IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-WC-00363-COA

SCOTT COLSON'S SHOP, INC. and
THE OHIO CASUALTY INSURANCE COMPANY — APPELLANTS

VERSUS

PARNELL HARRIS — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Winston Kidd - Circuit Court Judge, Hinds County, MS;
2. Honorable Mark Henry - Former Administrative Judge for the Mississippi Workers Compensation Commission;
3. Parnell Harris, Claimant/Appellant;
4. Scott Colson's Shop, Inc., Employer/Appellee;
5. The Ohio Casualty Insurance Company, Carrier/Appellee
6. Douglas Bagwell, Robert E. Briggs III - Attorneys for Employer/Carrier-Appellees;
7. Louise Harrell - Attorney for Appellant;
8. Commissioners, Mississippi Workers Compensation Commission.

ROBERT E. BRIGGS
Attorney for Appellants

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STATEMENT OF THE ISSUES

I. The Commission did not improperly consider inadmissible hearsay evidence which violated the Appellant's due process rights.

II. The Circuit Court improperly substituted its opinion for that of the Commission.

III. The Commission's findings were based on the correct legal standard and properly based on all available evidence.

STATEMENT OF THE CASE-PROCEDURAL HISTORY

This is a workers' compensation action wherein the Claimant has alleged that he is mentally ill and permanently disabled. (See MWCC Record, pp. 1-11, Claimant's Petition to Controvert). Specifically, the Claimant has alleged that he has suffered a "mental and emotional breakdown" as a result of "excessive verbal abuse and racial harassment by a supervisor." (See MWCC Record, pg.1, Claimant's Petition to Controvert). The Employer and Carrier have denied these allegations and specifically asserted that the mental and emotional conditions were not caused by or contributed to by Claimant's employment with the Employer and that the alleged injury is not compensable. (See MWCC Record, pp.12-14, Answer).

It should be noted that the Claimant has not received any medical treatment for any physical injuries as this is purely a mental-mental claim. (See MWCC Record, pg.1). Due to the Claimant's condition at the time of trial, the parties agreed to submit the case on briefs and the following exhibits:

Exhibit 1, Petition to Controvert;

Exhibit 2, Answer to the Petition to Controvert;

Exhibit 3, Claimant's Answers to Interrogatories;

Exhibit 4, Employer and Carrier's Answers to Interrogatories;

Exhibit 5, Medical Records Affidavit and Medical Records of Hinds Behavioral Health Services;

Exhibit 6, Medical Records Affidavit and Medical Records of Dr. Wood C. Hiatt;

Exhibit 7, Wage Statements;

Exhibit 8, Employment Records of Claimant from Scott Colson's Shop;

Exhibit 9, Mississippi Department of Employment Security file;

Exhibit 10, Deposition of Parnell Harris, dated October 31, 2000;

Exhibit 11, Deposition of Parnell Harris, dated March 9, 2001;

Exhibit 12, Deposition of Mark Clay, dated January 26, 2001;

Exhibit 13, Deposition of Scott Colson, dated January 26, 2001;

Exhibit 14, Deposition of Alex D. McGowan, dated February 26, 2000; and

Exhibit 15, Deposition of Antonius McKay, dated February 26, 2001.

In addition, the Employer and Carrier introduced the affidavit of Jimmy Hudson as Exhibit ID-A, to which the Claimant objected. The affidavit of Jimmy Hudson was obtained after he was diagnosed with terminal throat cancer and was utilized in a separate Federal Court proceeding involving the same parties and issues. Although the Administrative Judge excluded the affidavit, the Commission, as the final fact finder, accepted and considered it as relevant evidence.

The parties thereafter submitted written letter briefs to the Administrative Judge on or about August 11, 2006. The Administrative Judge, thereafter, issued its opinion and order on January 22, 2007, concluding in relevant part, as follows:

> Based on all the facts and mindful of the beneficent purposes of our workers' compensation law, the Administrative Judge finds that Mr. Harris' mental condition is causally connected to his work; that the precipitating events at work were out of the ordinary (as was also found by the Mississippi Department of Employment Security Hearing Officer); and, that Mr. Harris is permanently and totally disabled. Mr. Harris, accordingly, is entitled to permanent total disability benefits of $173.33 a week, beginning on June 9, 1999, and continuing for 450 weeks.

(See Order of Administrative Judge Henry, pp.14-15, MWCC Record, pp. 94-95; Appellants' Record Excerpts, pp. 30-31).

The Employer/Carrier appealed this ruling to the Full Commission, and on December 5, 2007, the decision of Judge Henry was reversed. The Commission said that "the Administrative Judge erred in finding that the Claimant sufficiently proved the existence of a work-related mental injury arising on or about June 9, 1999. (See Commission Order, pp.9-10, MWCC Record, pp. 107-108; Appellants' Record Excerpts, pp. 15-16).

The Claimant then timely filed a Notice of Appeal with the Commission on January 3, 2008, seeking review and reversal of the full Commission Order by the Hinds County Circuit Court. (See Notice of Appeal, MWCC Record, pp. 109-110).

On December 28, 2009, an Order from Judge Kidd was entered in the Hinds County Circuit Court reversing the Commission and awarding the Claimant permanent total disability benefits. (See Judge Kidd Opinion and Order, Supreme Court Record, pp. 3-6; Appellants' Record Excerpts, pp. 3-6). Judge Kidd concluded that the "Commission did not give proper weight to the testimony of [Harris'] treating physician, Dr. Ladner, and gave too much weight to the testimony of [Employer/Carrier's] expert, Dr. Hiatt." (See Judge Kidd Order, pg. 4, Supreme Court Record, pg. 6; Record Excerpts, pg. 6).

The Employer/Carrier were not provided notice of this Order from Judge Kidd and on February 4, 2010, filed a Motion to Reopen Time for Appeal. (See Supreme Court Record, pp. 7-24). On February 22, 2010, Judge Kidd signed an Order reopening the time for appeal until March 8, 2010. (See Judge Kidd Order, Supreme Court Record, pg. 25). The Employer/Carrier then timely filed a Notice of Appeal on March 1, 2010, seeking review of the Circuit Court decision. (See Notice of Appeal, Supreme Court Record, pp.26-27).

STATEMENT OF THE CASE- FACTUAL BACKGROUND

The Claimant, Parnell "Neal" Harris, testified that he was hired by Mr. Scott Colson in December of 1998. (See MWCC Record, Exhibit 10, October 31, 2000 deposition of Parnell Harris at p.12). The Claimant was hired to make horseshoes in the Employer's blacksmith shop. (MWCC Record, Exhibit 10 at p.15). According to the Claimant, the events giving rise to this workers' compensation action included that Mr. Harris was harassed, discriminated against, his civil rights were violated and he was physically abused by his then supervisor Alex (aka "Donnie") McGowan. (See MWCC Record, Exhibit 11, March 9, 2001 deposition of Parnell Harris at p. 20-21). Mr. Harris claims that Mr. McGowan cursed and screamed at him, pushed him on one occasion while he was making horseshoes, and used racial slurs, specifically the "n-word" in his presence. (MWCC Record, Exhibit 11 at pp. 20, 21, 24, and 27-28).

With regard to the use of the "n-word," Claimant has alleged that he can recall only two specific incidences where the word was used. (See, MWCC Record, Exhibit 10 at p. 26). In both instances the "n-word" was used only in stories that Mr. McGowan was telling about other individuals (MWCC Record, Exhibit 11 at pp. 25 and 31).

In the first incident, Mr. McGowan was not speaking to the Claimant but to another employee, John Bingham, and the Claimant overheard Mr. McGowan use the "n-word." (MWCC Record, Exhibit 11 at p. 31-32). In the second incident, Mr. McGowan was telling Claimant and another African-American employee, Tony McKay, a story that a relative told him. (MWCC Record, Exhibit 11 at pp. 24-25).

At no time, did Mr. McGowan call the Claimant himself the "n-word" (MWCC Record, Exhibit 11, at pages 31-33 and 24-25). According to the Claimant, after the second incident, he left work early but, thereafter, returned to work at his usual time of 7:00 a.m. the next day. (MWCC Record, Exhibit 11, at pages 33-34). Claimant also claims that on the following day, June 9, 1999, Mr. McGowan told him he did not feel an apology was warranted. (MWCC Record, Exhibit 11, at page 33). Mr. McGowan supposedly made this statement in front of both Tony McKay and Jimmy Hudson. (MWCC Record, Exhibit 11, at pages 33 and 36). As a result, Claimant stated he once again left work early and, thereafter, did not return. (MWCC Record, Exhibit 11, at page 34).

Tony McKay and Jimmy Hudson worked with the Claimant shoeing horses and were also supervised by Mr. McGowan. (See MWCC Record, Exhibit 15, deposition of Tony McKay, at page 9). Both Mr. McKay and Mr. Hudson are also African-Americans (See, MWCC Record, Exhibit ID-A) and deny ever witnessing any of the alleged conditions or behavior by Mr. McGowan. (See MWCC Record, Exhibit ID-A and Exhibit 15, at pages 14-15). In fact, Tony McKay testified as follows:

> Q. What type of relationship did Neal and Mr. McGowin have?
>
> A. A supervisor and employee relationship.
>
> Q. You don't recall anything else?

A. No.

Q. Did they get along?

A. As far as I know.

(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:

Q. Before Mr. McGowan told the story in the breakroom, did he say anything to the people who were present?

A. Yes, he apologized, first of all, in the beginning and in the end, you know, if it offended anybody.

Q. What did he say in particular?

A. I ain't trying to sound racist or nothing. Something like that. I hope what I've said don't offend anybody because this is something that happened in the past.

(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)

Jimmy Hudson was Mr. McKay's step-father. (See MWCC Record, Exhibit 15, at page 20). Prior to the trial, Mr. Hudson was diagnosed with terminal throat cancer. In a Federal discrimination lawsuit involving the same parties and same incidents, Mr. Hudson submitted certain affidavit testimony providing that in his ten plus years of employment with Scott M. Colson's Shop, Inc., he did not find the working environment to be racially hostile. (See MWCC Record, Exhibit ID-A, at paragraphs 2 and 5). Moreover, Mr. Hudson, who worked side by side with the Claimant, stated Claimant "appeared to have some sort of psychiatric or emotional condition, as he talked to himself frequently." (See MWCC Record, Exhibit ID-A, at paragraph 4).

Mark Clay and Scott Colson also dispute and deny the Claimant's allegations. 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 as follows:

> Q. Now when did you see Mr. Colson that day? Not Mr. Colson. I'm sorry. Mr. McGowan?
>
> A. Probably an hour later.
>
> Q. What happened when you saw him?
>
> A. I got Neal in the break room and Mr. McGowan apologized.
>
> Q. You were present when Mr. – what did Mr. McGowan say?
>
> A. He said, I'm sorry if what I said, you know, offended you. He said, I'm sorry. It was not directed at you.

(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).

The first time that the Claimant sought medical treatment for his mental condition was October 19, 1999, more than 4 months after the alleged incident. (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.

SUMMARY OF THE ARGUMENT

This workers compensation case involves an allegation of mental injury without associated physical trauma. Specifically, Claimant Parnell Harris alleges that he was subjected to a racially hostile work environment which ultimately resulted in the development of schizophrenia. Mr. Harris claims that his supervisor at Scott Colson's Shop repeatedly harassed him with the use of racial slurs and other inappropriate and abusive language.

Scott Colson's Shop denies that Mr. Harris was subjected to a racially hostile work environment and further denies that Mr. Harris' schizophrenia was caused by his employment. As outlined above, numerous co-employees of Mr. Harris testified that the work environment was not racially hostile, was not offensive and that Mr. Harris was not subjected to the abuse that he claims.

One of these co-employees, Jimmy Hudson, signed an Affidavit that was reviewed and considered by the Commission. Mr. Hudson's affidavit was submitted by the Employer/Carrier because he passed away before trial and had relevant information about Mr. Harris' alleged work environment and mental condition. The Commission has purposefully adopted relaxed rules of evidence in workers compensation proceedings and the Mississippi Supreme Court has repeatedly held that the Commission's evidentiary

rulings will rarely, if ever, be disturbed. Simply put, there was no error by the Commission in accepting and considering the Affidavit of Jimmy Hudson.

Because this is a claim of mental injury without associated physical trauma, the Claimant must prove his case by clear and convincing evidence. To sustain that burden, the Claimant needed to offer testimony from a competent medical expert causally relating the diagnosed schizophrenia to the allegedly hostile work environment. The Claimant, however, failed to offer any medical testimony whatsoever. Instead, he relied on medical records from his mental health providers that contain no discussion of causation.

The Administrative Law Judge concluded that the medical records "implied" a causal relationship between the work environment and schizophrenia. The Commission correctly rejected such a connection and held that a more definite medical opinion as to causation was needed in a mental injury case where the burden of proof is clear and convincing evidence.

The Mississippi Supreme Court has likewise held that in all but the most simple cases, expert testimony is required to establish medical causation. A case of schizophrenia allegedly caused by a racially hostile work environment hardly qualifies as a most simple case.

Bottom line, the Circuit Court substituted its judgment for that of the Commission and held that the Commission did not give proper weight to the treating doctor's opinions and too much weight to the EME physician. The Circuit Court does not identify in the record a single causation opinion from a treating doctor for which the Commission should have given more weight. Of course and even if the treating physician had provided a

causation opinion, the Circuit Court would still be in error for substituting its judgment for that of the Commission as to the proper weight of the evidence.

As such, and pursuant to the appellate courts' limited scope of review in a workers compensation case, the Commission's Order should be reinstated in all respects.

ARGUMENT

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

With this issue, Mr. Harris argued, and the Circuit Court agreed, that the Commission improperly considered the hearsay affidavit of Jimmy Hudson. 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.

Rule 804(b)(5) of the *Mississippi Rules of Evidence* states as follows:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804(b)(5) requires that the declarant be unavailable to testify. There is no dispute that Mr. Hudson was unavailable as he died after executing the affidavit. Mr. Hudson's statement was submitted in affidavit form and therefore should be deemed trustworthy. In addition, the affidavit is certainly offered as evidence of a material fact. For example, the affidavit indicates the possible existence of prior mental problems as Mr.

Hudson was asked by the Claimant's family to watch over Claimant and also as Mr. Hudson observed the Plaintiff exhibiting peculiar behavior in talking to himself.

The Administrative Law Judge identified the lack of evidence about prior medical problems as a factor in his decision and the affidavit of Jimmy Hudson was highly probative on that point, primarily because Harris and Hudson worked side by side on a daily basis. Mr. Hudson, also an African American male, further disputed Mr. Harris' claims that Harris was subjected to a racially hostile working environment. Because there was no other way to submit Mr. Hudson's testimony as to his daily observations of the Claimant and their working environment, the rules and the interests of justice were best served by admission of the statement into evidence.

This argument is further bolstered by MWCC Procedural Rule 8. 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 at the Circuit Court that the Employer/Carrier surprised him with the sudden introduction of the Affidavit at trial. This is a rather astonishing argument in light of the fact that the very same affidavit was used in the federal discrimination lawsuit filed by Harris (Louise Harrell represented Harris in that action also) and settled long before the workers compensation case ever went to trial.

In addition, 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).

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.

In sum, the Claimant spent 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.

II. THE CIRCUIT COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE COMMISSION.

As an initial matter, it should be pointed out that the Circuit Court never once mentioned that the burden of proof in a "mental 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 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 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).

Judge Kidd did not provide any explanation as to what "testimony" from Dr. Ladner the Commission failed to properly weight. In fact, providing such an explanation would have been impossible because 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). The role of the reviewing court "is not to determine where the preponderance of the evidence lies when the evidence is conflicting, since it is presumed that the Commission, as trier of fact, has previously determined which evidence is credible and which is not." *Smith v. Johnston Tombigbee Furniture*, 2010 Miss.App. LEXIS 144*10, NO. 2009-WC-00381-COA at P.16 (Miss.App.2010)(citing *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 (Miss.1997).

Case after case from both the Mississippi Court of Appeals and the Mississippi Supreme Court has held that when the evidence is conflicting, the decision of the Commission should not be disturbed, no matter which way it was resolved.[1] See e.g. *Dillon v. Roadway*, 823 So.2d 588 (Miss.App. 2002)(where the Court of Appeals held that they were powerless to overrule the Commission when the Commission considered disputed factual and medical evidence and concluded that there was no proof of a mental injury by clear and convincing evidence); *Borden v. Eskridge*, 604 So.2d 1071 (Miss. 1991)(where the Mississippi Supreme Court held that they were not at liberty to reverse the Commission when the Commission reviewed the hotly disputed evidence and concluded that the Claimant had proven his mental injury by clear and convincing evidence); *McElveen v. Croft Metals*, 915 So.2d 14 (Miss.App. 2005)(where the Court of Appeals concluded that they must affirm the Commission's decision of no compensable mental injury when the available evidence and testimony was conflicting); *Scarborough v. MDOT*, 764 So.2d 488 (Miss.App. 2000)(where the Court of Appeals held that they could not reverse the Commission's decision to reject the treating doctor's opinion that the Claimant's work environment led to his mentally disabling condition); *Bates v. CountryBrook Living Center*, 609 So.2d 1247 (Miss. 1992)(where the Mississippi Supreme Court held that they could not reverse a Commission determination that a causal connection between work

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In this case, it is of course arguable as to whether or not the medical evidence was even conflicting. The Claimant provided no proof of any causal relationship between his work environment and the diagnosis of schizophrenia; instead he relied on the "implication" of such causation which may or may not have been contained in the relevant medical records. The only concrete opinion that was offered in this case came from Dr. Wood Hiatt, and he clearly concluded that no causal relationship existed.

environment and a mental condition had not been established by clear and convincing evidence).

Even the cases cited by Claimant in his Brief to the Circuit Court support reinstatement of the Commission's decision in the present case. The Claimant cited *Borden Inc. v. Eskridge*, 604 So.2d 1071 (Miss. 1991) and *Mid-Delta Home Health v. Robertson*, 749 So.2d 379 (Miss. 1999) for the proposition that his claim is compensable.

In both *Eskridge* and *Robertson*, however, the Mississippi Supreme Court held that the evidence and testimony was conflicting and that in such a situation, the appellate courts cannot overturn the Commission's resolution of that conflict. In *Robertson*, the Mississippi Supreme Court said:

> The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge not withstanding. If the Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby. This is so, even though the evidence would convince this court otherwise, were we the fact finder.

Robertson, 749 So.2d at 384-385.

The common theme in each and every one of the Mississippi reported decisions is that the Commission is the ultimate fact finder and their decision as to compensability cannot be reversed when supported by evidence in the record. In other words, when the evidence is disputed, the Commission's decision cannot be disturbed regardless of whether compensability is found or not and regardless of whether or not the appellate court would have decided the issue differently had they been the fact finder.

III. THE COMMISSION'S FINDINGS WERE BASED ON THE CORRECT LEGAL STANDARD AND PROPERLY BASED ON ALL AVAILABLE EVIDENCE.

As an initial matter, this court needs to understand that no doctor testified or even stated in his records that Mr. Harris' mental condition was related to the work environment

at Scott Colson's. Administrative Law Judge Henry concluded that the medical records "implied" such a causal relationship, but nothing whatsoever exists in the record to support that conclusion and certainly nothing to establish a causal connection by "clear and convincing evidence."

The Mississippi Supreme 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." On that basis alone, the Claimant's failure to bring forth expert testimony as to the causal relationship issue dooms his case. On that basis alone, the Commission and now this court can and should determine that the Claimant has failed to meet his burden of proof.

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)).

Although the viability of any argument that a treating doctor's opinion should be given more weight than an employer retained physician[2] is certainly questionable, the

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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)

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. As such, this argument made by the Claimant and accepted by the Circuit Court is unsupported and should be rejected.

Even if this Court chose to sidestep the Claimant's glaring lack of proof as to the causation question and consider the "implication" of causation allegedly found in Claimant's medical records, the Commission's decision must still be affirmed.

The medical records submitted by Harris and cited in his Brief do not discuss the rather controversial and still undetermined causes of schizophrenia. Sure, these records mention Scott Colson's as an employer for Harris, but do nothing else.

Even a cursory review of the medical literature surrounding schizophrenia establishes that the causes of the disorder are still largely unknown. The possible causes discussed by the researchers include genetics, brain chemistry, complications during pregnancy or birth, an abnormality within the brain, social environment or a combination of all these factors. Research by this attorney in fact located no study which conclusively established anything about the causes of schizophrenia.

It is also established in the medical records that Mr. Harris did not immediately seek medical treatment upon his resignation from Scott Colson's; in fact it was approximately four months from his last day of work until his first visit with any mental health professional. (See Exhibit 5, Medical records from Hinds Behavioral Health Services; Appellants' Record Excerpts, pp. 42-82). What happened during this time period? Were there any other

social interactions that could have led to a breakdown? Was there a breakdown in the chemistry of Mr. Harris' brain during this time period?

These are the types of questions that would have to be answered by any physician making a diagnosis of schizophrenia . Any argument that medical records alone, and only by implication, can conclusively establish a causal relationship between schizophrenia and work environment is ridiculous and should be rejected by this Court. The Claimant had the burden to prove, by clear and convincing evidence, that his mental disorder was causally related to work. His failure to meet that burden is obvious when considering that the administrative judge had to resort to implications and innuendos from the medical records for a basis to find causation and subsequently compensability.

There are a number of recent cases from the Mississippi Court of Appeals and the Mississippi Supreme Court which discuss and analyze the "mental mental" injury and what must be shown to prevail.

In *Daniels v. Peco Foods of Mississippi, Inc.*, 980 So.2d 360 (Miss. App. 2008), the Claimant was working at Peco Foods in Canton, Mississippi when a plastic bag of frozen chicken parts fell from a conveyor line onto her head. The Claimant testified that she was wearing a scarf, a hair net, and a jacket hood on her head when the bag struck her. *Daniels*, 980 So.2d at 362.

Sometime after the "falling chicken parts" incident, the Claimant was hospitalized for depression and suicidal ideation. Her medical history provided that she had suffered a chemical accident which resulted in loss of hair and scalp disfiguration and that she had been depressed ever since the accident. The Claimant also told doctors that her imaginary

friend told her she was ugly without her hair, and she should kill or physically harm herself. *Id.*

The initial treating doctors believed that Daniels's suicidal tendencies had subsided and released her. She was eventually referred to another mental health professional- Dr. James Brister- who diagnosed Daniels with depression and post-traumatic stress disorder from the loss of her hair. Dr. Brister was of the opinion that the "falling chicken parts" incident was the causative factor in Daniel's mental condition. *Id.*

After a hearing on the merits, the Administrative Law Judge concluded that Daniels had sustained a compensable mental injury as a result of the incident at work. The Employer/Carrier appealed that ruling and the Commission reversed, concluding that a mental injury had not been established by clear and convincing evidence. *Id.* at 363.

The medical evidence before the Commission was conflicting, with the primary treating physician having testified that the work incident directly led to the depression and anxiety being experienced by the Claimant and an employer medical examiner concluding that there was no proof of a causal connection. *Id.* at 364.

The Mississippi Court of Appeals first said that because there was a physical injury also involved, the proper burden of proof for the Claimant was clear evidence- a less exacting burden than the usual clear and convincing evidence. Despite this seemingly lesser burden[3], the Court of Appeals nonetheless concluded that the Commission decision was supported by substantial evidence, saying in pertinent part as follows:

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[3]The Court of Appeals has subsequently concluded that clear evidence and clear and convincing evidence are one in the same in the context of a workers compensation claimant alleging a mental injury. *Hospital Housekeeping Systems v. Townsend*, 993 So.2d 418, 424 (Miss.App. 2008).

> Again, the Commission heard the testimony of both doctors and, after weighing the evidence, found Dr. Webb's testimony to be more persuasive. The Commission provided clear reasons for finding Dr. Brister's testimony to be suspect. As the finder and trier of fact, it is the Commission's job to evaluate and weigh the evidence... We find substantial evidence existed to support a finding that Daniels failed to prove, by clear evidence, a causal connection between the mental injury and physical injuries she suffered at work.

Id. at 365.

Importantly, the Claimant's treating doctor testified that the mental condition was causally related to the work incident and the Court of Appeals still concluded that the Commission's determination of no causal relationship was supported by substantial evidence.

Another recent case and one in which the Claimant likewise failed to introduce any evidence of causation is *Hospital Housekeeping Systems v. Townsend*, 993 So.2d 418 (Miss.App. 2008). In *Townsend*, the Claimant alleged anxiety and depression as a result of a chemical exposure incident at work. *Townsend*, 993 So.2d at 422.

The medical records from Weems Mental Health Center that were introduced into evidence consistently indicated that the Claimant believed that the root cause of her depression and anxiety was the chemical exposure incident at work. *Id.* at 422. However, none of the Claimant's medical providers were deposed and none of the medical records contained an opinion from the doctor that the anxiety and depression were caused by the chemical exposure at work. *Id.* at 426-427.

The Mississippi Court of Appeals held that a clear and convincing evidence burden could not be sustained when none of the medical providers testified or otherwise provided an opinion conclusively linking the anxiety and depression to the work activities, saying in pertinent part that "Townsend must have met her burden of proof without basing it upon

only speculation and conjecture." *Id.* at 427. The Court of Appeals also explained that "clear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level." *Id.* at 426.

The present case is no different as the only mention of causation comes from Administrative Judge Henry's conclusion that causation can be "implied" from the medical records. Circuit Court Judge Kidd doesn't even say that causation is implied; he simply states that the Commission did not give proper weight to the non-existent "testimony" of Dr. Ladner. Quite simply, proof of causation is sorely lacking in this case, and a clear and convincing evidence burden cannot be sustained by implication, conjecture, speculation or non-existent testimony.

One final case worthy of discussion is *Kirk v. K-Mart*, 838 So.2d 1007 (Miss.App. 2003). In *Kirk*, the Claimant was diagnosed with a mental illness identified as major depression, which she attributed to the increased work load and responsibilities she was given while employed as a store manager with K-Mart. *Kirk*, 838 So.2d at 1008-1009.

Medical records from the Claimant's doctors were introduced into evidence at the trial of the matter. Dr. Faiza Jones, Kirk's treating physician at Warren-Yazoo Mental Health Services, and her therapist, Mrs. Angela Street, both were of the opinion that Kirk's major depression was caused or contributed to by her stressful working environment at K-Mart. In their view, which was uncontradicted, stress related to her work appeared to have triggered a pattern of debilitating headaches, which triggered Kirk's mental illness. Both also were of the opinion that the physical injury she suffered in June 1996 may have also been a contributing cause in exacerbating the pattern of headaches. *Id.* at 1009.

Like *Daniels*, the Administrative Judge in *Kirk* concluded that the Claimant's mental injury was causally related to her work environment and awarded benefits accordingly. Also like *Daniels*, the Commission reversed the AJ's ruling on this issue and determined that the Claimant had not proven her mental injury by clear and convincing evidence. *Id.*

In affirming the Commission's decision, the Mississippi Court of Appeals said in relevant part as follows:

> Kirk asserted that her disabling mental injury was sufficiently aggravated by the physical injury she suffered when she fell from a ladder at work. The Commission disagreed with Kirk's assertion. The reasoning given concerned the medical evidence produced by Kirk. In the record, both Dr. Jones and Mrs. Street were of the opinion that this fall 'may' have aggravated the pattern of headaches Kirk was suffering. The Commission, in considering this particular question, placed particular importance on the use of the word may. It stated the opinion of the doctors does not sound to us in terms of reasonable and dependable medical probabilities, but merely in terms of possibility. This Court agrees with this conclusion. It is well settled that proof of causal connection must rise above mere possibility. Especially, this is so in cases of this type, which require expert medical opinion to help establish causation. **This Court finds, like the Commission and the Circuit Court of Yazoo County, that a more definite medical opinion is required to substantiate Kirk's claim**.

Id. at 1010-1011 (Emphasis added).

Importantly for our purposes, Kirk's treating doctors actually provided causation testimony which was considered by the Administrative Judge and then the Commission. The Commission and subsequently the Court of Appeals did not find the testimony particularly persuasive and held that "a more definite medical opinion" was needed in a mental injury case to meet the clear and convincing evidence burden.

In the present case, Administrative Judge Henry concluded that the medical records implied a causal connection even though no medical doctor provided a single piece of testimony even making that a possibility and Circuit Court Judge Kidd did not even address

the causation question. The Claimant did far less in this case than what was done by Claimant Kirk's treating physicians, who at least testified about the possible causal connection to work. The Commission Order in our case highlighted this problem, saying that:

> Dr. Hiatt is the only medical expert of record to give an opinion regarding causation as none of the 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.

(See Commission Opinion and Order, pg. 7; MWCC Record, pg. 105; Appellant's Record Excerpts, pg.13).

Administrative Judge Henry and later the Circuit Court clearly erred by failing to require Claimant Parnell Harris to provide a more definite medical opinion connecting the diagnosis of schizophrenia with the work environment at Scott Colson's. This error by Judge Henry was corrected by the Commission and the error by the Circuit Court should be corrected by this Court.

CONCLUSION

The Commission did not err in accepting into evidence and considering the affidavit testimony of Parnell Harris' co-employee Jimmy Hudson. Such testimony is excepted from the hearsay rule pursuant to rule 804(b)(5) of the *Mississippi Rules of Evidence.* 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 affidavit was obtained under oath during the course of previous litigation in Federal Court involving the same parties and incidents; it was also identified on three

different occasions by the Employer/Carrier prior to trial. Mr. Hudson's affidavit provides some evidence that Claimant had a pre-existing mental condition and because there was no other way to submit Mr. Hudson's testimony as to his daily observations of the Claimant and their working environment, the rules and the interests of justice were best served by admission of the statement into evidence.

The Commission also properly concluded that the administrative judge erred in finding that claimant had 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.

As said by the Commission in the present case, "the Claimant's claims regarding Mr. McGowan cursing him, or calling him the "n-word," and/or physically abusing the Claimant are totally uncorroborated, and are in fact largely disputed." The Commission also held 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 13 day of August, 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 I have this date addressed and directed via Federal Express to the Clerk of this Court an original and three copies of the Brief for Appellants and one computer readable disk of the Brief for Appellants and further certify that I have 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.

This the 13 day of August, 2010.

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