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)

BRIEF OF THE APPELLANTS

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IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

SUSAN PATTERSON — CLAIMANT

VERSUS — CAUSE NO. 2008-00,515(1)

MS SECURITY POLICE AND
COMMERCE AND INDUSTRY INSURANCE CO. — EMPLOYER/CARRIER

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 so that the Judges of this Court may evaluate possible disqualifications or recusal.

1. Susan Patterson, 9209 Samuel Adams Street, Moss Point, Mississippi;

2. Jackye C. Bertucci, Esq., counsel for Susan Patterson, Appellee;

3. Mississippi Security Police, Appellant;

4. Commerce and Industry Insurance Co., Appellant;

5. Jeff Moffett of Markow Walker, P.A., counsel for Appellants;

6. Honorable Melba Dixon, Administrative Law Judge;

7. Mississippi Workers' Compensation Commissioners: Liles Williams, Augustus Collins, John R. Junkin;

8. Circuit Court Judge, Dale Harkey.

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I. The Administrative Law Judge erred as a matter of law and fact in finding Claimant sustained a work related injury where the decision was based upon Claimant's testimony and the substantial weight of the medical records and other evidence introduced at trial contradict Claimant's testimony in every material respect.

III. STATEMENT OF THE CASE

This appeal of a workers' compensation order determining compensability arises out of a back injury allegedly sustained by Claimant while working in the course and scope of her employment as a security guard for Mississippi Security Policy (hereinafter "MSP") on November 19, 2005. The Employer and Carrier deny the incident occurred as alleged or, assuming it did, that this incident necessitated Claimant's subsequent medical treatment, including two back surgeries.

On February 28, 2008, trial was held before the Honorable Melba Dixon, Administrative Law Judge for the Mississippi Workers' Compensation Commission. The evidence presented at trial indicated Claimant not only failed to report any work injury to her medical providers for several months but, more importantly, expressly denied a work injury to her initial doctor. Four months after the alleged injury, and after she learned returning to work was impossible, Claimant reported two different injuries to two different doctors. Notwithstanding this evidence, the Administrative Judge found Claimant sustained a compensable injury while working on November 19, 2005 and related this to Claimant's subsequent medical treatment.

The Employer/Carrier appealed from this Order to the full Commission, relying principally upon the divergence between Claimant's testimony and the testimony of her initial treating physician and the medical records. The Commission entered an Order affirming the Administrative Judge's initial Order without additional comment on September 25, 2008. The Circuit Court of Jackson County subsequently affirmed the decision on August 20, 2009.

The Administrative Law Judge's Order did not directly address the discrepancies between Claimant's testimony, the medical records and her initial doctor's deposition. The Order made

only a summary reference to "inconsistencies" without further explanation. The summary affirmation by the full Commission and the Order of the Circuit Court likewise addressed none of these issues directly. Only Chairman Liles Williams' dissent from the full Commission Order made specific mention of the contradictory evidence and Chairman Williams concluded that "not only is this a doubtful claim, it is downright hard to believe, and is not supported by a preponderance of the credible evidence." The Employer/Carrier agree and, mindful of the very high burden they face in asking this Court to revisit a lower court's factual determinations, now appeal and request this matter be reversed and rendered.

FACTS

Claimant began working for MSP in September 2005 as a security guard (R., p. 23) and was usually stationed in a guard shack at the Chevron facility in Pascagoula. (R., p. 26) She ordinarily worked with another MSP employee but claimed to have injured herself on November 19, 2005, one of the only times she was stationed alone at a different Chevron gate. (R., p. 26-27) Claimant contends she stepped from a truck and felt something "pull" in her right leg and back.[1] (R., p. 27) Claimant testified this was the only work injury she sustained. (R., p. 51)

Claimant completed her shift on November 19 and on the next night claims she told her shift supervisor, Brook Walters, she hurt herself without providing specific details.[2] (R., p. 27) Mr. Walters' allegedly laughed and drove away without comment. (R., p. 27) Mr. Walters was not present at trial but James Wilson, her companion in the guard shack, testified in support of

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[1]The opinion and Order issued by the Administrative Judge stated Claimant testified she "fell" from the truck. (Exhibit A to Brief, ALJ Order, p. 3)

[2]Claimant's shift supervisor was Brook Walters. (R., p. 25). Russ Gardner and John Hyde were the primary MSP supervisors at Chevron. (R., p. 25).

this encounter but said Claimant provided considerable detail about her injury to Mr. Walters. (R., p. 66)

Mr. Wilson, who left MSP's employ a week after this alleged conversation, testified he told Claimant to report the incident to someone else. (R., p. 66) Claimant never again attempted to speak with Mr. Walters about her alleged injury (R., p. 28-29, 36-37) and she never make any attempt to raise the issue of her alleged injury or Mr. Walter's response with anyone else.[3] Claimant's last date of employment with MSP was January 20, 2006 and, during those two months, Claimant never discussed the matter with the primary MSP supervisors at the Chevron facility, John Hyde and Russell Gardner. (R., p. 38) She concedes Mr. Gardner was a family friend she had known for years. (R., p. 26)

Claimant's first medical visit after November 19, 2005 was just over one month later with Dr. Paul Fineburg on December 20, 2005. She claims to have told Dr. Fineburg three very specific things: she injured her back while working for MSP on November 19, 2005 when stepping from a truck. (R., p. 29) However, Dr. Fineburg's record for this visit provides the following history:

> This is the initial visit of this 29 year old female. She is in with back pain. It started a week ago. It got progressively worse over the last two days. There was no specific injury or inciting event. She woke up with it sore one day. It seems to be going down her right buttock. Her right great toe was numb the other day. It seems to have resolved. She has had intermittent low back problems in the past. None have ever required surgery or missing significant work. She has no history of low back injuries.

Record Excerpt No. 1 to Brief (Emphasis applied). (Also available as attachment to E/C Trial

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[3]Mr. Walters left MSP's employ in January 2006 prior to Claimant's last day of work.

Exhibit 3 and E/C Trial Exhibit 5)

Dr. Fineburg's December 20, 2005 medical record was discussed point by point at trial. (R., p. 30-32) Claimant denied giving this history or that the information recorded was true but Dr. Fineburg also testified in this case and he was certain this record was accurate for several reasons. First, he and his office "pay meticulous attention to whether it's going to be workers' comp or not...[because] its's usually filed under a completely different chart." (E/C Trial Exhibit 3, p. 7) In order to make sure work related injuries are recorded as such, in part because it affects how they are billed, Dr. Fineburg's staff asks the patient whether the injury happened at work when they first come in and the doctor himself asks again when taking the history from the patient. (E/C Trial Exhibit 3, p. 11-12) Dr. Fineburg's diagnosis is of course often informed by the mechanism of injury and, in reviewing his record when testifying, he knew Claimant was directly asked whether she sustained an injury because his record indicates she answered the question in the negative. (E/C Trial Exhibit 3, p. 12)

Misunderstandings can happen of course, but Dr. Fineburg was certain the office note accurately reflected what Claimant told him because he dictated it with Claimant present in the examining room on December 20, 2005. (E/C Exhibit 3, p. 39-40) In other words, Claimant listened to Dr. Fineburg say every word block quoted above from the office note. Claimant admitted Dr. Fineburg dictated this record right in front of her but she denied the dictation which appears in the medical record is actually what he said. (R., p. 32)

Claimant's report of something other than a work injury was not the only discrepancy between her testimony and the December 20, 2005 medical record. While Dr. Fineburg stated Claimant reported "intermittent low back problems in the past," she denied telling him this. (R.,

p. 31-32) Not only did she deny saying it, Claimant flatly denied she had any back problems requiring medical treatment in the five years preceding this alleged work accident. (R., p. 17-23) The Employer/Carrier's Composite Medical Exhibit 5 (an index is attached to the front) shows otherwise:

1. Singing River Hospital, October 24, 2001: Back pain over three weeks radiating into the left leg;

2. Singing River Hospital, November 25, 2001: Claimant taking Skelaxin due to back pain;

3. Singing River Hospital, January 14, 2002: Claimant taking Skelaxin for back pain, woke up unable to move due to back pain after lifting boxes at work the preceding day, taken off work for short period;

4. Singing River Hospital, December 19, 2002: Claimant had severe back pain registering 9/10 for previous week;

5. Coastal Family Medical Clinic, July 16, 2003; Claimant reported she suffered from lower back pain;

6. University Medical Center, November 17, 2003; Claimant reported she suffered from back pain due to a degenerated disc;

7. University Medical Center, December 8, 2003; Claimant reported she suffered from back pain;

8. University Medical Center, May 27, 2004; Claimant reported she suffered from back pain;

9. Singing River Hospital, October 2, 2004; Claimant reported back pain radiating into her right flank;

10. Singing River Hospital, October 19, 2004; Claimant reported back pain radiating into her right flank, told the physician she had disc problem in her back, physician told her she had low back pain with radiculopathy.

Just as she did when discussing Dr. Fineburg's record, Claimant refused to deal with the reality of the ER records. She claimed the records misrepresented her actual condition and these

multiple emergency room visits had nothing to do with her back, but rather with "female" issues. (R., p. 19-20) In an effort to give Claimant the benefit of the doubt where warranted, she was asked at trial clarify why certain of the above medical records show her telling the doctors she had a degenerated disc in her back. (R., p. 22) Unable to dispute what appears in black and white, Claimant simply denied any recollection of these statements. (R., p. 22)

After seeing Dr. Fineburg on December 20, 2005, Claimant's condition worsened and she returned on January 13, 2006. (R., p. 33) There is again no mention of work related injury and Dr. Fineburg recommended an MRI and physical therapy. (E/C Composite Medical Exhibit 5) Claimant complained to her physician about the costs associated with this but, despite her insistence a work injury was reported in December, she could not explain why Dr. Fineburg did not tell her medical treatment would be covered by workers' compensation. (R., 34-35)

Claimant's last day of work was the night of January 19-20, 2006 and by this point she had not reported any of her medical treatment to her employer. (R., p. 35-38). She left work at 5:00 a.m. on January 20 and two days later reported to the Singing River Hospital emergency room on Sunday, January 22, 2006. (R., p. 39) The record for the ER visit indicates her right leg had become almost paralyzed over the previous day and a half, i.e. after her last day of work. (E/C Composite Medical Exhibit 5) Claimant specifically reported "no injury" to the hospital staff.

Claimant declined admission to the hospital on January 22 but returned to the emergency room near midnight on the night of January 23-24, 2006. (R., p. 41) She was admitted and emergency back surgery was performed on the afternoon of January 24, 2006 due to the presence of two very significant disc herniations. (E/C Composite Medical Exhibit 5) None of the records during her week long admission to the hospital give any indication of a work related injury. (E/C

Composite Medical Exhibit 5) To the contrary, the record dictated by Dr. Jason Hannegan at 2:17 p.m. on Tuesday, Jan 24, 2006 states Claimant was unsure of any trauma. (E/C Composite Medical Exhibit 5)

According to Claimant, shortly after her discharge from the hospital on January 31, 2006, she received a telephone call from Tim Jesperson, the Director of Human Resources for MSP who terminated her employment during this call. (R., p. 42) In something of a *non sequitur*, Claimant testified she at this point remarked to Mr. Jesperson that she had never claimed her condition was not work related. (R., p. 43) Mr. Jesperson then allegedly took the details of her injury but told her she could not make a claim because too much time had passed. (R., p. 43)

Mr. Jesperson left MSP in July 2006 and currently works as Wal-Mart's director on human resources for stores located in the Florida panhandle and Alabama. (R., p. 70) Prior to his employment with MSP, Mr. Jesperson was workers' compensation compliance coordinator for Grand Casino Biloxi and Grand Casino Gulfport. (R., p. 71) He voluntarily returned to the State of Mississippi for trial in this case and his testimony concerning the interaction with Claimant is more plausible.

Mr. Jesperson confirmed he called Claimant after her discharge from the hospital to advise company policy required termination due to un-excused absence but he testified Claimant was asked to come by MSP's office to discuss the issue in person. (R., p. 81-82) He met with Claimant on or about February 3, 2006. (R., p. 81) Mr. Jesperson explained the company's policy on absence due to medical condition and advised Claimant she was ineligible for FMLA leave since she had not been employed the requisite time required by this statute. (R., p. 82) He also explained the distinction between the company's policy for non-work related condition and

their policy of accommodation, where possible, for employees injured at work. (R., p. 82) It was then that Claimant interjected that she had never said her condition was not work related. (R., p. 82) Mr. Jesperson asked her specifically whether she was claiming to have had a work injury and, if so, for details of her injury by way of an incident report but Claimant declined to do so. (R., p. 82-83)

After this meeting with Mr. Jesperson on February 3, 2006 Claimant went to Dr. McCloskey's office the same day to have her staples removed. (R., p. 44) The medical record shows she reported her termination and she also apparently asked Dr. McCloskey or his staff whether her injury was work related. (E/C Composite Medical Exhibit 5) There is no indication she provided any details or history of a work related accident. (E/C Composite Medical Exhibit 5) Indeed, Dr. McCloskey's records through February and early March continue to say nothing of a work injury. (E/C Composite Medical Exhibit 5)

According to Dr. McCloskey's records, Claimant telephoned his office on March 13, 2006 requesting a release to return to work. (E/C Composite Medical Exhibit 5) Dr. McCloskey provided an unrestricted work release that same day (E/C Composite Medical Exhibit 5) Also on March 13, Claimant returned to Dr. Fineburg but it is unclear whether this visit was before or after her telephone call to Dr. McCloskey. (E/C Composite Medical Exhibit 5) The visit with Dr. Fineburg appears primarily related to cold or flu issues, but it also states in part:

> She has had an interesting time frame since we last saw her [on January 13, 2006]. We had set her up for a MRI of her low back. She continued to work and did something at work basically bulged her disk out resulting in some paralysis. She subsequently had to undergo emergency lumbar surgery to resolve it.

(Emphasis applied) In other words, Claimant's first definitive report of a work injury was on

March 13, 2006 but she told Dr. Fineburg about a work accident resulting in paralysis that occurred "since [he] last saw her" on January 13, 2006.

Having procured the medical release from Dr. McCloskey on March 13, 2006, Claimant took it to MSP on March 14 but learned she had to take a physical. (R., p. 47) Claimant did not attend the physical because she knew it would be impossible for her to pass. (R., p. 47) This same day, March 14, she called Dr. McCloskey's office and reported a work injury to him:

> 3/14/06 [patient] calls - now attempting to file a w/c claim - needs something in writing stating her injury is work related - she was attempting to RTW but will be required to pass a physical which she can't do [at] this point.

Record Excerpt No. 2 to Brief. (E/C Composite Medical Exhibit 5) Claimant had of course testified she reported a work injury to all her physicians from the very beginning, so she simply denied making this call to Dr. McCloskey. (R., p. 47)

Two days later, on March 16, Mr. Jesperson received a fax from Claimant's counsel advising him of Claimant's workers' compensation claim. (R., p. 84) Mr. Jesperson immediately requested statements from Chris Gilbert and Russell Gardner, the two primary MSP supervisors at Chevron,[4] and prepared a First Report of Injury so the claim could be turned over to the workers' compensation carrier. (R., p. 85-86) The written statements from Mr. Gardner and Mr. Gilbert denying Claimant's report of work injury were part of the personnel file authenticated by Mr. Jesperson. The Administrative Law Judge allowed the authenticated personnel file into evidence but excluded the written statements taken from Mr. Gilbert and Mr. Gardner as

[4]Brook Walters, having left MSP in January 2006, was not available to give a statement to Mr. Jesperson by the time Claimant reported her injury.

hearsay.[5] (R., p. 86-93)

The same day her counsel wrote to Mr. Jesperson, March 16, Claimant also called Dr. McCloskey again:

> She is attempting to file a w/c claim, about the end of Nov, [first] of December, she was sitting in a diesel truck (one that's high off the ground) while working for MSP. She stepped out of the truck, when her right foot went down she felt something pull in Rt leg, this continued to worsen, she saw Dr. Fineburg a week or so later, was given pn meds which helped some, however her condition worsened and she ended up in the ER underwent MRI and surgery. Symptoms continued to progress and she has cont'd [unknown word] to this day.

Record Excerpt No. 3 to Brief (E/C Composite Medical Exhibit 5) (abbreviations in the original) This telephone call is the first time Claimant reported a November-December 2005 work injury.

As she had with the March 14 call, Claimant again denied this telephone call to Dr. McCloskey. (R., p. 48) However, while none of Dr. McCloskey's records before this date mention a work injury, all of his records after March 16 specifically reference a work related injury sustained in December 2005. Three such records, dictated on March 29, March 30 and April 9, 2006 are attached as part of Employer/Carrier's composite Exhibit 5.

This same week, Claimant apparently requested Dr. Fineburg prepare a letter discussing the cause of her condition. Claimant also implausibly denied requesting this letter (R., p. 49-50) but, in any case, Dr. Fineburg prepared it on March 17, 2006. ***Record Excerpt No. 4*** to Brief (E/C Composite Medical Exhibit 5) He confirmed Claimant provided "no known history of injury" during her visit on December 20, 2005. He then outlined the extent of her complaints on

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[5]The statements indicate the supervisors had no knowledge of any work injury. Claimant's back problems were known but were understood to be related to her life-long weight issues. Mr. Gardner was no longer employed by MSP at the time of trial and was under subpoena but did not appear. For purposes of this appeal the Employer/Carrier does not argue the statements were substantively admissible but rather as authenticated documentary evidence of the Employer's investigation.

January 13, 2006 and his recommendation for MRI at that time. The letter continues:

> After that visit [on January 13, 2006] the patient was not seen again until March. At that time she had returned after having emergency back surgery by Dr. McCloskey. **According to the patient while she had continued to work full duty while we were evaluating her back she had an incident at work where she felt something pop**, and according to her basically it progressed to lower extremity paralysis bilaterally which required emergency surgery by Dr. McCloskey.

[Emphasis applied].

Dr. Fineburg's letter went on to say Claimant had back problems when he initially saw her on December 20, 2005, "but apparently these were made acutely worse by some incident at work" requiring surgery. Thus, he concluded the surgery was related to the work injury she sustained in January 2006. For her part, as was the case with so many other inconvenient facts, Claimant simply denied giving Dr. Fineburg any of the history recorded in his letter. (R., p. 51)

IV. SUMMARY OF THE ARGUMENT

It is simply impossible to square Claimant's testimony of a November 19, 2005 work related injury with the medical records. This is not a circumstance where the discrepancies can be chalked up to Claimant being a "poor historian." She has flatly denied or disavowed every recorded detail at variance with her claims. The sheer volume of the contradictions renders them impossible to dismiss and her denials of so many easily established facts undercut her credibility entirely.

The Order issued by the Administrative Judge makes only passing reference to "inconsistences" and there is no explanation offered as to what these were or why they were discounted. The Commission's majority opinion and the Circuit Court's short affirmation likewise include no account of a struggle to reconcile the contrary evidence. It is remarked upon only by Chairman Williams' dissent and he was unable to square Claimant's testimony with the records. The Employer/Carrier respectfully submit this must be the result for anyone who would attempt, in written form, to lay out the contrary evidence and detail the rationale of the result.

V. ARGUMENT

1. Standard of Review

The Employer/Carrier acknowledges the daunting task they face in asking this Court to revisit a resolution of fact by the trial court. A factual determination by the full Commission will be affirmed where there is substantial and reasonable inference in the record to support it. ***Central Electric Power Assn. v. Hicks***, 110 So. 2d 351 (Miss. 1959). However, such determinations shall be found "clearly erroneous when, although there is slight evidence to support it, the reviewing court on the entire evidence and the record, is left with a firm and

definite conviction that a mistake has been made by the Commission in its findings of fact and its application of the Act." ***Id.***, 110 So. 2d at 356.

The Employer/Carrier respectfully submit this standard can be met for reasons more fully explained below. What "slight evidence" may exist to support the underlying decision is overwhelmed by evidence to the contrary. The lack of any discussion of the latter in the written decision produced by the trier of fact should at the least give pause when considering whether a mistake was made.

2. Applicable Law

A claimant bears the burden of proving an injury arising from employment and a causal relationship between the injury and alleged disability. ***Penrod Drilling Co. v. Etheridge***, 487 So. 2d 1330, 1331(Miss. 1986). A claimant's testimony in this regard should generally be regarded as truthful. ***Westmoreland v. Landmark Furniture, Inc.***, 752 So. 2d 444, 449 (Miss. Ct. App. 1999). However, when Claimant's testimony is contradicted by medical records or physician testimony, this "negative testimony" may constitute substantial evidence upon which the claim may be denied. ***Id.***, 752 So. 2d at 447 (citing ***White v. Superior Products, Inc.***, 515 So. 2d 924, 927 (Miss. 1987)). Testimony may be accepted or rejected based upon circumstances demonstrating its degree of credibility or trustworthiness. ***Id.***

2. Analysis

The compensability of this claim rests almost entirely upon the credibility of Claimant's testimony. Although Dr. McCloskey opined Claimant's injury was work related, the Administrative Law Judge correctly observed his causation opinion was "based solely upon the fact Ms. Patterson said [she] had an incident at work and that's when [her] back trouble

started." (ALJ Order, p. 11, ***Exhibit A to Brief***) Dr. McCloskey's testimony does not take on any special significance due to his status as a physician if he is simply operating on the history given him by Claimant. It is the Claimant's trial testimony that is the pillar upon which the lower court's decision rests, but Claimant's statements are demonstrably false and should not serve as the basis for finding the claim compensable.

Several illogical conclusions are required to find Claimant credible, primary among them a belief that Dr. Fineburg's records and trial testimony are hopelessly inaccurate. Dr. Fineburg saw Claimant one month after her alleged work injury and, though she claims to have told him her injury happened on November 19, his record says her pain started a week prior to her visit. She claims to have specifically told Dr. Fineburg she was hurt when she stepped from a truck while working for MSP. Dr. Fineburg's record says Claimant "woke up with [her back] sore one day" and there was "no specific injury or inciting event." Claimant denied any previous low back problems but Dr. Fineburg's record states she told him otherwise. Hospital records reveal several admissions for back pain and reports of a degenerated disc long before November 2005. Claimant denies all of it.

Claimant contends she should not be penalized for being a poor historian and analogizes her case to other compensable claims where employee's initial medical reports were vague and later synthesized with subsequent history and earlier developed facts. The discrepancies here though are not matters one can chalk up to confusion or mis-communication between patient and doctor. In this case the initial medical record is not simply silent as to the existence of a work injury and cannot be interpreted as innocent forgetfulness of an important detail. Claimant instead gave Dr. Fineburg a very specific history that so thoroughly contradicts her claim she had

to later disavow it entirely.

Dr. Fineburg testified in this case and has no stake in the outcome. He had no doubt Claimant was specifically asked how she hurt herself and the record indicated she had responded in the negative to this very question. More importantly, the December 20, 2005 office note was dictated by Dr. Fineburg with Claimant in the room but, as with every other piece of evidence inconvenient to her claim, Claimant simply denies Dr. Fineburg really said what appears in the note. This single point, even taken completely alone, is so unlikely it demonstrates the extreme suspension of disbelief required to take Claimant credibly on anything.

There is far more than a single point against her claims though. Finding Claimant credible requires not only total disregard of Dr. Fineburg, but one must also believe Claimant told Brook Walters she got hurt but provided no details, that she completely dropped the matter when Mr. Walters laughed in her face and drove off and she never raised it with a supervisor who happened to be a long time family friend. This hardly seems like a plausible response especially when the cost of medical treatment was a concern throughout.

Claimant writes this off to her lack of familiarity with workers' compensation. Yet, this requires one to believe Claimant was somehow hired by MSP without their usual instruction on injury reporting and that she was allowed to work on Chevron's property without being first subject to their own independent instruction. None of this is true of course and Claimant admits she did take a class on workers' compensation and safety issues.

Claimant argues these facts are irrelevant and, because she has testified to a November 2005 work injury, it is up to the Employer/Carrier to affirmatively prove a different injury event. This would ordinarily be difficult, as proving a negative usually is, but here the medical records

for Claimant's emergency room visits on January 22 and 24, 2006 indicate Claimant became partially paralyzed over the weekend after she left MSP for the last time at 5:00 a.m. on Friday, January 20. Using the same standard of inference suggested by Claimant, an injury event over the weekend is equally and perhaps more plausible. Whatever the case, several records from her hospital admission that week specifically say she denied any known injury or trauma and there was never any mention of a work injury by Claimant.

Claimant's descriptions of the events at issue is utterly at odds with another disinterested witness. As was the case with Dr. Fineburg and the physicians who produced the Singing River records, Mr. Jesperson had no stake in the outcome of these proceedings as he is no longer employed by MSP and now resides in another state. It defies logic to believe he would voluntarily drive back to Mississippi to appear at trial only to perjure himself.

Mr. Jesperson testified Claimant made a cryptic comment during his exit interview but declined to provide a report of an injury or any detail when asked. The obvious explanation is that this moment, when Claimant had lost her job, was the first time she contemplated making an injury claim. Yet, she knew her injury was not work related and she was not inclined to make a definitive claim she knew to be false since she evidently intended to return to work for MSP. Claimant insinuates the Employer acted to frustrate her claim but, as Mr. Jesperson pointed out at trial, simply accepting an incident report from the Claimant would not have meant the claim was compensable. It would merely have precipitated an investigation which would have been handed to the Employer's insurance carrier. Any decision on compensability would have rested, primarily, with the carrier and not Mr. Jesperson.

The subsequent medical records appear to bear out Claimant's plan changed as her

circumstances did over the next six weeks. She first tried to return to work but, when she realized this was impossible on March 14, she called Dr. McCloskey the very same day and first reported her injury was work related. She gave no details then but, two days later on March 16, 2006, she called Dr. McCloskey again and specifically said she was hurt in November or December 2005 while stepping from a truck at work. All of Dr. McCloskey's records thereafter mention a work injury but none of those pre-dating this phone call do, making it very clear this was her first report.

Claimant understood the implications of these calls but, unable to provide any reasonable explanation for them at trial, she simply denied them. This was a recurring theme at trial when any troubling written record threatened to disrupt the narrative Claimant sought to construct. She denied Dr. Fineburg dictated what appears in his record. She denied any of the prior back problems in the ER records. She denied telling the ER doctors about a degenerated disc in her back. She denied calling Dr. McCloskey on March 14 or 16, and she denied requesting a letter from Dr. Fineburg.

If the other evidence could not overcome Claimant's dogged denials, the latter provides the weight under which the entire rotten edifice should crumble. Dr. Fineburg's March 17, 2006 letter begins by confirming Claimant gave no history of injury when seen on December 20, 2005, just as he later testified. It says on March 13 she reported an incident at work "where she felt something pop" causing paralysis. In other words, the work injury happened after her January 13, 2006 visit to Dr. Fineburg.

It cannot be said this history was just another mis-communication since Claimant utterly denies requesting the letter and denies providing the history to Dr. Fineburg. The basis of the

letter is plain to see though. As of March 16 she was casting around for medical opinions to support her newly made claim of work injury. Dr. Fineburg simply wrote what he knew to be true, i.e. Claimant had no work related injury when she came in on December 20, 2005 but she told him on March 13 that she had a felt a pop in her back sometime after her last visit with Dr. Fineburg on January 13, 2006.

As outlined above, Claimant had not reported a work injury to Dr. McCloskey as of March 13, but over the next three days she would telephone twice to report a November-December 2005 injury. We will never know when Claimant requested the letter from Dr. Fineburg since she denies doing so, but it seems quite clear she understood her conundrum. There had been no work injury in January 2006 (a fact Claimant admitted at trial) and Claimant had to tell Dr. McCloskey a different story to make her case. Dr. Fineburg, who saw her in December and dictated his note right in front of Claimant, would have easily comprehended the lie had she tried to tell him a different story in March. Thus do we have the letter which should remove all doubt that the claim of work related injury was inexpertly fabricated once her circumstance, which the Employer/Carrier recognizes was extremely difficult, became clear.

V. Conclusion

Claimant bears the burden of proof on the issue of compensability. It is therefore her duty to show her condition is more likely than not related to a work injury on November 19, 2005. When considering whether this burden was met, Claimant's own testimony is to one side and on the other are voluminous medical records contradicting her statements, the testimony of Dr. Fineburg and Mr. Jesperson who have no stake in the outcome and Claimant's own selective lack of memory when confronted with inconvenient details.

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:

Jackye C. Bertucci, Esq.
Post Office Box 8212
Biloxi, MS 39535
Counsel for the Claimant

THIS THE 30th day of March, 2010.

Jeff Moffett