the Administrative Law Judge found otherwise and it is respectfully submitted that her decision is contrary to the evidence and the law.

B. THE CREDIBILITY OF THE CLAIMANT

The next issue to be addressed is Judge Wilson's finding that the testimony of the Defendant's witness, Mr. Wilkins, was more persuasive than the testimony of the Claimant. This finding is very close to a distinction without a difference. Mr. Wilkins' testimony did not contradict the testimony of the Claimant. Mr. Wilkins testified that prior to December 19, 2004, the Claimant complained to him that he had worn himself out picking up limbs after the hurricane. The Claimant testified that he had picked up limbs after the hurricane, but did not remember telling anyone that he had "worn himself out". The hurricane referenced in the testimony of Mr. Wilkins and the Claimant is Hurricane Ivan, which hit Alabama in September of 2004, three months before the December 19 injury. Wilkins never indicated that the Claimant's complaints about wearing himself out occurred in December. The Claimant testified that he picked up limbs at his mother-in-law's house immediately following the storm. Neither Wilkins, nor the Claimant, give any indication that the Claimant herniated his disks while picking up limbs after Hurricane Ivan, and given the nature of the Claimant's duties at work, picking up limbs certainly is no more difficult than climbing ladders and carrying five gallon buckets of chemicals as Mr. Taylor was required to do in the course and scope of his employment. He was able to continue these duties until December 19.

Both the Claimant and Mr. Wilkins testified that the Claimant had suffered a back injury on the job in 1991, thirteen years earlier, and each testified that he was demoted after taking time off due to the fact that he missed work to have stints placed in his heart. Both Wilkins and the Claimant testified that the Claimant was a good worker and the Claimant understood that it was company policy to immediately report on the job injuries. Because it has figured prominently in the Judge's

opinion, the circumstances surrounding the Claimant's failure to report should be thoroughly examined here.

The Claimant has testified that his injury occurred one hour before his Christmas vacation, which was to last approximately one week. It occurred on December 19, 2004, just before the end of the year. Company wide bonuses, according to the Claimant, were paid based upon the absence of "lost time" accidents. The Claimant testified that Mr. Wilkins had been stressing the importance of no "lost time" accidents because they would affect bonuses company wide. The Claimant testified that he thought perhaps he had pulled a muscle and that he hoped it would improve over his vacation. He rested and took Aleve but when he returned to work on December 27th, he found that he could not pull himself up a ladder.

The Claimant never testified that Mr. Wilkins told him not to report an accident; merely that he stressed the importance of no "lost time" accidents. Mr. Wilkins never denied that he stressed the importance of no "lost time" accidents; he merely testified that he never had instructed anyone to fail to report an accident. The fact that no "lost time" accidents were important to the company and its employees at the time of the Claimant's injury, is supported by a very important fact. Following the accident, First Chemical gave the Claimant a desk and a telephone which never rang and allowed him to "work" under those circumstances until the end of the year, after which he was told that the company was denying his claim and to seek his own treatment.

Since there are no real inconsistencies between the testimony of Mr. Wilkins and the testimony of the Claimant, the Judge's determination that Mr. Wilkins is more credible than the Claimant does not explain or justify her decision. Mr. Wilkins did not witness the Claimant's accident, nor did he have any factual basis to challenge it. The employer and carrier admitted that

the work related incident occurred in their answer to the Petition to Controvert. The Defendant has offered nothing more than speculation and conjecture to support its position that the work related incident did not cause the herniated disk at C5-6. In fact, the Administrative Law Judge failed to follow basic principles of Workers' Compensation law when she found against the Claimant.

C. OTHER FACTUAL DISPUTES

The employer and carrier have raised other factual issues to support their position that the Claimant's testimony is untrustworthy. First, they raise inconsistencies in the Claimant's account of the accident. However, there is no finding by Judge Wilson that his testimony was inconsistent. As stated in the Claimant's primary brief, the differences are minor and can as easily be the result of innocent mistakes by treating physicians in recording the history. We know that Mr. Taylor recorded his injury date as December 19, 2004, when her personally filled out the questionnaire on his first visit to Dr. McCloskey. Despite this information, some of Dr. McCloskey's later notes indicate that the accident occurred December 12th. When Dr. Wolfson was asked if the Claimant's account of his injury were consistent, he testified that they were consistent and given the number of times that the Claimant had to recount the history, it is not surprising that the histories are not all exactly the same.

Another issue raised by the employer and carrier is the Claimant's alleged confusion about the time the injury occurred. As recounted in the Claimant's principal brief, the shifts at First Chemical are quite unusual. Mr. Taylor would work two days on and two days off, and then three days on and two days off. His shifts would alternate weekly between the night shift and the day shift so that he might work two days on the day shift, have two days off, work three days on the night shift and two days off, and work two days on the night shift and have two days off and then work three

days on the day shift. With all of these changes, and given the passage of time between the date of his injury and the date of the hearing, it is not surprising that Mr. Taylor might have been confused about the shift that he was on when his accident occurred. What is not confusing is his testimony that the injury occurred one hour before the end of his shift. In Judge Wilson's opinion, there are several mistakes which may or may not have affected her decision. She indicates that an MRI of the Claimant's cervical spine was conducted on January 20, 2005 which showed changes in the thoracic spine. (R.E. 9 C.R. 28). No cervical MRI was conducted in January of 2005. An MRI of the thoracic spine was conducted at the request of Dr. Wiggins. While it is possible that the Judge's reference to the MRI as a cervical MRI is a typographical error, at the very least, it demonstrates how easy it is to make mistakes when reciting facts supplied through other sources. More importantly, she indicates that Dr. McCloskey did not have Dr. Fineburg's records, when in fact he did. (W.C. Exh. 3) This certainly affected her decision, which is unsupported by the record before the Court, and warrants reversal of the Court's decision. (R.E. 14; C.R. 33).

III.

THE LAW

In his original Brief, the Claimant has raised three distinct legal issues to support his position that the findings of the Administrative Law Judge cannot stand. First, the law requires doubtful cases to be resolved in favor of compensation in order to fulfill the beneficent purposes of the Workers' Compensation statutes. *Duke Ex Rel Duke v. Parker Hannifin Corp.* 925 So.2d 893, 897-98 (Miss. Ct. App. 2005). The employer and carrier did not dispute this principal of law and yet they have offered nothing to show that the Court, the Commission, or the ALJ followed this rule of law. Second, under longstanding precedent, and pursuant to the terms of the Mississippi Workers'

Compensation Statute, deference is afforded to the treating physician. *Spann v. Walmart Stores, Inc.* 700 So.2d 308 (Miss. 1997). In this case, even if the Court held that it was not obligated to give deference to the treating physician, certainly it is obligated to consider the basis for Dr. Wolfson's opinions in evaluating his testimony. In *Johnson v. Ferguson*, 435 So.2d 1191, 1195 (Miss. 1983), the Mississippi Supreme Court held:

> "When an expert's opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight and it has little or no probative value when compared to the opinion of an expert that has made a thorough and adequate examination."

In *Spann*, the Court relied upon *Ferguson* to support its conclusion that it should reject the testimony of an employer's medical examiner (EME) due to the fact that he had not reviewed an MRI. In this case, Dr. Wolfson made a cursory of examination of the Claimant long after he had undergone surgery. Dr. Wolfson relied upon Dr. McCloskey's records only (or documents contained within Dr. McCloskey's records), in formulating his opinions. Dr. Wolfson also relied upon misinformation and hearsay that was provided to him by defense counsel. While the employer and carrier assert in their brief that the Claimant failed to delineate the false information provided, the Claimant did exactly that on Page 11 of the Appellant's Brief. Dr. Wolfson's testimony is quoted where he says that the Mr. Briggs informed him that the Claimant had performed heavy work at home after his injury. (Appellant's Brief, p. 11) (W.C. Exh. 1, p. 15; W. C. Exh. 4).

Since both doctors reviewed the same records and since Dr. McCloskey treated the Claimant on a regular basis and performed a complete and thorough examination of him on numerous occasions versus a single examination by Dr. Wolfson, it is respectfully submitted that Judge Wilson and the Commission erred when they gave more credence to Dr. Wolfson than to Dr. McCloskey.

This error is compounded by the inaccurate hearsay provided to Dr. Wolfson by defense counsel.

Another legal issue, which the employer and carrier have barely addressed in their brief, is the point that under the Workers' Compensation Statutes, an EME can be used solely for the purpose of evaluating temporary or permanent disability or medical treatment being rendered. (Miss. Code Ann. §71-3-15(1) (1972) An employer or carrier is not entitled to have a claimant examined for the purpose of establishing whether his work related injury caused the undisputed herniated disk. While the employer and carrier argue that this statute would prevent them from contesting claims, clearly that is not so. Employers and carriers can continue to use EMEs for the purposes stated in the Act, and if they want to contest causation, they can ask for an Independent Medical Examiner to be appointed to consider that issue.

This Court exercises *de novo* review on matters of law. *KLLM, Inc. v. Fowler*, 589 So.2d 670, 675 (Miss. 1991). For the reasons stated herein, it is respectfully submitted that there are questions of law which require reversal of the Commissions' ruling in this matter.

IV.

CONCLUSION

In conclusion, the Claimant would show that under longstanding legal principles, the Commission's decision in this case should not stand. Under the law, doubtful cases should be resolved in favor of coverage under the Act. Even if the work related incident merely aggravated a pre-existing problem, coverage would still be afforded. The employer and carrier have presented no evidence to support the information their lawyer provided to Dr. Wolfson that the Claimant performed heavy work after his December 19th injury. Dr. Wolfson clearly relied upon this mistaken advice and his opinion should not be given any weight on any issue where he relied upon this

unsupported assumption. To hold otherwise is to allow a lawyer to interject a fact into the record that is completely unsupported by the testimony of the witnesses. This Court, would never allow an attorney to testify on behalf of his client, and if he is allowed to present such an unsupported fact to a doctor, who then offers it through his testimony, then a very real problem will be allowed to go unredressed.

Under the facts of this case, and the applicable law, it is respectfully submitted that the Claimant presented substantial credible evidence that the incident of December 19, 2004, occurred, that it caused his herniated disk, that it required a cervical fusion, and that he has suffered a disability as a result. It is respectfully requested that the decision by the Commission and lower court should be reversed.

RESPECTFULLY SUBMITTED on this the 9 day of April, A.D., 2009.

EARL DEAN TAYLOR, Claimant/Appellant

BY: _____
CATHERINE H. JACOBS,
Attorney for Claimant/Appellant

CERTIFICATE OF SERVICE

I, CATHERINE H. JACOBS, do hereby certify that I have on this the 9 day of April, 2009, served a true and correct copy of the foregoing document, upon the following counsel of

record by facsimile and by depositing a copy of the same in the United States mail, properly addressed, first-class postage prepaid as follows:

Counsel of Record:

Honorable John S. Gonzalez
DANIEL, COKER, HORTON & BELL, P.A.
P. O. Box 416
Gulfport, MS 39502

Judge Dale Harkey
Circuit Court of Jackson County
P. O. Box 998
Pascagoula, MS 39568

CATHERINE H. JACOBS

CATHERINE H. JACOBS
Attorney at Law
425 Porter Avenue
Ocean Springs, MS 39564
(228) 872-7004
FAX: (228) 872-7006
STATE: [redacted]