

2010-WC-00792 T

CERTIFICATE OF INTERESTED PERSONS

Terrience Bates v. Dedicated Management Group, et.al. 2010-WC-00792

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Terrience Bates

Appellant

Dedicate Management Group, LLC.

Appellees

Employers Insurance of Wausau,

A Mutual Company

Carlos E. Moore

Attorneys for the Appellant

Tangala L. Hollis

Don Burch

Attorney for the Appellees

Cindy Wilson

Administrative Law Judge

Liles Williams

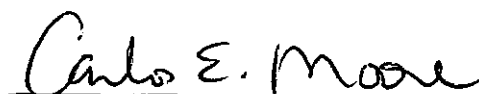
Full Commission

John R. Junkin

Augustus Collins

Judge David Strong

Circuit Court Judge



Carlos E. Moore

Tangala L. Hollis

Attorneys of Record for Appellant

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STATEMENT OF THE ISSUES

I. Issue 1

Whether the Circuit Court has the authority to base its decision on findings of facts that are not supported by credible evidence when it held that the date of the accident occurred on August 26, 2005; even though Appellant repeatedly stated in his deposition that he was not sure of the date of the accident, and that the paperwork from the hospital would prove the date of injury occurred on August 22, 2005.

II. Issue 2

Whether the Circuit Court has the authority to base its decision on findings of facts that are not supported by credible evidence when it held that August 22, 2005 was the first mentioning of the date of injury even though the Appellant testified that the date of the accident was located on his medical records from King Daughters Hospital and the Court acknowledged that the records from King Daughters Hospital showed the Appellant coming into the hospital complaining of back pain on August 22, 2005.

III. Issue 3

Whether the Circuit Court has the authority to base its decision on findings of facts that is not supported by credible evidence when it held that the accident was not reported even though Appellant testified that he reported the accident to his supervisors, Randy and Jeff and no evidence was presented to contradict the existence of a supervisor named Jeff or that the accident was reported to him.

STATEMENT OF THE CASE

This is a Workers Compensation Case on appeal from an Order of the Circuit Court of Lincoln County affirming the Full Commission Order that reversed the Administrative Judge's decision, which held that Appellant Terrience Bates (hereinafter Appellant), suffered a work related back injury in August of 2005.

In April of 2005, Appellant began working for Employer, Dedicated Management Group, LLC (hereinafter Employer), unloading trailers. Appellant had an average weekly wage of \$311.58. The employer had sufficient employees to require workers' compensation insurance and, as such, contracted with Employers Insurance of Wausau, A Mutual Company as the carrier (hereinafter Carrier).

In August of 2005, Employer was covered by Carrier for workers' compensation benefits. Also in August of 2005, Appellant was working for Employer at McLane's in Brookhaven unloading groceries. Appellant drove an automatic jack used to unload said groceries. Because the automatic jack does not have power steering, Appellant had to use force, leaning to the left and right, in an effort to turn the jack. After continuously turning the jack, Appellant felt a pain in his back. At the time of the incident, Appellant was within the course and scope of his employment with Employer.

Appellant promptly informed his supervisors, Jeff and Randy, of the shooting pains in his back. (Rec. p. 30) Appellant was instructed to go to King's Daughters Hospital in Brookhaven. While being examined by the emergency room doctor, Appellant informed the doctor that he was injured on the job due to faulty equipment. (Rec. p. 28)

On May 7, 2008, a hearing on the merits was conducted exclusively on the issue of whether or not an injury occurred to Appellant on or about August 26, 2005 and whether Appellant was within the course and scope of his employment with Employer. At the hearing, Appellant had Michael Butler (hereinafter Mr. Butler) make an offer of proof and it was argued by Employer/Carrier that this was the first notice of the testimony of Mr. Butler. Mr. Butler testified he gave Appellant a faulty jack and saw him using it in August of 2005.

On January 9, 2009, the administrative law judge stated that Appellant had proven by a preponderance of the evidence that Appellant had suffered a work related injury to back in August of 2005. The judge also ordered that the issue of permanent disability, if any, would be determined at a future hearing. The administrative law judge admitted all the testimony of Mr. Butler as an offer of proof (Rec. p. 46), but determined that the testimony was not prejudicial to the employer/carrier, as it was not a pivotal piece of evidence for the Appellant proving the occurrence of a work related accident.

On March 19, 2009, the full commission issued an opinion letter following an appeal of the case by the Employer/Carrier. The order addressed a number of issues. The first issue was the date of the accident as being alleged as August 26, 2005 in both the Petition to Controvert and in Claimant's Deposition. Appellant had the following exchange with counsel for Employer/Carrier in deposition.

Question. "And on what date did you sustain this accident that you alleged?"

Answer. "I don't remember the actual date, but I know it was in August."

Question. "Of '05?"

Answer. "Yes."

Question. "Okay. But what date was it?"

Answer. "I can't recall. My lawyer will probably have that on file, though."

Question. "Now, how would he know it if you don't know it?"

Answer. "Well, we had my paperwork from doctors and such. When I went in we had it all on files.

Question. "So that's where—the date of August 26, 2005, because that the date you've alleged in your lawsuit?"

Answer. "Yes."

Question. "So, to the best of your recollection and knowledge, that is the correct date?"

Answer. "Yes."

Employer/Carrier's Exhibit #2, p.8-9

Secondly, the Commission stated that the evidence presented conflicts with Claimant's allegation that the injury occurred August 26, 2005. The Commission stated the hospital records from Kings Daughters Hospital indicate Appellant was injured August 22, 2005. The Commission assigned error to the date of the injury.

Third, the Commission stated Claimant's conflicting statements regarding the reporting of his injury called the credibility of his testimony in question.

SUMMARY OF THE ARGUMENT

It is unsupportable finding of fact that the date of injury was August 26, 2005. The Commission erred when it held that since the Appellant was not working on August 26, 2005 that no injury occurred. The Commission neglected the fact that the Appellant himself repeatedly stated in deposition that he was not sure of the day of the accident. The date of the accident being August 26, 2005 is not supported by any credible evidence, and, as such, is an unsupportable finding of fact.

It is false that August 22, 2005 was the first mentioning of that date of injury. The Commission erred when it held that August 22, 2005 was the first mentioning of a date other than August 26, 2005. The Commission ignored the deposition testimony of the Appellant in which he stated that the date of the accident is on his paperwork from the doctors. Although the Commission acknowledges that the hospital records from King Daughters Hospital in which the Appellant first made his complaints began on August 22, 2005, the Commission still held that August 22, 2005 was the first mentioning of the reported injury.

It was not in error for the administrative law judge to find the accident was reported. In Appellant's deposition he testified that he reported the accident to his supervisors, Randy and Jeff. The Appellee failed to present any evidence to contradict the existence of a supervisor named Jeff or that the accident was reported to him. A decision of the Commission cannot be based on unsupportable findings of fact. The allegation that the accident was not reported is not supported, as Appellant testified in his deposition that the report was made to Jeff, and no evidence was presented to contradict it.

ARGUMENT

"In reviewing the decision of a chancery or circuit court regarding an agency action, this Court applies the same standard employed by the lower court. [The] Court will not disturb an agency's ruling unless the decision of the administrative agency "(1) was unsupported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the administrative agency to make; or (4) violated some statutory or constitutional right of the complaining party."" *Parchman v. Amwood Products, Inc.*, 988 So.2d 346, 356 (Miss. 2008) (citing *Mississippi Sierra Club v. Mississippi Dep't of Env'tl. Quality*, 819 So.2d 515, 519 (Miss.2002)).

"[The] Court will overturn a Commission's decision for an error of law, *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss.1991); *Mississippi Workmen's Compensation* § 272 (3d ed. 1982), or an unsupportable finding of fact. *Metal Trims Industries v. Stovall*, 562 So.2d 1293, 1297 (Miss.1990)." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

I. It is unsupportable finding of fact that the date of injury was August 26, 2005.

The Commission first argued the date of the accident is incorrect, and therefore, there is error. The Commission held that because the Appellant was not working on August 26, 2005 (the date of injury stated in the Petition to Controvert), no injury occurred. The Commission neglected the fact that the Appellant himself repeatedly stated in deposition that he was not sure of the day of the accident. The Appellant also referred the Employer/Carrier to his medical records. The medical records Appellant referenced informed the Commission that the Appellant was injured on August 22, 2005. The only time Appellant provided a different answer as to the

date of the injury was during his deposition, which was in response to question from Employer/Carrier directing him to August 26, 2005. A decision of the Commission cannot be based on unsupportable findings of fact. *Metal* at 1297. The date of the accident being August 26, 2005 is not supported by any credible evidence and as such is an unsupportable finding of fact.

II. It is false that August 22, 2005 was the first mentioning of that date of injury.

The Commission secondly argued that August 22, 2005 was the first mentioning of a date other than August 26, 2005. The Commission ignored the deposition testimony of Appellant in which he stated that the date of the accident is in his medical records. The Commission even acknowledged that the records from Kings Daughters Hospital show Appellant came into the hospital complaining of back pain on both August 22, 2005 and August 24, 2005. The record reflecting August 22, 2005 was an official part of the record, as the Commission was able to examine it prior to making a final decision. A decision of the Commission cannot be based on unsupportable findings of fact. *Metal* at 1297. The fact is that the Commission directed themselves to a point in the official record where August 22, 2005 was mentioned as a date of injury.

III. It was not in error for the administrative law judge to find the accident was reported.

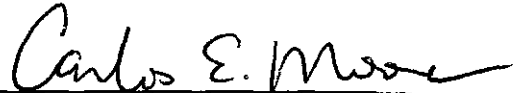
The Commission thirdly argued that the accident was not reported because it was not reported to Randy or Eric. Appellant supposedly testified at the hearing that he reported the accident to his supervisors Randy and Eric. Randy testified and stated it was not reported to him. He also testified they have not supervisor named Eric. But, in deposition the Appellant testified

that he reported the accident to his supervisors, Randy and Jeff. No evidence was presented to contradict the existence of a supervisor named Jeff or that the accident was reported to him. A decision of the Commission cannot be based on unsupportable findings of fact. *Metal* at 1297. The allegation that the accident was not reported is not supported, as Appellant testified in his deposition that the report was made to Jeff, and no evidence was presented to contradict it.

CONCLUSION

For the foregoing reasons, the Appellant, Terrience Bates, is asking this Honorable Court to reverse the decision of the Lincoln County Circuit Court and render a decision granting workers' compensation benefits to the Appellant.

Respectfully submitted, this the 3rd day of ^{Sept.}~~August~~, 2010.



Carlos E. Moore, MB # 100685
Tangala L. Hollis, MB # 103301
His Attorneys

Of Counsel:
MOORE LAW OFFICE, PLLC
P.O. BOX 1487
GRENADA, MS 38902
662-227-9940

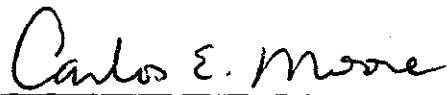
CERTIFICATE OF SERVICE

I, Carlos E. Moore, Appellant's attorney, 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 document to the attorney for Employer/Carrier:

Don Burch, Esq.
Daniel Coker Horton & Bell, P.A.
Post Office Box 1084
Jackson, MS 39215-1084

Honorable David Strong
Circuit Court Judge
P.O. Drawer 1387
McComb, MS 39649

THIS, the 3rd day of ^{Sept.}~~August~~, 2010.



Carlos E. Moore, Esq.
Tangala L. Hollis, Esq.