IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

ALONZO SMITH — APPELLANT

V. — NO. 2009-WC-00381

JOHNSTON TOMBIGBEE FURNITURE MFG. CO.
AND
BRIDGEFIELD CASUALTY INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF LOWNDES COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Alonzo Smith, 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. Alonzo Smith, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Mark L. Pearson, Esq., Counsel for Appellant;
4. Johnston Tombigbee Furniture Mfg. Co., Appellee;
5. Dennis W. Vogue, Counsel for Appellee.

THIS the 21 day of May, 2009.

JOHN HUNTER STEVENS

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1. Whether the Commission erred in reversing the findings of the Administrative Judge.

2. Whether the Circuit Court erred in not reinstating the findings of the Administrative Judge.

INTRODUCTION

The Administrative Judge correctly entered an Order after a hearing on the merits finding that the Claimant, Alonzo Smith, who worked for this employer for almost 40 years, had sustained a permanent and total loss of wage-earning capacity. Aggrieved, the Employer and Carrier appealed this Order urging that it was contrary to the facts; however, the Employer and Carrier submit no legitimate facts sufficient to show that the learned and experienced Administrative Law Judge was wrong. The Administrative Law Judge found and held that the Claimant, a long-term employee for nearly 40 years, having sustained an admitted injury necessitating significant back surgery; being assigned permanent impairment by his physicians including significant restrictions; being refused to a return to work at modified duty; having been awarded Social Security disability for the identical injury; and, continuing to be on a significant amount of narcotic pain medication; correctly found Claimant permanently and totally disabled. Therefore, the Order of the Administrative Law Judge should be reinstated. There is simply no credible evidence to the contrary. Despite clear facts and law substantiating the Administrative Law Judge's findings, the Commission, in a blatant attempt to punish the Claimant, lowered the award by approximately 70%. This action was taken solely as a result of the manufactured evidence from the carrier's expert over two years after the Claimant was released by his surgeons, and who provided a report approximately two weeks before the hearing. Despite that, the Commission felt compelled to penalize the Claimant without any basis of law or fact. The Claimant requests that this Court reverse the Commission's illogical findings and reinstate the Administrative Judge's findings.

SUMMARY OF THE ARGUMENT

The findings of the Commission in reversing the Administrative Law Judge's Order is not

based on any rational evidence. The Commission's reduction of the award by 70% has no basis either in law or fact. The complete and sole basis for the Commission's reversal of the learned Administrative Judge's findings are based solely on speculative testimony of a litigation expert retained 2 ½ years after the Claimant's surgical treatment. To affirm the findings of the Commission would result in a travesty of justice and make a mockery of the beneficent purpose of the Mississippi Workers' Compensation Act.

STATEMENT OF FACTS

The actual facts, despite representations by the Employer and Carrier, are undisputed. The Claimant, a heavy manual labor worker for almost 40 years for this Employer sustained an admitted on-the-job injury in June of 2003. (Tr. pg. 3, 19-21) After significant treatment, he was ultimately required to undergo major back surgery. (Tr. pg. 12, 5-7) He was actively treated by Dr. Chang, the surgeon, for almost 1 ½ years before having reached maximum medical improvement. Initially, the doctor assigned him restrictions of light duty, although he ultimately indicated that the Claimant had atrophy and foot drop. (Tr. pg. 12, 10-12) The doctor could not explain what was causing these problems, but continued treating the Claimant with narcotic pain medications after maximum medical improvement. (Gen. Ex. 4)

The Claimant's testimony was completely 100% undisputed. He was a heavy machine operator, with no prior back problems until this admitted injury. (Tr. pg. 12, 2-4) All of his testimony concerning his continued problems with his foot drop, which requires that he use a cane (prescribed by Dr. Chang and Dr. Barrett) and take significant narcotic pain medication, is unrefuted. (Gen. Ex. 6) In fact, Dr. Vohra, the company litigation physician who saw the Claimant on one occasion, acknowledged that this pain medication was reasonable and necessary (800 milligrams

multiple times a day). (Gen. Ex. 1) Dr. Vohra acknowledged that the Claimant had permanent disability, but stated that he would need a functional capacity evaluation to assign any restrictions. (Ex. 2) Therefore, none of this non-treating doctor's opinions from a one-time visit (solely for trial testimony) were sufficient to refute the findings of the many other treating doctors, specifically including the findings of Dr. Barrett, who found that the Claimant was disabled.

The Claimant underwent over 135 job search efforts, and none of these job search efforts were questioned as to their validity by the Employer. (Gen. Ex. 7) Not a single one. Furthermore, Claimant testified that he attempted to return to light-duty work for the employer, having been a loyal employee for almost 40 years, and was refused re-employment in any light-duty position. (Tr. pg. 12, 13-16) This was attested to in the interrogatory responses by the Employer made in Exhibit "9". There was not one witness or one piece of evidence to refute this return-to-work effort.

The Employer and Carrier, apparently realizing the futility of attempting to use the inconclusive opinions of a one-time visit from a company physician in Jackson, 100 miles away from the Claimant's residence, instead sought to retain a vocational rehabilitation expert over 2 ½ years after the Claimant had reached maximum medical improvement. (Tr. at 50) It is undisputed that this proposed vocational rehabilitation consultant did not produce one single job opportunity to the Claimant until such were identified in a report in a supplemental pretrial dated August 9, 2007, produced to the Claimant less than two weeks before the hearing. (Tr. pg. 21, 1-4) Nothing in Mr. Stewart's proposed testimony refutes that any, again not one single effort of the approximately 135 job search efforts, were anything other than reasonable. He did not even attempt to identify a job position with the Claimant's long-term employer in this action. (Gen. Ex. 11) He further acknowledged, under cross-examination, that most of his opinions were based on faulty information,

and that he ignored the findings of the Claimant's treating physician, Dr. Barnett. (Tr. at 56) He acknowledged that the continued problems and significant medication being prescribed to Mr. Smith (admittedly appropriate by the company physician, Dr. Vohra) indicated that even most of the jobs he claimed the Claimant may be employable for, he had found in the short weeks before the hearing and are not appropriate. (Tr. at 55) In short, Mr. Stewart's alleged testimony does nothing to provide that the Claimant is employable, nor does it come close to satisfying the burden of proof on the employer to overcome the presumption.

In this case, the Employer and Carrier provide no evidence to refute that the Claimant has a significant disability. He gave his work life to this employer, over 35 years, and it refused to allow him to return to work. This is undisputed. The Claimant's testimony as to his continued problems with foot drop and pain, are unrefuted. The only evidence that even vaguely or remotely proves otherwise is the inconclusive testimony of the company doctor, which is based on a one-time visit with Dr. Vohra. Even his testimony supports that the Claimant has significant problems, acknowledging continued impairment, the need for strong narcotic medication and the need for an FCE. (Gen. Ex. 1) This could hardly be evidence to refute that the Claimant is not totally disabled as so found by the Federal Government, by Dr. Barnett, his primary, main treating physician after his surgery, who has been treating him over a multiple year period and correctly by the Administrative Law Judge. The surgeon's records also indicate permanent impairment and restrictions, and continued significant narcotic pain treatment. (Gen. Ex. 6)

The scope of review of a workers' compensation case before this Court is limited to a determination of whether the decision of the Commission is supported by the substantial evidence. *Westmoreland v. Landmark Furniture, Inc.*, 752 So.2d 444, 447 (¶7) (Miss. Ct. App. 1999). While

the Commission sits as the ultimate finder of fact, its findings can be reversed if the Commission's rulings are found to be unsupported by the substantial evidence, and have matters of law that are clearly erroneous, or the decision is arbitrary and capricious. *Hale v. Ruleville Health Care Ctr.*, 687 So.2d 1221, 1225 (Miss. 1997). [A] finding can be found to be clearly erroneous when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the Act. *J.R. Logging v. Halford*, 765 So.2d 580, 583 (¶13) (Miss. Ct. App. 2000) (citation omitted).

The Commission's actions in reversing the Administrative Law Judge's findings is a rather serious miscarriage of justice, and an absolute attempt to ignore the intent and meaning of the Act. To affirm the findings of the Commission absolutely ignored the liberal interpretation of the Act. To affirm the findings of the Commission would reflect an interpretation that a Claimant would be punished for not helping the Employer and Carrier manufacture a defense by retaining a litigation expert provides a report less than two weeks before the hearing and more than three years after the Claimant was released to go back to restricted duty work. The testimony relied on by the Commission to punish the Claimant is based solely on the litigation experts of Stewart and Dr. Vohra. Stewart's opinions are shear and utter speculation and do nothing to refute the clear medical evidence and the unrefuted testimony of the Claimant and his having made over 135 job search efforts. Furthermore, the Commission's reliance on the second litigation expert, Dr. Vohra, retained by the Employer and Carrier is again shear speculation. Dr. Vohra indicated permanent impairment, but deferred restrictions requesting the necessity of a functional capacity evaluation that was never done, and immediately requested another MRI, but was never done. Each of these opinions are flawed. The Commission's reliance on this shear speculation compared to the overwhelming

evidence substantiating disability is a travesty. The findings of the Administrative Law Judge warrant reinstatement. The Administrative Law Judge correctly found:

> Claimant worked for the Employer for almost 40 years. By the admission of the Employer in Exhibit 9, the Employer cannot accommodate the restrictions placed upon Claimant by his treating physician. Any Claimant seeking permanent disability benefits makes a *primae facie* case of total loss of wage-earning capacity if the employer fails to provide suitable employment within the claimant's restrictions after maximum medical improvement and then the Claimant makes a reasonable but unsuccessful job search. The burden of proof then shifts to the employer to prove that the claimant's disability and/or loss of wage-earning capacity is less than total. Hale v. Ruleville Health Care Center, 687 So.2d 1226-27 (Miss. 1997); Jordan v. Hercules, 600 So.2d 179, 183 (Miss. 1992); Thompson v. Wells-Lamont Corp., 362 So.2d 638, 640 (Miss. 1978).
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> The majority of the medical evidence showed that Claimant has a problem with his back and right leg due to the work accident. Dr. Chang found that Claimant had right foot drop, even though he could not find an anatomic explanation. He prescribed a foot brace for Claimant. Dr. Leis found irregularities in the nerve conduction studies, although he felt regeneration was present. He also noted that Claimant had "slight focal atrophy" in the right calf. Dr. Barnett stated that Claimant had right foot drop, and he prescribed a quad cane for Claimant's use. In any event, Dr. Chang permanently restricted Claimant to light duty work with no lifting over 10 pounds and no excessive sitting, standing, bending, or twisting.
>
> Claimant unsuccessfully searched for work (Exhibit 7). The vocational expert was only able to identify one or two possible job opportunities which would allow Claimant to be flexible about sitting and standing. The Employer was not able to accommodate Claimant's restrictions. Based upon the evidence as a whole, including but not limited to Claimant's credible testimony, age, education, employment with the Employer for over 40 years, unsuccessful job search, and current medical restrictions, I find that he is permanently and totally disabled.

(R. 36)

When there is no evidence to support the Commission's findings as in the instant case, the Appellant Court should not hesitate to reverse and reinstate the Administrative Law Judge's findings. *Foamex Prods. v. Simmons*, 822 So.2d 1050, 1053 (Miss. Ct. App. 2002) The Commission in this case ignored the Mississippi Supreme Court's pronouncement that Workers' Compensation Law is to be liberally construed in favor of the Claimant to fulfill the beneficent purposes of the Act. *Marshall Durbin v. Warren*, 633 So.2d 1006, 1010 (Miss. 1994) It is unequivocal that the burden of proof was shifted to the Employer and Carrier since the Claimant was refused re-employment. As a matter of law the Claimant is not even required to do an independent job search, despite the significant unrefuted legitimate job searches. The speculative testimony of one expert witness is not sufficient to arbitrarily lower the award by 70%. This is simply not legitimate evidence, and the substantial evidence supports an award of permanent and total disability.

CONCLUSION

The Employer and Carrier have no evidence from the Employer indicating any attempt for accommodation. In fact, it admits that it would not put him back to work if he is not full duty. The supposed expert Stewart has nothing to refute the overwhelming evidence of permanent and total disability. His opinions should be ignored since they were not provided or produced until less than two weeks, before this hearing. He did not provide one single job opportunity to the Claimant, and his opinions are sheer, utter speculation and bear no weight whatsoever. The learned and experienced Administrative Law Judge correctly found that because of the Claimant's significant job history, that he admittedly could not return to at his age of 60 years old, his continued problems with foot drop, having to use a cane, and take significant narcotic pain medication, all of which were unrefuted; the fact that his primary physician said he was disabled from this accident, justify the

finding of a permanent and total disability. Dr. Vohra's opinions are inconclusive and inadequate to substantiate the burden placed on Employer and Carrier. The 135 job search efforts by the Claimant were not refuted. There is simply no legal or factual justification to change the Administrative Law Judge's finding. The assertions of the Employer are unfounded and illogical. Therefore, this Court must reinstate the Administrative Law Judge's Order. Amazingly, the aforementioned portion of our brief was almost identical to what was submitted to the Commission requesting affirmance of the Administrative Law Judge's Order. The Commission affirmed the Order in all respects except for lowering the amount of the award by approximately 70% on what they claimed to be a penalty for the failure of the Claimant to engage the expert witness of the employer who provided potential, that's right, potential (speculative) jobs approximately two weeks before the hearing. Again, this is after the Employer and Carrier specifically requested a continuance so that they could manufacture a case using nothing but a vocational rehabilitation specialist, despite no evidence whatsoever to refute job search efforts and despite the fact that the Claimant had been at MMI and was refused re-employment for almost two years. The Commission absolutely, and in a completely unjustifiable manner ignored the well settled law and the evidence. As such, Claimant submits that the Administrative Law Judge's Order should be reinstated. The law clearly provides that the substantial evidence rule was completely and unequivocally ignored by the Commission in this case. In fact, there is no law whatsoever which supports the Commission's finding. As such, Claimant respectfully requests the Court to view the facts and reverse the findings of the Commission and reinstate the Administrative Law Judge's findings.

RESPECTFULLY submitted, this the 21 day of May, 2009.

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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 to:

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_____

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