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INTRODUCTION

In his Brief, Parnell Harris fails to substantively address the two key issues in this case. The first issue is the complete lack of medical proof causally relating Mr. Harris' diagnosis of schizophrenia to the alleged incidents at work. Harris simply does what Administrative Law Judge Henry did by arguing that causation is implied from a review of the medical records. Harris does not point this Court to a single medical record which provides any opinions about causation other than Dr. Hiatt's EME report, which rules out the work environment as a cause for Mr. Harris' mental condition. In fact, Dr. Hiatt's causation opinion is the only such opinion which can be found anywhere in the evidence introduced before the Commission.

Claimant Harris argues that the Commission gave improper weight to the opinions of Dr. Hiatt, a conclusion likewise reached by the circuit court judge in this case. This brings up the second key issue in this case for which the Claimant has failed to provide a substantive response.

Even if one could argue that the "implications" about causation in the medical records from Dr. Ladner were enough to create a factual dispute, the Commission decided that factual dispute against the Claimant. Case after case from this Court has held that the Commission is the fact finder in all workers compensation cases and the appellate courts are not to re-weigh the evidence and substitute their judgment for that of the Commission.

More recently, this Court has issued several opinions making it clear that the opinions of a treating physician are not entitled to greater weight than an EME physician simply because they come from a treating physician. This Court has in fact held that the Commission is free to accept the opinions of an EME physician and to reject the opinions

of a treating physician without being subject to appellate reversal. Thus, the continued argument that Dr. Hiatt's opinions were given too much weight simply because he was an EME physician is without merit and should be rejected.

In his Brief, Claimant Harris also makes an argument that the Commission violated the no fault principles of the workers compensation but provides no support for such a conclusion. The Commission rather clearly stated that Claimant's allegations of harassment and abuse "are largely uncorroborated and are in fact largely disputed." (Commission Order, pg.9, App. R. pg. 107). The Commission concluded that Mr. Harris' proof was lacking and that the testimony of his co-workers was more credible. This is a factual finding based on the evidence presented and has nothing to do with fault.

ARGUMENT

I. THE COMMISSION DID NOT IMPROPERLY CONSIDER INADMISSIBLE HEARSAY EVIDENCE WHICH VIOLATED APPELLANT'S DUE PROCESS RIGHTS.

Claimant Harris argues that the Commission improperly accepted the Affidavit of Jimmy Hudson as medical evidence. Harris does not point this Court to any portion of the Commission Order wherein the Commission discussed the Hudson affidavit as medical testimony. In fact, the only mention of the Hudson affidavit comes from one paragraph of the Order on page 4. The Commission states that Mr. Hudson worked side by side with Mr. Harris and did not find the environment to be racially hostile. The Commission further states that Mr. Hudson indicates in his affidavit that Mr. Harris talked to himself frequently and appeared to have some sort of psychiatric or emotional condition. (Commission Order, pg.4, App. R. pg. 102).

There is no further mention of Jimmy Hudson in the Commission's ten page opinion and it is clear that the Commission simply considered and evaluated this testimony as part of the overall puzzle. The Commission did not conclude that Mr. Harris had an emotional or psychiatric problem because of the Hudson Affidavit; in fact, there is no real dispute that Mr. Harris has a psychiatric problem and the question in this case deals with causation of that condition.

Claimant Harris also argues that the Hudson Affidavit was inadmissible hearsay and should have been excluded from evidence. With this issue, the Claimant spends a great deal of time arguing about the admissibility of an affidavit that in the grand scheme of things, had very little impact on the Commission's decision. It was simply one piece of the overall puzzle which led to the Commission's ruling. Even if this court were to disagree with the Commission's consideration of the Affidavit, there is a plethora of other evidence to support the denial of compensation in this case; perhaps most important of which is the Claimant's complete lack of expert medical proof as to causation of his condition.

For better or worse, the Commission is the fact finder in all workers compensation cases and as such, has the final say as to what evidence is relevant and admissible. MWCC Procedural Rule 8 provides that "in compensation hearings the general rules of evidence shall be relaxed so as to permit the introduction of any relevant and competent evidence." This Rule has been interpreted by the Mississippi Supreme Court to allow almost absolute discretion to the Commission in deciding the admissibility of evidence in a workers compensation proceeding.

The Mississippi Supreme Court has said "As an administrative agency, the Commission possesses authority to relax and import flexibility to those procedures where

in its judgment such is necessary to implement and effect its charge under the Mississippi Workers' Compensation Act....it is a rare day when we will reverse the Commission for an action taken in the implementation and enforcement of its own procedural rules. " *Delta Drilling Co. v. Cannette*, 489 So.2d 1378, 1380-81 (Miss. 1986).

Harris also argued in his Brief that the Employer/Carrier somehow surprised him with the sudden introduction of the Affidavit at trial. This has previously been addressed, but to be clear, the Affidavit of Jimmy Hudson was identified by the Employer/Carrier in its answers to discovery, its Pre-Hearing Statement and its Supplemental Pre-Hearing Statement. (See E/C's answers to Interrogatories, Responses to #5 and 10, MWCC Record, Exhibit 4; E/C's Pre-Hearing Statement, MWCC Record, pp. 70-74; E/C's Supplemental Pre-Hearing Statement, MWCC Record, pp.76-90).

It was certainly not sprung on the Claimant as implied in his Brief, but in any event, and as made clear by the Mississippi Supreme Court, the Commission has established relaxed rules of evidence "in the interests of justice" and it is a "rare day" when an appellate court should reverse the Commission's decision about evidence admissibility. The present case falls far short of the circumstances necessary to reach that rare day.

The Circuit Court did not discuss or even mention the relaxed evidentiary standards in a workers compensation proceeding nor did that court discuss the precedent which holds that it should be a rare day indeed when the Commission's decision about the introduction of evidence is reversed. The Circuit Court provides no explanation as to why this case represents that rare exception to the Commission's relaxed evidentiary rules- the court simply jumped to the unsupported conclusion that the affidavit lacked credibility, was not trustworthy and was not considered expert medical history.

II. THE COMMISSION PROPERLY WEIGHED ALL OF THE AVAILABLE EVIDENCE IN REACHING ITS DECISION AND IT WAS THE CIRCUIT COURT WHO IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSION.

Claimant Harris argues that the Commission did not apply the standard of review as established by the Mississippi Supreme Court. The Claimant argues that the Commission did not take into account the entire body of evidence when making its findings of fact and its application of the Act. On pages 32 and 33 of his Brief, Claimant Harris lists twelve different events that he alleges occurred while employed with Scott Colson's Shop and argues that these events support a conclusion that "what he suffered was more than the ordinary events and incidences in the workplace."

Harris does not provide support in the record for any of these events other than his own deposition testimony. The evidence in fact establishes that the Claimant was not abused or mistreated at all while employed by Scott Colson's Shop.

Tony McKay is an African American male, worked with the Claimant shoeing horses and was also supervised by Mr. McGowan. Mr McKay denies ever witnessing any of the alleged conditions or behavior by Mr. McGowan. (See MWCC Record, Exhibit 15, at pages 14-15).

With regard to Mr. McGowan's alleged use of the "n-word," McKay testified that he was only aware of its use while Mr. McGowan was telling a story about his relatives. Mr. McKay further testified that Mr. McGowan apologized both before and after telling the story. (See MWCC Record, Exhibit 15 at p. 35).

In stark contrast to the Claimant's testimony, Mr. McKay testified that Mr. McGowan did, in fact, apologize to the Claimant:

- A. Yes, I heard the apology several times from Donnie.
- Q. You heard it several times?
- A. Yes. Not only has he apologized to Neal, but he apologized to me and Jimmy also.
- Q. He apologized to you and Jimmy and Neal?
- A. Yes.
- Q. Was Neal present when he apologized to you all?
- A. No, madam.
- Q. So, he apologized to you all separately from Neal?
- A. Uh-uh (indicating yes).
- Q. But you were present when he apologized to Neal?
- A. Yes.

(MWCC Record, Exhibit 15, at page 32).

Moreover, Tony McKay testified that he was not offended by Mr. McGowan's story as it was merely involving a story about people in the past. (See MWCC Record, Exhibit 15, at p. 20).

Mark Clay and Scott Colson also disputed and denies the Claimant's allegations of mistreatment. Mr. Clay and Mr. Colson, like Tony McKay, did admit that McGowan did on occasion use curse words and profanity but they were never directed to any one person. (See MWCC Record, Exhibit 12, deposition of Mark Clay at p. pp. 39-40 and MWCC Record, Exhibit 13, deposition of Scott Colson at p. 40).

Similarly, at no time did they ever witness Mr. McGowan directing the "n-word" at any specific person. (See deposition of Colson, MWCC Record, Exhibit 13 at p. 60). In fact when discussing the incident in which Mr. Harris allegedly became offended, Mark Clay

testified that McGowan apologized to Mr. Harris if he had unintentionally offended him by telling the story. (See deposition of Mark Clay, MWCC Record, Exhibit 12 at pp. 31-32).

McGowan himself admitted using profanity and having a "dirty mouth" but clearly stated that he never directed his curse words to any one person and it was done around both whites and blacks. (See MWCC Record, Exhibit 14, deposition of Alex McGowan at pp.29-30 and 33). Mr. McGowan denied ever yelling or cursing at Mr. Harris and strongly denied ever popping his hand and pushing Mr. Harris. (See MWCC Record, Exhibit 14 at pp. 30-32). Mr. McGowan did admit that on one occasion, he grabbed a tool from Harris' hand and stepped in between him and a machine in an effort to protect Harris from harming himself and classified this as an attempt to save his life or keep him from being hurt. (See MWCC Record, Exhibit 14 at pp. 30-32)

With regard to the incident that occurred on or about June 9, 1999, this involved a story told by Mr. McGowan about his grandfather and the use of the word "nigger". (See MWCC Record, Exhibit 14 at p. 12) Mr. McGowan admitted that he told the story and the word was used but it was not directed at any one person. He stated that he just repeated something someone else said in telling the story. (See MWCC Record, Exhibit 14 at p. 13). In addition, Mr. McGowan stated that prior to telling the story, he apologized to Harris and Tony McKay, that he was not intending to offend anyone but he would tell the story as it was told to him. (See MWCC Record, Exhibit 14 at pp. 12-14) He also apologized after telling the story concerning the use of the word "nigger". (See MWCC Record, Exhibit 14 at pp. 12-14) In addition, McGowan stated that the day after the story he apologized again to Harris for using the word "nigger" and that Harris seemed to accept the apology and not be bothered by it. (See MWCC Record, Exhibit 14 at pp. 22 and 24).

This dispute in the evidence was referenced by the Commission in its Opinion and Order, wherein they held in pertinent part as follows:

Claimant's claims regarding Mr. McGowin cursing him, or calling him the "n-word" and/or physically abusing the Claimant are totally uncorroborated, and are in fact largely disputed... As a result, the events giving rise to Mr. Harris' claim are highly in dispute, and because Plaintiff's claims are uncorroborated, the burden of proof necessary to establish an entitlement to compensation has not been met in this case.

MWCC Order, pg.9; App.R., pg. 107.

Claimant Harris argues that his allegations of mistreatment were undisputed and simply ignored by the Commission. The reality; however, is that the allegations were hotly disputed, fully considered by the Commission but rejected as unsupported by the evidence. The Commission's resolution of those factual disputes are entitled to deference and not subject to reversal on appeal.

Although the Employer/Carrier assert that the Claimant did not provide any medical evidence causally relating his psychiatric condition to the alleged incidents at work, even if one accepts the implications argued by Harris, there was still a dispute as to medical causation.

In his Brief, Claimant Harris does not dispute that the first time he sought medical treatment for his alleged mental condition was October 19, 1999, more than 4 months after the alleged incident(s) at work. (See MWCC Record, Exhibit 5, Certified Medical Records of Hinds Behavioral Health Services, at 10/19/99 clinic note; Appellants' Record Excerpts, pp.43-45).

During these four months, Claimant also received unemployment compensation benefits from the Mississippi Department of Employment Security. (See MWCC Record, Exhibit 9, Certified Records of the Mississippi Department of Employment Security).

Notably in order to receive such unemployment benefits the Claimant stated in his application that he was capable of full-time employment. (See MWCC Record, Exhibit 9, at Initial Claim for Benefits). In fact, when specifically asked "Is there any reason you cannot accept full-time work," the Claimant responded by checking "no." (See MWCC Record, Exhibit 9, at Initial Claim for Benefits).

Since beginning treatment at Hinds Behavioral Health, the Claimant has treated with three different psychiatrists. He was eventually diagnosed by a psychiatrist at that clinic with paranoid schizophrenia. (See MWCC Record Exhibit 5 at 10-3-00 Clinic Note; Appellants' Record Excerpts, pg. 58). At no time during his treatment did any of his physicians specifically causally relate Harris' medical condition to the alleged events or incidents at work. (See Hinds Behavioral Health Records, Appellants' Record Excerpts; pp. 42-82).

Although the records reference Claimant's work with the Employer and give a history of events as reported by the Claimant, the records **do not** state that claimant's work caused his schizophrenia. In fact, the records indicate that the Claimant was affected by, and fearful of, many other things including utility workers at his house, the West Nile virus, mosquitoes, and strangers in general. (See MWCC Record Exhibit 5 at 06/26/01, 08/27/02, and 04/16/04 Clinic Notes; Appellants' Record Excerpts, pg. 61, 66 and 73).

Dr. Wood Hiatt was retained by the Employer/Carrier to perform an examination of Mr. Harris. Dr. Hiatt diagnosed the Claimant as having paranoid schizophrenia and specifically opined that Harris' mental condition and disability were not causally related to

his work environment or anything at work:

It is my opinion within a reasonable degree of medical certainty that the chronic paranoid Schizophrenia suffered by Parnell Harris was not caused by the employment at Scott Colson's Shop. Specifically, whether the pattern of comments by the supervisor and owners of Scott Colson's Shop are interpreted as merely politically incorrect or as grossly inappropriate, those comments did not cause Schizophrenia.

(See MWCC Record, Exhibit 6 at page 7, emphasis added; Appellants' Record Excerpts, pg. 41).

Dr. Hiatt is the only medical expert of record to give an opinion regarding causation as none of Plaintiff's other treating physicians were ever deposed and at no time in their records of treatment do they ever express an opinion concerning causation.

This Court has said that "in all but the most simple cases, medical causation must be established by expert testimony." *Cole v. Superior Coach*, 106 So.2d 71 (Miss. 1958), *Bates v. Merchants*, 161 So.2d 652 (Miss. 1964)(Emphasis added). A diagnosis of schizophrenia allegedly caused by a racially charged work environment is not a "most simple case."

In his Brief to the Circuit Court, the Claimant argued that "the opinion of a doctor who examined the Appellant on several occasions is not undercut by the subsequent contradictory opinion given by a physician who examines the Appellant only once." (Claimant's Circuit Court Brief, pg.22 citing *Johnson v. Ferguson*, 435 So.2d 1191 (Miss. 1983)).

In his Brief to this Court, the Claimant again argues that Dr. Hiatt's opinions were erroneously given more weight than the opinions of Dr. Ladner, saying that "the

Commission should not have taken the word of Dr. Hiatt over all other medical and lay testimony presented in this case.” (Claimant’s Brief, pp. 30-31).

Although the viability of any argument that a treating doctor’s opinion should be given more weight than an employer retained physician¹ is certainly outdated, the treating doctor in the present case provided no opinions as to causation. The only opinion offered as to causation came from Dr. Hiatt and he concluded that there was no causal relationship between Mr. Harris’s schizophrenia and his employment at Scott Colson’s Shop. Dr. Hiatt did not contradict the opinion of a treating physician because the treating physician did not give any opinions as to causation.

In addition, the Commission did not take the word of Dr. Hiatt over all other medical and lay testimony. There was a plethora of evidence offered by the Employer/Carrier to establish that the Parnell Harris was not abused or harassed at work. In fact, the only evidence of harassment and abuse at Scott Colson’s shop comes from the testimony of Parnell Harris, an individual who undisputably suffers from paranoid schizophrenia.

The Circuit Court never once mentioned that the burden of proof in a “mental injury” case is clear and convincing evidence. The Circuit Court said that the Commission decision was arbitrary and capricious and not supported by substantial

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In recent decisions from both the Mississippi Court of Appeals and the Mississippi Supreme Court, it was clearly stated that Mississippi law does not require the Commission to give a treating physician’s opinion more weight than an employer retained physician’s opinion. See *Martinez v. Swift Transportation*, 962 So.2d 746, 752 (Miss.App. 2007) and *Doyle v. Public Emples. Ret. Sys.*, 808 So. 2d 902, 907 (Miss. 2002)

evidence, but that court did not explain how the Claimant had established an injury by clear and convincing evidence such that the Commission decision was erroneous.

In fact, the Circuit Court did not discuss or even mention the numerous cases from both the Mississippi Court of Appeals and the Mississippi Supreme Court dealing with mental mental injuries; cases which were extensively discussed and analyzed in the Employer/Carrier's Initial Brief.

The Circuit Court's error is perhaps no better illustrated than on page 4 of Judge Kidd's Opinion and Order, wherein it states as follows, "the Court finds that the Commission did not give proper weight to the testimony of Appellant's treating physician, Dr. Ladner, and gave too much weight to the testimony of Appellee's expert, Dr. Hiatt." (See Circuit Court Opinion and Order, Supreme Court Record, pg.6, Appellant's Record Excerpts, pg. 6).

Dr. Ladner did not testify at all in this case and his medical records contain no opinions about causation between the diagnosed condition and the alleged work incident. Putting that issue aside, however, and even assuming that Dr. Ladner had testified in this case or provided an opinion as to causation, the Circuit Court was nonetheless in error for re-weighing the evidence and substituting its opinion for that of the Commission.

The standard of review in actions arising under Workers' Compensation Law is limited to determining whether the Commission erred as a matter of law or made findings of fact contrary to the overwhelming weight of the evidence. *Clements v. Welling Truck Serv., Inc.*, 739 So. 2d 476, 478 (Miss.App. 1999) (citing *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). This remains true even though the reviewing court might

have reached a different conclusion were they the trier of fact. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994).

This Court has clearly established that the “reviewing court commits error if it simply re-weighs the evidence and substitutes its judgment for that of the Commission.” *Lifestyle Furnishings v. Tollison*, 985 So. 2d 352, 358 (Miss.App. 2008)(Emphasis added).

As recently as March 9, 2010, the Mississippi Court of Appeals has reiterated this well established principle of law. *Intl. Staff Management v. Legions Insurance Company*, No.2008-WC-01641-COA (Miss. App. 2010). In *Stephenson*, the Court of Appeals said, “This Court has previously held that when examining conflicting opinions by medical experts, we will not determine where the preponderance of the evidence lies ... the assumption being that the Commission as trier of fact, has previously determined which evidence is credible, has weight, and which is not.” *Id.* at P.25.

In affirming the Commission’s award of benefits to Claimant Stephenson, the Court of Appeals acknowledged the conflicting opinions of the two medical doctors, but held “it is for the Commission, and not this Court, to judge the reliability of conflicting expert opinions.” *Id.* at P.29.

The Circuit Court judge in the present case did exactly the type of “re-weighing of the evidence” that this Court has repeatedly condemned. The Circuit Court judge did not even attempt to disguise what he was doing, specifically saying that the Commission gave too much weight to Dr. Hiatt’s opinions and not enough weight to the opinions of Dr. Ladner.

CONCLUSION

The Commission did not err in accepting into evidence and considering the affidavit testimony of Parnell Harris' co-employee Jimmy Hudson. Pursuant to the relaxed evidentiary standards contained within Commission Procedural Rule 8, considering such testimony, and even if hearsay, is also within the discretion of the Commission. Absent a showing by Claimant that "it is a rare day" the Commission's decision as to the admissibility of evidence cannot be disturbed.

The Commission also properly concluded that the claimant had not sustained a work-related mental-mental injury and the circuit court was in error for substituting its opinion for that of the Commission. Specifically, the Commission concluded that the administrative judge erred by relying on implications and innuendos in the medical records instead of requiring definitive testimony from a competent medical professional.

In addition, a review of the evidence and testimony shows that Claimant's allegations were both unsupported and uncorroborated. As a result, the Commission correctly concluded that the Claimant did not meet his required burden of proof and should be denied compensation. At a minimum, however, the Commission decided the disputed facts against a finding of compensability and in such a situation, the reviewing court should not substitute its opinion for that of the Commission.

The Commission also determined that the "medical records [in this case] do not state that Claimant's work caused his schizophrenia. In fact, the records indicate that the Claimant was affected by, and fearful of, many other things including utility workers at his house, the West Nile virus, mosquitoes and strangers in general."

Quite simply, the Commission considered the disputed facts and medical evidence and determined that the Claimant had not proven his claim by clear and convincing evidence. As stated in numerous appellate decisions, the reviewing court is powerless to reverse the Commission's resolution of those disputed facts.

Here, the Circuit Court did just that and concluded that the Commission had improperly weighed and evaluated the evidence- in essence, substituting its judgment for that of the Commission. The bigger problem, however, is that there was really no dispute as to causation of the alleged mental injury. The only evidence/testimony submitted on the issue came from Dr. Wood Hiatt, who concluded that the work incidents did not cause Claimant's diagnosed mental condition.

That causation opinion from Dr. Hiatt was not disputed in any way by Claimant's treating physicians. Neither Administrative Judge Henry nor Circuit Court Judge Kidd identified a single piece of evidence or testimony which would establish causation by clear and convincing evidence, or for that matter, even a preponderance of the evidence. As such, Claimant's case fails, the Circuit Court opinion and order should be reversed and the Commission decision reinstated in all respects.

RESPECTFULLY SUBMITTED, this the 28th day of October, 2010.

**SCOTT COLSON'S SHOP, INC. and THE OHIO
CASUALTY INSURANCE COMPANY**
Appellants

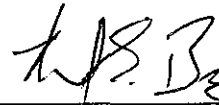
By: CARR, ALLISON

By: 
ROBERT E. BRIGGS

CERTIFICATE OF FILING AND SERVICE

Pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure, I, Robert E. Briggs, attorney for the Appellant, do hereby certify that on October 28, 2010, I shipped via UPS to the Clerk of this Court an original and three copies of the Reply Brief for Appellants and one computer readable disk of the Brief for Appellants and further certify that I on October 28, 2010, I forwarded via United States Mail, postage pre-paid, a true and correct copy of the same to Louise Harrell, Esq. at her regular address of P.O. Box 2977, Jackson, MS 39207-2977 and to the Honorable Winston Kidd, at his usual mailing address of 407 East Pascagoula Street, Jackson, MS 39201.

This the 28th day of October, 2010.



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