

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-WC-00444-COA

JOSHUA LOWELL ODOM

APPELLANT

VS.

FEDEX GROUND PACKAGE SYSTEMS, INC.
SELF-INSURED

APPELLEE

**BRIEF OF APPELLEE
FEDEX GROUND PACKAGE SYSTEMS, INC.
SELF-INSURED**

ORAL ARGUMENT NOT REQUESTED

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VS.

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CERTIFICATE OF INTERESTED PERSONS

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

1. FedEx Ground Package Systems, Inc., Self-Insured, Appellee;
2. Joshua Lowell Odom; Appellant
3. Honorable Liles Williams, Chairman
Mississippi Workers' Compensation Commission
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P.O. Box 5300
Jackson, MS 39296-5300
4. Honorable Barney J. Schoby, Commissioner
Mississippi Workers' Compensation Commission
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5. Honorable Johnny Junkin, Commissioner
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6. Honorable James Homer Best, Administrative Judge
Mississippi Workers' Compensation Commission
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7. Honorable Robert B. (Bob) Helfrich
Forrest County Circuit Court Judge
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THIS, the 7 day of July, 2009.

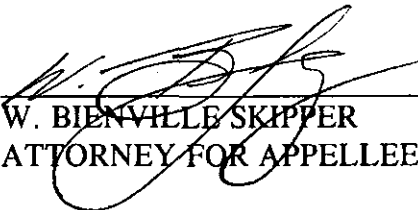

W. BIENVILLE SKIPPER
ATTORNEY FOR APPELLEE

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STATEMENT OF THE ISSUES

Whether the Commission's decision denying compensability of claimant's alleged work-related injury is supported by substantial evidence.

STATEMENT OF THE CASE

This appeal involves a review of the Order of the Mississippi Workers' Compensation Commission ("Commission"), which affirmed the Administrative Judge's ("AJ's") decision denying compensability of Joshua Odom's ("Odom's") alleged work-related injury. The AJ properly judged the weight and sufficiency of Odom's evidence and testimony and found that it did not suffice to overcome the absolute absence of any contemporaneous history of a work injury in the non-biased and independent medical records. The Commission's decision to affirm the AJ was based on substantial evidence and was properly affirmed by the Circuit Court of Forrest County, Mississippi. It should be affirmed by this Honorable Court.

A. Nature of the Case and Course of Proceedings Below

Odom began working part-time at FedEx Ground Package Systems, Inc. ("FedEx") in the summer of 2002. On January 18, 2005, Odom filed a Petition to Controvert, alleging he had injured his back at work on December 14, 2003. R.E. 1. FedEx denied the claim. R.E. 2. Following the trial of this cause, the AJ entered an Order on September 26, 2006, denying and dismissing Odom's claim for benefits. R.E. 3.

Aggrieved by the AJ's decision, Odom petitioned for review by the Full Commission, the statutory finder of fact. Following briefing and a complete review of the evidence, on February 28, 2007, the Commission entered its order affirming the AJ without comment. R.E. 4. Odom then appealed to the Circuit Court of Forrest County, Mississippi, which conducted its own independent review of the record. On March 6, 2009, the Circuit Court affirmed the Commission's decision. R.E. 5. Odom now appeals to this Court, seeking to re-urge arguments previously rejected by the AJ, Commission and the Circuit Court. Despite Odom's protests,

substantial evidence in the record supports the Commission's decision, and, therefore, the Commission's ruling should once again be affirmed.

B. Statement of Relevant Facts

Odom was a part-time package handler of FedEx at the time of his alleged injury. R.E. 6 at 6.¹ Odom began working at FedEx in the summer of 2002, and customarily worked fifteen to twenty hours per week, usually 5:00 p.m. to 9:00 p.m., Monday through Friday. *Id.* at 6-7. On January 18, 2005, Odom filed a Petition to Controvert, alleging he injured his back at work on December 14, 2003. Since Odom had never reported an injury and his initial medical records did not reflect any history of a work injury, FedEx disputed compensability of his claim. Interestingly, Odom maintained his injury occurred on December 14, 2003 – a Sunday – throughout the course of litigation (including discovery and depositions) but attempted to change the date of his alleged injury at the hearing on the merits. *Id.* at 23-26.

According to Odom, he lifted a box and felt a sharp pain down the left side of his back into his left leg. *Id.* at 8. At the hearing, he testified he told his immediate supervisor, Will Thompson, about his injury and signed an accident report. *Id.* After signing the report, Odom left work and went home. *Id.* at 9-10. Odom further testified he presented to Dr. Beamon the following day and that he told Dr. Beamon that his injury had occurred the prior day while at work. *Id.*

At the hearing, Dr. Beamon's medical records were offered into evidence and contradicted Odom's testimony. Dr. Beamon's records reflect Odom presented on December 11, 2003,

¹Citations to Appellee's Record Excerpts are abbreviated "R.E. ____". Citations to exhibits in the record before the Mississippi Workers' Compensation Commission are abbreviated "Ex. ____", and citations to the trial transcript are abbreviated "Tr. ____".

complaining of lower back pain with no history of a work injury. Ex. 2. When confronted with this evidence on cross examination, Odom testified his injury occurred December 10, 2003. *Id.* Moreover, Dr. Beamon's records reflect Odom returned to him for treatment five days later – December 16, 2003 – but still had no history of any work-related injury. *Id.*

At the hearing, Odom suggested that, even if he had maintained the wrong date of injury throughout the course of this litigation, he was certain the injury occurred on the last day he worked at FedEx and was certain he had never seen Dr. Beamon for his back before he injured it at work. R.E. 6 at 11. Odom's time card from FedEx, though, refuted that story as well. According to his time cards, Odom continued to work at FedEx until December 12, 2003 – after he first saw Dr. Beamon on December 11th (without reporting a work injury) and before he next saw Dr. Beamon on December 16th (again, without reporting a work injury). *Id.* at 24-26.

On December 18, 2003, Odom presented to the emergency department at Wesley Medical Center, complaining of "chronic" back pain. Ex. 1. The records from Wesley Medical Center document an old back injury. *Id.* The triage note from that date reveals that in response to the question "is this a work-related accident/injury?" the box "NO" was marked. *Id.* The physician's record documented Odom's pain as "chronic back pain" with onset "six months" before. *Id.* The records also indicate Odom told the doctor his injury occurred at "home." *Id.*

After seeing the emergency physician, Odom next saw Dr. Michael Molleston. Dr. Molleston's initial intake questionnaire reveals Odom checked "no" when asked whether his initial visit on January 7, 2004, was due to a work-related injury. Ex. 4. Dr. Molleston's records also indicate Odom provided a history of back pain from November 2003 and reported that he had experienced problems for over a year, with the complaints becoming severe "ten or eleven

months" ago. *Id.* Odom told Dr. Molleston he had been previously referred to Dr. Patterson, an orthopaedic spine surgeon, but had never seen him. *Id.*

At the hearing on the merits, Odom offered various explanations when confronted by the numerous contradictions between his testimony and the actual medical proof. First, he attempted to change his date of injury, based on Dr. Beamon's initial medical record. R.E. 6 at 24-25. Next, he attempted to change it again when confronted by his own time cards from work. *Id.* Then, he attempted to blame his mother for failing to provide a work history to the emergency room. *Id.* at 30. A cursory reading of the hearing transcript reveals that, despite all his efforts, however, Odom simply could not invent a story that satisfied all the facts. For this reason, the Commission was correct in denying the claim.

During his trial testimony, Odom stated his supervisor, Will Thompson, contacted his manager, Traci Boone, to tell her about the accident; however, Ms. Boone's testimony contradicted those allegations. Ms. Boone testified Odom had never reported an injury at work and, had Odom done so, Mr. Thompson would have completed an accident report. Exs. 5 & 6. Ms. Boone testified that she had personally reviewed Odom's personnel file and the accident/injury binder that FedEx maintains for all work injuries, and that there is no accident/injury report regarding Odom. Ex. 6. When asked whether, according to Mr. Thompson, Odom told Mr. Thompson he injured his back at work or that his back "felt funny," Ms. Boone testified that Mr. Thompson reported to her that he allowed Odom to leave work because Odom told Mr. Thompson his back "felt funny." Ex. 5. She stated that, "it wasn't Josh hurt hisself [sic] and he had to, like, leave and a dire emergency. It was just it "felt funny." Ex. 5. Further, Ms. Boone testified she personally knew Odom had suffered a skateboarding

accident in the summer of 2003, and it had been reported to her that Odom's back pain stemmed from that skateboarding accident, not any work injury. Ex. 5. In fact, Ms. Boone testified that she had given Odom the name of a chiropractor she recommended, due to his back issues. Ex. 5.

At the close of the evidence, the AJ determined Odom had not met his burden of proving he had sustained a work related injury. R.E. 3. After careful examination of the record, the Full Commission affirmed the AJ's order on February 28, 2007. R.E. 4. Odom appealed to the Circuit Court of Forrest County, which issued its ruling on March 6, 2009, affirming the Commission. R.E. 5. It is from this decision that Odom now appeals to this Court. As the record clearly supports the conclusions of the AJ, Full Commission and Circuit Court, the employer petitions this Court to affirm the Full Commission's Order as it is supported by the overwhelming testimony and substantial evidence in the record.

SUMMARY OF THE ARGUMENT

The employer and carrier submit the Commission's ruling is due to be affirmed, as it is supported by substantial evidence. The Commission received and reviewed all the evidence and determined the appropriate weight to give the testimony and each admitted exhibit. Odom's appeal seeks nothing more than to have this Court allot different weight to the testimony and evidence - focusing primarily on his own testimony while discounting the contradictory proof - but, as this Court is aware, an appeals court cannot re-weigh the evidence and render its own opinion of the testimony. Under the law, deference is given to the Commission, which issued its decision after its own independent review of the evidence. Even if the Order of the Full Commission is not the

opinion this Court would have rendered, the fact that the Commission's Order is supported by substantial evidence in the record necessitates it be affirmed.

STANDARD OF REVIEW

FedEx asserts that the Order of the Full Commission is supported by substantial evidence and should be affirmed. It is well-settled in Mississippi law that an appeals court is not to substitute its judgment for the judgment of the trier of fact or factual questions. See *R. C. Petroleum v. Hernandez*, 555 So. 2d 1017 (Miss. 1990). When the Commission adopts the findings of the Administrative Judge without presenting its own findings of fact, a court must examine the findings of the Administrative Judge. *McDowell v. Smith*, 856 So. 2d 581, 585 (Miss. 2003). The Commission is also the ultimate judge of the credibility of witnesses. *Miller Transporters, Inc. v. Guthrie*, 554 So. 2d 917, 918 (Miss. 1989). The Court will reverse the Commission's Order only if it finds the Order clearly erroneous and contrary to the overwhelming weight of the evidence. *Hardaway Co. v. Bradley*, 887 So. 2d 793, 795 (Miss. 2004). The AJ relied on his observation of Odom's credibility and the unbiased medical records in denying Odom's claim, and the Commission, based on the substantial evidence, affirmed the AJ's decision. Therefore, this Court should affirm the Commission's Order.

ARGUMENT

This case centers around Odom's credibility and the simple fact that the evidence does not support his story of sustaining an injury at work. The AJ observed Odom and his demeanor, and the Order reflects the judge's observations and careful and thorough review of the medical evidence. As a result, the AJ correctly determined that Odom's version of events was not

supported by the preponderance of credible evidence and properly denied this claim. Thereafter, the Commission properly affirmed the AJ's decision, based on the substantial evidence before it.

A claimant must prove he suffered a work injury "beyond speculation and conjecture." *Coleman v. Chattanooga Container*, 377 So. 2d 606, 608 (Miss. 1979). Indeed, contradictions in the claimant's testimony and circumstantial evidence are sufficient to rebut testimony of a work injury. *Id.* Regarding the absence of contemporaneous corroboration of a work injury, the Supreme Court has found that, "when a patient gives a history to a physician, which is inconsistent with allegations in a workers' compensation case, this is a significant factor in support of denial of the claim." *Raytheon Aerospace Support Services v. Miller*, 861 So. 2d 330, 336 (Miss. 2003) (emphasis added), citing *Hudson v. Keystone Seneca Wirecloth*, 482 So. 2d 226, 227-28 (Miss. 1986). In *Hudson*, the Supreme Court recognized "that it is generally known that reasonable patients relate injuries that may have causal connection to a disability to their physicians." *Hudson*, 482 So. 2d at 227. The Court also observed that "[a] back injury is not ordinarily a condition in which the patient is taciturn. There is an inclination to sing its praises." *Id.* at 228.

None of the Odom's allegations are consistent with the evidence. Although Odom had listed December 14th as his date of injury throughout his pleadings, during his testimony he attempted to change his date of injury numerous times to avoid being trapped by his own medical records. Although he testified he told Dr. Beamon he suffered his injury at work, Dr. Beamon's records reflect no such history. Despite Odom's testimony he injured himself at work, the records from Wesley Medical Center reference an injury occurring at home six months before, while the triage note reflects Odom specifically marked the box stating his injury was not work-related. Further, Odom testified he told Dr. Molleston that he had been injured at work, but Dr.

Molleston's records reveal Odom marked "no" as to whether his injury was work related and reveal Odom provided a history of back pain for over a year with a prior referral to Dr. Patterson. To overcome the contradictions between his testimony and the medical evidence, Odom attempted to change his date of injury and blame his mother for telling his doctors he had been injured at home. Eventually, he simply claimed the doctors did not write down the history he provided them.

Odom attempts to deflect scrutiny from his own inconsistencies by trying to make some conspiracy argument over an allegedly "missing" accident report. Although he testified he told his supervisor, Will Thompson, about the work-related injury and subsequently completed a report evidencing such, no such report exists. Ms. Boone testified that the absence of such accident report would imply Odom did not report any work-related injury.

Contrary to Odom's assertions in his brief, Ms. Boone's testimony is in accordance with Miss.R. Evid. 803(7), in that the absence of such a business record is admissible proof that no such record exists. In response to the inescapable contradictions in his story, Odom's Brief simply states that the accident report he claims to have completed is "missing." This argument cannot disguise a fatal flaw in his proof. The only person who claims to know anything about an accident report is Odom. As Ms. Boone testified, every accident report at the FedEx location is accounted for - except the very one Odom alleges he completed, but no one else has ever seen. As Ms. Boone testified, the absence of such a business record is proof that no such record exists and that Odom never reported any work injury.

Notwithstanding Ms. Boone's testimony, Odom is still unable to explain how he could have been treated by a doctor one day prior to his alleged injury. Tr. at 24-26. Odom testified that he

sought treatment the day after his injury and never returned to work. Id. His timecard, however, shows his last day of work was December 12, 2003. Id. The medical records of Dr. Beamon clearly show that Odom sought treatment for back pain on December 11, 2003, one day prior to Odom's last day of work. Id. Odom's only explanation for this was that the records must be wrong. Id.

The Administrative Judge properly judged the weight and sufficiency of Odom's evidence and testimony and found that it did not suffice to overcome the absolute absence of any contemporaneous history of a work injury in the non-biased and independent medical records. Odom repeatedly contradicted himself in his testimony, and his demeanor was such that his version of events simply cannot be relied upon. Given the totality of the evidence, Odom simply did not prove a work-related injury by a preponderance of the evidence. Therefore, the Commission's decision is in accordance with the overwhelming evidence and mandates affirmance of the Order of the Full Commission.

CONCLUSION

As evidenced above, substantial evidence supports the conclusions found in the AJ's Order denying and dismissing this claim and the Commission's Order affirming such. In accordance with the deferential standard of review, the appellee submits the Order of the Full Commission should once again be affirmed.

Respectfully submitted,

FEDEX GROUND PACKAGE SYSTEMS,
INC., SELF-INSURED

BY: 

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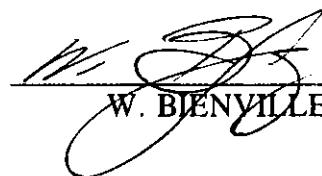
CERTIFICATE

I, W. Bienville Skipper, of counsel for FedEx Ground Package Systems, Inc., do hereby
certify I have this day served a correct copy of the above and foregoing pleading to:

Honorable Robert B. (Bob) Helfrich
Forrest County Circuit Court Judge
Post Office Box 309
Hattiesburg, MS 39403

Leonard B. Melvin, Esq.
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THIS, the 8 day of July, 2009.



W. BIENVILLE (BEN) SKIPPER

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