IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2009-WC-01511-COA

MISSISSIPPI SECURITY POLICE and
COMMERCE AND INDUSTRY INSURANCE COMPANY
Appellants

V.

SUSAN PATTERSON
Appellee

On Appeal from an Order Affirming
Workers' Compensation Appeal by the Circuit Court
of Jackson County, Mississippi

(Oral Argument Requested)

REPLY BRIEF OF THE APPELLANTS

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ARGUMENT

Claimant's response brief rightfully focuses on the limited nature of this Court's review in workers' compensation cases since the focus of the Employer/Carrier's appeal are fact based determinations by the Mississippi Workers' Compensation Commission. A high hurdle is imposed for overturning such decisions but, as was discussed in the initial brief, the appellate court may reverse a Commission order contrary to the overwhelming weight of the evidence and clearly erroneous. ***Lott v. Hudspeth Ctr.***, 26 So.3d 1044, 1048 (Miss. 2010) (citing ***Vance v. Twin River Homes, Inc.***, 641 So.2d 1176, 1180 (Miss. 1994)). It is a claimant's burden to prove an injury arising from employment and a causal connection between the injury and the alleged disability. ***Penrod Drilling Co. v. Etheridge***, 487 So.2d 1330, 1331 (Miss. 1987). Although a claimant's testimony in this regard should generally be considered truthful, testimony contradicted by medical records or physician testimony may constitute substantial evidence upon which the claim may be denied. ***Westmoreland v. Landmark Furniture, Inc.***, 752 So. 2d 444, 447-449 (Miss. Ct. App. 1999). The record in this case is replete with medical records and other documentary evidence, much of it not specifically remarked upon in the written decisions below, demonstrating the error requiring reversal now.

Generally speaking, it is the Commission findings which are reviewed on appeal. ***Tyson Foods, Inc. v. Thompson***, 765 So.2d 589 (Miss. Ct. App. 2000). In the present case the Commission's two member majority offered no written explanation for their decision and it was only the dissent which detailed why reversal was warranted. ***Record Excerpt No. 2 to Brief.*** It is therefore the Administrative Judge's opinion that is the focus of this appeal and it is the basis of those conclusions meriting scrutiny. Although the Order of the Administrative Judge made

passing reference to "inconsistencies" in the evidence presented, no substantial analysis was presented and the Reply brief focuses upon the two conclusory bases offered in justification of the ruling: the Claimant's own testimony and the medical opinions of the two physicians deposed.

However, the Administrative Judge's opinion clearly misconstrued the opinion of Dr. Fineburg, quoting him as saying "[t]herefore, it appears her back injury that resulted in surgery was work related." (ALJ Order, p. 7, **Exhibit A to Brief)** This was indeed Dr. Fineburg's opinion but the context for this statement is not provided. As was detailed in the Employer/Carrier's initial brief, Dr. Fineburg was under the impression Claimant sustained a work injury sometime after he saw her on January 13, 2006 because this is what she told him when she came in to see him in March 2006. (E/C Composite Medical Exhibit 5) Dr. Fineburg had no reason to disbelieve Claimant and based his conclusion upon what she told him but, rather than supporting the finding of compensability, this statement from Dr. Fineburg cuts entirely the other way. To have it cited in the Order as supporting the claimed injury in November 2005 is especially confounding.

The other medical opinion testimony relied upon by the Administrative Judge came from Dr. McCloskey. ***Record Excerpt No. 1 to Brief.*** Yet, it is illogical to accord his opinion (or any other doctor in similar cases) with special significance as its basis is no more sound than the history provided by the Claimant to the doctor. This Court has recognized this, recently declining to rely upon a physicians opinion based solely on the delayed report of a work related injury. ***Brown v. Robinson Prop. Group, Ltd.,*** 24 So.3d 320, 325 (Miss. Ct. App. 2009). In ***Brown***, the Claimant allegedly injured his elbow at work but failed to report the work related nature of his injury until several months later. ***Id.*** at 324. The Commission overturned the

findings of the Administrative Judge and denied compensability. *Id.* at 321. On appeal, the Court agreed with the Commission's analysis of Claimant's doctor's opinion, reasoning Claimant's doctor did not provide an objective opinion to a reasonable degree of medical probability because his opinion was based solely on Claimant's delayed report. *Id.* Simply put, the employee in ***Brown*** "conveniently recalled an injury when it served his needs". *Id,* at 324.

This case is no different than ***Brown*** and, if anything, provides greater documentary basis for doubting the veracity of Claimant's history and Dr. McCloskey's resultant opinion. To begin, Claimant did not report a work injury of any kind to Dr. McCloskey until placing a telephone call to his office on March 14, 2006. ***Record Excerpt No. 5 to Brief.*** Her injury allegedly occurred in November 2005, she worked until January 19, 2006, had surgery on January 24, treated with Dr. McCloskey for approximately six weeks, was released to work by him in early March and only then, after realizing she could not pass her return to work physical, did she relay a report of a work injury. (E/C Composite Medical Exhibit 5) It was two days later, on March 16, 2006, that Claimant first told Dr. McCloskey the story of how she was injured. ***Record Excerpt No. 6 to Brief.***

If it were simply a matter of delay then the issue would be close and the "substantial evidence" rule would likely compel this court to uphold the Commission. The delay here is only half the story though. Claimant went to Dr. Fineburg on December 20, 2005 and testified she specifically told him her back was injured at work on November 19, 2005 while stepping from a truck. (R., p. 29) His record though, dictated by the doctor right in front of Claimant while in his office that day, says she woke up sore a week previous and recalled no injury. (E/C Trial Exhibit 3, p. 39-40) Claimant says she had no history of back trouble but Dr. Fineburg's record

says she reported otherwise. ***Record Excerpt No. 4 to Brief*** Multiple emergency room records from before November 2005 show Claimant sought treatment for lower back problems, including by her own description in those records, a degenerated disc. (E/C Composite Medical Exhibit 5) Claimant simply denied all of it.

Claimant saw Dr. Fineburg again on January 13, 2006, was in the hospital much of late January for surgery and followed up many times in February. (E/C Composite Medical Exhibit 5) None of these records mention a work injury and, in many cases, specific injury is denied altogether. Under Mississippi law, the medical history a patient provides her doctor is binding upon that patient absent unusual and compelling circumstances. ***Bechtel Corp. v. Phillips,*** 591 So. 2d 814, 818 (Miss. 1991). The issue here is not so much whether Dr. McCloskey's opinion is credible, it is if judged in light of the history Claimant gave him, but whether Claimant should be allowed to construct a history that suits her needs when and if she chooses to, even if this history flies in the face of every record that comes before it.

Claimant's reply brief does not much attempt to explain any of these records and offers no explanation for those portions of her trial testimony which simply cannot be true, i.e. what she told Dr. Fineburg and the various ER doctors. Instead, Claimant opts to say little and cling to the substantial evidence standard by citing Dr. McCloskey's record of January 24, 2006 which noted Claimant "had for some time been having problems with back and leg pain, but things got a lot worse three or four days ago." This is presumably offered to support the proposition Claimant sustained an initial injury at work in November, forgot to mention it to various physicians and in fact gave an alternate version of events, before the injury worsened on its own at some point in late January.

Leaving aside the reasons to doubt an incident even occurred at work in November 2005, how then does one conclude that the "problems" Dr. McCloskey referenced on January 24, 2006 dated to a 2005 work injury as opposed to the pre-existing lower back condition outlined in the earlier ER records (whose accuracy Claimant also denies), or the incident about a week previous to her visit with Dr. Fineburg on December 20, 2005 when Claimant "woke up" with it sore one day? Secondly, Claimant had not worked since January 19, 2006 so the dramatic worsening she testified to and that Dr. McCloskey alludes to in this record happened away from work. (R., p. 35-38) This conclusion is all the more sound since the record makes no mention, just as all the others before March 16 do not, of a work injury happening then or ever.

It is well settled that "[t]he Commission also serves as the ultimate finder of fact in addressing conflicts in medical testimony and opinion." ***Raytheon Aero. Support Servs. v. Miller***, 861 So.2d 330, 336 (Miss. 2003). Ultimately though, this case does not turn on the conflicting opinions of medical expert witnesses. Indeed, both Dr. Fineburg and Dr. McCloskey agree Claimant suffered a significant injury at work but there are two fatal flaws in Claimant's effort to rely upon them. Dr. McCloskey's opinion concerning a November 2005 work injury is utterly contradicted by the earlier medical records and supported only by the inaccurate history Claimant belatedly gave him when she wanted to make a claim. Dr. Fineburg of course is under the impression Claimant was hurt at work in late January, either because this is what Claimant told him in March 2006 or because he assumed it since Claimant had flatly denied any work injury when seen in December 2005 or early January 2006. The doctor's "opinions" are frankly not the issue here at all. Claimant's veracity is the only relevant point and it fails completely when contrasted with the contemporaneous records. The opinions and records of the two

physicians are important only to the extent they shine a light upon the divergent histories provided by Claimant.

CONCLUSION

The Employer/Carrier acknowledges the heavy burden they bear in asking the Court to reverse a finding of fact. However, a fair analysis of Claimant's version of events reveals it cannot stand up to the thorough scrutiny warranted here where the only written opinion outlining the facts and conclusions underlying the decision was authored by the Administrative Judge. This is especially so where some of the evidence cited therein was clearly interpreted wrongfully to support the claim where it in fact did the opposite. For these reasons, and those outlined in the initial brief, the Employer/Carrier requests the decision of the Commission be reversed.

STATEMENT ON ORAL ARGUMENT

As noted above, the standard of review in this case cuts strongly against the party seeking reversal. The Employer/Carrier's argument is based on a multitude of different documents and contrasting witness testimony. It is therefore anticipated the Court may have questions and the Employer/Carrier wants to be in a position to answer them fully. If the Court finds this unnecessary then the Employer/Carrier would of course withdraw the request.

RESPECTFULLY SUBMITTED THIS THE 13th day of August, 2010.

MISSISSIPPI SECURITY POLICE and
COMMERCE AND INDUSTRY INSURANCE CO.

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CERTIFICATE OF SERVICE

I, Jeff Moffett, do hereby certify that I have this day mailed via United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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THIS THE 13th day of August, 2010.

Jeff Moffett