IN THE SUPREME COURT OF MISSISSIPPI

NO. 2009-WC-01526-COA

JAMES D. ROMINE — **APPELLANT**

VERSUS

ALLIED WASTE NORTH AMERICA, INC., A/K/A BFI AND AMERICAN HOME ASSURANCE COMPANY — **APPELLEES**

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ROBERT H. TYLER
ATTORNEY AT LAW
MSB NO[redacted]
TYLER LAW FIRM
160 PORTER AVENUE
P.O. BOX 1124
BILOXI, MS 39533-1124
TELEPHONE: (228) 436-4682
FACSIMILE: (228) 436-3991

TABLE OF AUTHORITIES

REPLY ARGUMENT

The rule governing appellate review of an administrative agency' decision, such as one made by the Workers' Compensation Commission, is clear: If substantial evidence exists in the record to support the administrative agency's decision, appellate courts affirm the decision. It is the application of this rule to the specific facts of a case that causes divergent opinions. As illustrated by the parties' briefs in this case, precedent can be cited to support the respective arguments.

It is still Romine's position that Dr. Kalnas' opinion that Romine suffered from hypertension that resulted in a lesion that caused his neuromuscular condition is not based on evidence that provides an adequate factual basis from which the opinion can be inferred and is , thus, not substantial. This is because there is no evidence that Romine suffered hypertension; he was never treated for it and it was never considered by any treating physician as a potential causative condition of his dystonia.

Romine still submits that the Supreme Court's decision in *Sharpe v. Choctaw Elec. Enter.*, 767 So.2d 1002 (Miss. 2000) is the best example of the application of appellate review of a workers' compensation claim involving admitted chemical exposure on the job and is more closely akin to the instant case.

In its reply, the Employer/Carrier criticizes Romine's failure to address the Court of Appeal's decision in *Hensarling v. Casablanca Construction Company*, 906 So.2d 874 (Miss. Ct. App. 2005). It is suggested that the evidence presented in the *Hensarling* case "is nearly identical to the evidence" in this case; thus, providing the distinguishing aspects from the Supreme Court's decision in *Sharpe*. Romine disagrees.

In *Hensarling*, the claimant alleged that his compensable injury arose from from workplace exposure to unidentified substances at unidentified times. He alleged anemia, neutropenia, and a bone marrow disease resulted from these vague exposures. 906 So.2d at 875. Hensarling was a carpenter for the employer and alleged that he had exposure to termite and pest control treatments. There was no specific exposure incident identified in the case; rather, it appears that it was based on a 10-year employment history. In contrast, here there were two specific incidents of chemical

exposures that Romine identified. One resulted in overnight hospitalization and the other preceded his severe onset of a neuromuscular condition by mere days.

In *Hensarling,*, the appellate court agreed with the Commission that the claimant had provided little, *if any*, probative evidence supporting his theory that he had suffered a workplace injury. Apparently, the only exposure testimony was vague allegations by Hensarling that he walked through smoke of burning leaves and lumber and visquine which made him feel nauseated and that he installed visquine over ground that had been sprayed with insecticide a few times a year. This, according to the Court, did not "provide sufficient support for his claim that his illness was work-related". *Id.* at 877.

In *Hensarling*, in contrast to Romine's case, no treating physician suggested or even alluded to chemical exposure as being a potential causative factor for any condition. For example, Dr. Beaman, testified he "no idea" what might have caused the neutropenia., Dr. Cox, the treating toxicologist, identified prescription medication prescribed by Dr. Beaman as the cause. Even Dr. Beaman testified that the condition could have resulted from the medication. *Id.* In contrast, Romine's treating neurologist, Dr. Gorman, testified that, after an eight day hospital work-up, neurosurgical consultation (Dr. Terry Smith) and extensive diagnostic and radiological work-up, it was his opinion, *based on a reasonable probability*, that Romine's exposures to chemicals in the workplace caused the dystonia. That is clearly not "identical" to any of the facts in *Hensarling* where none of the treating physicians gave any opinion suggestive of workplace connection. Instead, in *Hensarling* only one doctor offered affirmative medical testimony explaining the origins of the claimant's condition and it was not workplace related.

In distinguishing the *Sharpe* decision, the *Hensarling* court noted that there was "no identifiable chemical exposure during *Hensarling's* employment with Casablanca." *Id.* at 878. Here, as in *Sharpe*, there are identifiable chemical exposures that occurred during the course and scope of Romine's employment..These incidents were the foundation of Dr. Gorman's affirmative opinion and are referenced by other treating physicians such as Dr. Chance (p. 66 of General Exhibit 1), and Dr. Fang who stated he could not "exclude toxic exposure" (General Exhibit 6). While in

Hensarling, the appeals court noted that there was *uncontradicted* medical evidence that the claimant's condition was medication related, such is not the case here. As the appeals court noted, *Hensarling* did not even prove his injury by speculative testimony. *Id.* at 878. *Hensarling* is nowhere near identical to Romine's claim.

From an appellate review standpoint, one question is whether Dr. Kalnas' opinion can be characterized as substantial evidence. As in *Sharpe*, Romine contends that the retained expert's opinion does not provide substantial evidence in light of the treating physician's opinion and the beneficent purposes of the Workers' Compensation Act. As previously pointed out, Dr. Kalnas' conducted no studies, tests, and he never reviewed any of the MRI films of the lesion to which he attaches so much importance. He did, however, agree that exposure to toxic chemicals is a known cause of dystonia. He admitted that there was no evidence to suggest Romine's condition was genetic or congenital. He attributed the cause to hypertension resulting in the cyst or lesion. Dr. Kalnas testified that he relied upon radiologists' interpretations of MRI's, but downplays the fact that all of the interpreting radiologists and the neurosurgeon (Dr. Terry Smith) all noticed the cyst, its size and concluded that it was benign and not causally related to the dystonia. Nowhere in the record did Kalnas address that fact that none of the treating neurologists, neurosurgeons, or interpreting radiologists, attributed any clinical significance to the lesion. Instead, he suggests that, since they did not have benefit of a post-onset MRI taken in October 2002, their opinions were not credible. He further attempts to support his opinion by suggesting the medical research concludes that one time, limited exposure to "ammonia, chlorine and muriatic acid" could not result in the condition. However, the exact nature of the chemicals to which Romine was admittedly exposed, which resulted in at least two (2) distinct incidents, was never identified; Romine only testified that it smelled like those chemicals. The important point is that Romine suffered two (2) incidents of exposures significant enough to result in one hospitalization in May 2002, and an incident in August 2002 that preceded the dystonic onset by several days.

Dr. Kalnas' opinion is suspect. He disagrees with every radiologist, neurosurgeon, and neurologist; he ignores that there is no medical evidence supportive of a history of hypertension and

ignores that the current treating physician, Dr. Zhu who, although he offered no opinion on causation, was fully aware of the presence of the lesion and attributed no significance to it.

CONCLUSION

As noted in *Sharpe*, "[i]t is well established that the provisions of the Mississippi Workers' Compensation statutes are to be construed liberally in favor [of] the claimant and in favor of paying benefits for a compensable injury." 762 So.2d at ¶18. It is indeed a proper rule that doubtful workers' compensation cases should be resolved in favor of compensation. *Id.* at ¶19. Thus, when the issue is an "even question," the Supreme Court has stated it will continue to find in favor of the injured worker. *See, e.g., Metal Trim Industry, Inc. v. Stovall*, 562 So.2d 1293, 1297 (Miss. 1990). That should be the result here. The decision below should be reversed and the matter remanded to the Commission for the proper award of benefits.

For all the reasons set forth initially and the reasons set forth herein, Appellant respectfully requests that the decision of the Commission in this matter be reversed.

This the 30th day of April, 2010.

Respectfully submitted,

JAMES D. ROMINE

By: _____
ROBERT H. TYLER
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Robert H. Tyler, do hereby certify that I have this day served by United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief on:

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

Stephen A. Anderson, Esquire
Attorney for Appellee
Copeland, Cook, Taylor & Bush, P.A.
Post Office Box 10
Gulfport, MS, 39502

This the 30th day of April, 2010.

ROBERT H. TYLER

CERTIFICATE OF FILING PURSUANT TO MISSISSIPPI RULES OF APPELLATE PROCEDURE RULE 25(a)

I, Janet Ivy Smith, do hereby certify that I have this day deposited into the United States Mail a package containing the original and three (3) copies of the above and foregoing Appellant's Reply Brief, which was addressed to Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS, 39205-0249, and contained first class, prepaid postage.

SO CERTIFIED on this the 30th day of April, 2010.

Janet Ivy Smith

JANET IVY SMITH

ROBERT H. TYLER
Attorney at Law
MSB No. [redacted]
Tyler Law Firm
160 Porter Avenue
P.O. Box 1124
Biloxi, MS 39533-1124
Telephone: (228) 436-4682
Facsimile: (228) 436-3991