

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-WC-01284

MARTHA KAY STANFORD

APPELLANT

v.

V.F. JEANSWEAR, L.P. and
FIDELITY & GUARANTY INSURANCE COMPANY

APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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

- Martha K. Stanford, Appellant;
- William Stanford, Claimant's spouse;
- Bill Rutledge and Valarie Hancock, Appellant's counsel;
- V.F. Jeanswear, LP, Appellee;
- Fidelity & Guaranty Insurance Company, Appellee;
- Gallagher-Bassett Services, Third party administrator for Appellees;
- M. Reed Martz, Appellee's counsel.

Attorney of Record for Appellees


M. REED MARTZ

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STATEMENT ON ORAL ARGUMENT

Oral Argument Not Requested, but Not Opposed.

V.F. Jeanswear and Fidelity & Guaranty Insurance Company believe the issues presented to the Court in this appeal are settled issues of law which need no explanation by way of oral argument. The Claimant has requested oral argument and should the Court feel the same would be beneficial to its understanding of the case, the request is not opposed.

STATEMENT OF THE ISSUES

1. Whether the decision of the Mississippi Workers' Compensation Commission lacks the support of substantial evidence concerning its unanimous conclusion that the Claimant failed to sustain her burden of proof in establishing a work-related injury.

STATEMENT OF THE CASE

This is a workers' compensation matter. Martha Kay Stanford, Claimant, alleges she was injured in a work-related incident on either February 7, February 8, or possibly February 9, 2006, when she allegedly fell inside the cab of her truck. Appellant's Record Excerpts at page 1; MWCC Transcript at pages 35, 66. No worker's compensation benefits were paid by the Employer because the alleged injury was not reported and in fact was not work-related. Appellant's Record Excerpts at page 3 - 22 (ALJ and Full Commission Orders).

On January 4, 2007, more than a year and two major surgeries after her alleged injury, the Claimant filed a claim for worker's compensation benefits. Appellant's Record Excerpts at page 1. During that period she had been receiving short-term disability benefits not available for work-related injuries. MWCC Transcript beginning on page 71.

This matter was tried before Administrative Judge Virginia Mounger on March 31, 2009. Judge Mounger, by Order dated June 16, 2009, denied the claim for benefits. Appellant's Record Excerpts beginning at page 3. The Claimant appealed to the Full Commission on June 29, 2009. The Full Commission heard oral argument on November 16, 2009, and by Order dated November 18, 2009, (just two days later!) *unanimously* affirmed the administrative judge. Appellant's Record Excerpts at page 22. The Claimant filed an appeal with the Circuit Court of Union County. The Circuit Court, after having received briefs and hearing oral arguments, determined that "the Commission had substantial evidence to support its findings", thus affirmed the ruling of the Commission. Appellant's Record Excerpts at page 72. The Claimant then filed the instant appeal. Appellant's Record Excerpts at page 73.

SUMMARY OF THE ARGUMENT

Martha Kay Stanford had the burden to show all the essential elements of her claim by a preponderance of the evidence. She failed and consequently her case was dismissed. In her brief, the Claimant goes to great length to try to bolster her credibility, but failed to convince the finder of fact of that very issue. The Commission ultimately did not regard the Claimant as credible. The Claimant's story has been inconsistent on just about every point: The date of injury has changed three times; the injury was not reported to anyone for more than two years; she received short term disability benefits based upon her own representation that her condition was not work-related; and she went on a cruise vacation between her injury and substantive medical treatment and was observed, both by a traveling companion and on videotape produced as the trial of this matter (which she attempted to sequester from discovery), to be in no apparent distress despite her claim that she has been permanently totally disabled since the alleged injury. The Claimant's testimony was contradicted even down to the details of what route she took on her alleged mad dash home for medical treatment (which, incidentally, was not rendered until the following afternoon). The finder of fact had substantial evidence to reject her claims for a work-related injury.

Furthermore, the medical evidence in this matter belies her testimony. These records, beginning the day after her alleged injury and continuing through four operations spanning two years, all describe conditions which were chronic and pre-existing. Not one single provider's records contain a history of an accident so severe that she supposedly lost consciousness. In fact, most of those records expressly indicate that she had *not* suffered an injury. It was not until more than two years after her injury, after her short-term disability benefits had expired and she had instituted this claim, that she first described her alleged injury to her operative surgeon. Even this was preceded

by a letter from her attorney to the physician attempting to explain why his notes were missing any such history and, in fact, the medical record contained a contrary history. In other words, it was not until the Claimant had consulted with her attorney did this alleged injury ever appear in a single medical record.

The Commission's decision is absolutely supported by substantial evidence, is not arbitrary or capricious, nor does it contain any error of law. Therefore, the Commission must be affirmed.

ARGUMENT

a. Standard of Review

The scope of review in workers compensation cases is restricted both by caselaw and statute. The decision of the Workers' Compensation Commission is subject to a limited standard of appellate review. *Weatherspoon v. Croft Metals, Inc.*, 853 So.2d 776, 778 (¶ 6) (Miss. 2003). The Full Commission resolves conflicts in the evidence and the Court must defer to its factual findings. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1225 (Miss. 1997).¹ The Court can reverse the Commission only where the Commission's decision lacked the support of substantial evidence, was arbitrary and capricious, or contained an error of law. *Weatherspoon*, 853 So.2d at 778.

So long as there is a substantial basis for the Commission's decision, it must be affirmed, even if this Court when acting as the trier of fact would have been convinced otherwise. *Green v. Glen Oaks Nursing Center*, 722 So. 2d 147 (Miss. Ct. App. 1998). Substantial evidence is something less than a preponderance of the evidence and is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss. 1991).

The injured employee bears the general burden of proof of establishing every essential element of her claim by a preponderance of the evidence. She must show that: an accidental injury occurred arising out of and in the course of her employment; a disability was suffered; and a causal connection between the work injury and the claimed disability exists. *Bryan Foods, Inc. v. White*, 913 So.2d 1003, 1008 (18) (Miss. Ct. App. 2005). The causal connection between the claimant's

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When the Commission accepts the administrative law judge's findings and conclusions, those findings and conclusions are treated as being those of the Commission. *McDowell v. Smith*, 856 So.2d 581, 585 (¶ 10) (Miss. Ct. App. 2003).

injury and disability must be proven with competent medical proof and based upon a reasonable degree of medical probability. *Harrell v. Time Warner/Capitol Cablevision*, 856 So.2d 503, 511 (30) (Miss. Ct. App. 2003); *Howard Indus. v. Robinson*, 846 So.2d 245, 252 (49) (Miss. Ct. App. 2002).

b. The Claimant Proposes an Incorrect Standard of Review

Despite the preceding standard of review, which is well attested in the case law, the Claimant's Brief asks the Court to do precisely what it cannot: to re-weigh the evidence and come to a conclusion contrary to that of the Commission.

In her Brief the Claimant continues to incorrectly state that the burden of persuasion was upon the Employer/Carrier to disprove her alleged injury, e.g. to prove a negative by a preponderance of the evidence. For example, on page one of her brief, the Claimant argues "**The Employer/Carrier never showed any evidence that Stanford was injured in any other manner.**"² (Emphasis in original). The theme is replete throughout the Claimant's Brief. *Cf.* Appellant's Brief at page 2 ("Not one witness testified Stanford was not injured while working."); page 11 ("Employer has **never** established or produced **any** records or evidence of another injury") page 21 ("**Nobody** testified Stanford did not injure herself as she stated, nor explained any other reason for her injuries."); page 25 ("Nothing was produced to show Mrs. Stanford was not injured while in her truck and working for her employer as she claims.")

Additionally, the Claimant would have the Court fall into the logical pit of assuming

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As just one example of the difficulty of disproving a negative, the Employer/Carrier would show that there may in fact have been no other injury giving rise to her medical issues. As discussed elsewhere, Dr. Crosby described the Claimant's condition as chronic and of an "insidious onset." The Claimant would have the Employer/Carrier be responsible for an injury that never occurred simply because they could not demonstrate that something else (an intervening injury) also never occurred.

something occurred simply because there was some evidence that her condition at a point after the trip was different from that before the trip. As a purported example of the “complete bias in favor of the Employer and Carrier” by the administrative judge, the Claimant references witnesses Rhonda Butler and Jack Fanning. Appellant’s Brief at page 20. Both witnesses testified that the Claimant was healthy before she set out on her trip and was disabled at a remote time afterward. The Claimant then makes a leap too far, arguing that this before/after evidence is probative of what happened in the interim. Before/after evidence may be useful to show a change in condition, but it does nothing to enlighten us as to the cause of the change.

c. The Claimant Invents Explanations for Inconsistent Evidence

In an attempt to bolster her credibility, which the Commission severely discounted, the Claimant’s Brief spends page after page offering clever explanations for inconsistencies in her version of events. *Cf.* Brief of Appellant at pages 3-4 (explaining inconsistency in Claimant’s route by subtly adding “possibly dropping a load in Gulfport” to the Claimant’s testimony which denied any such diversion); page 10 (attempting to explain the absence of any accident history in first medical treatment using speculative phrases such as “Even had she”, “was not likely to think of”, and “very probable she could have”); page 13 (arguing that doctor’s record stating “No injury that started this” was “merely one doctor’s conjecture”, as if licensed medical doctors are somehow in the habit of creating patient histories); page 18 (hypothesizing that witness Rupley “was likely being paid for her time”); page 23 (proposing that “No average employee with a 7th grade education would know” certain things). In doing so the Claimant attempts to carefully weave a theme of speculation that contradicts the facts presented to the Commission.

d. The Claimant Was Not Credible

The Commission found that the Claimant failed to sustain her burden of proof for two principal reasons: first, the Claimant was not credible; and second, the medical evidence did not support the occurrence of a work-related injury. Each of these issues will be addressed in turn.

The Commission found that the Claimant was not credible and thus it was free to, and properly did, reject her testimony. *White v. Superior Products, Inc.*, 515 So. 2d 924, 927 (Miss. 1987) (commission may reject claimant's uncorroborated testimony if it is improbable, incredible, unreasonable or shown to be untrustworthy). The Commission, as the finder of fact, is entitled to considerable deference in making judgments as to the credibility of witnesses.

Neither the administrative judge, who personally received her testimony, nor the Full Commission, which independently reviewed the entirety of the evidence produced at trial, found the Claimant believable. There is ample support for such a conclusion. Although there are many more, the Employer/Carrier would offer the following eleven examples, organized by topic:

1. Immediate Disability

- a. The Claim: The Claimant's neck has hurt constantly ever since her accident, has prevented her from working at any time, and she is unable to turn or lean without pain. MWCC Hearing Transcript at pages 50-52, 80.
- b. The Reality: The videographic evidence introduced at trial showed the Claimant riding a horse, leaning back while wildly waiving at the camera, and vigorously rubbing ice on the bare chests of men while on a cruise shortly after the accident. See MWCC Exhibits 16 & 17;³ MWCC Exhibit 9 is still photographs of the same

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The relevant portion of Exhibit 16 is Chapter 4, "Beach Horseback Riding", at minutes 22:40,

activity. The Claimant's former friend, Sally Jo Rupley, testified that she traveled with the Claimant on the whole vacation and at no time observed her to be in pain or limited in her activities. MWCC Transcript at page 139.

2. Report of Injury to Operative Surgeon

- a. The Claimant reported how she was injured to Dr. Crosby at the first visit on March 31, 2006. MWCC Hearing Transcript at page 69.
- b. On March 31, 2006, Dr. Crosby recorded an "insidious" onset of neck pain. Dr. Crosby was not aware of any claim of work relation until May 30, 2008, following a letter from the Claimant's attorney dated May 27, 2008. MWCC Exhibit 1, Deposition of Dr. Crosby at pages 20-21; MWCC Exhibit 1 at page 69/72. Restated, the first report of a work connection to the operative surgeon was given by the Claimant's attorney more than two years and four surgeries after her first visit with Dr. Crosby.

3. How the Accident Occurred

- a. The Claim: Claimant stated in her Petition to Controvert and sworn discovery responses that she was injured when her truck stopped abruptly, throwing her "out of the seat and into a cooler/refrigerator. She landed with her back and neck against the cooler." See MWCC Exhibit 7, Response to Interrogatory No. 10.
- b. The Reality: At trial the Claimant testified that she tripped over the cooler while going to the cab of the truck; the truck was not moving during any of this. MWCC

26:52, 27:00, 31:01, 32:01, 34:06, 35:42 and 38:31. On Exhibit 17, the cruise line's promotional video, Ms. Stanford is seen beginning at approximately minute 52, which is chapter 10, entitled "Hairy Chest."

Transcript at pages 16-17, 45. She testified she fell backwards with her back on the cooler and her head striking the bed, not the cooler, causing a loss of consciousness.

MWCC Transcript at page 45.

4. Time and Location of Accident

a. The Claim: The injury occurred between 10 p.m. and 12 a.m. while parking in a suburb of New Orleans. MWCC Transcript at page 17.

b. The Reality: She did not arrive outside New Orleans until 3 a.m. the following day. MWCC Transcript at page 36; MWCC Exhibit 6, page 2/19.

5. Reporting of the Accident

a. The Claim: The Claimant advised the evening dispatcher of her injury immediately after it occurred, and the head dispatcher (Tom Swinton) as well as the terminal manager (Keith Horton) a few hours later. MWCC Transcript at pages 18, 20 and 24.

b. The Reality: No one at the Employer received notice of an injury. MWCC Transcript at page 152; MWCC Exhibit 5. Tom Swinton received no report of injury from the Claimant. MWCC Exhibit 5. Keith Horton vehemently denied receiving any notification of an injury from the Claimant. MWCC Transcript at page 150-151.

6. The Route Home After the Accident

a. The Claim: The Claimant drove straight back from Louisiana to Saltillo. MWCC Transcript at page 19. The Claimant additionally alleged the Employer cheated her out of her pay for the return trip. MWCC Transcript at pages 71 and 91.

b. The Reality: The Claimant went from the New Orleans area to Gulfport, where she delivered one load and picked up another, before returning to Saltillo. MWCC

Exhibit 6, pages 1 and 2; MWCC Transcript 105. She was paid for this trip. MWCC Transcript at page 156.

7. First Medical Treatment

- a. The Claim: Immediately upon returning home she went to the doctor, the same day as her injury. MWCC Transcript at pages 25 and 66.
- b. The Reality: She saw Dr. Prater the following day, February 9, 2006, well into the afternoon at 3:29 pm. MWCC Exhibit 4 at page 19/28. These notes contain no history of an injury but instead reference problems beginning a week earlier. *Id.*

8. Post-Accident Vacation

- a. The Claim: The Claimant was unaware photographs or videos of the vacation trip she took shortly after the accident existed. MWCC Exhibit 10, Response to Request for Production No. 13.
- b. The Reality: Not only did she know they existed (see MWCC Transcript at pages 55-56), the Claimant testified that the videos (marked as MWCC Exhibits 16 & 17) belonged to her (MWCC Transcript at page 55) and she requested Ms. Rupley hide them from counsel for the Employer. MWCC Transcript at page 137.

9. She Did Not Intentionally Misrepresent the Nature of Her Injury to Receive Benefits

- a. The Claim: Although the short term disability paperwork, which she concedes bears her signature, indicates she applied for benefits for a non-work related condition (benefits would not be available if the condition were work-related), she did not read or complete the form prior to signing it. MWCC Transcript at page 74-75.
- b. The Reality: During her deposition she claimed that she stated the injury was not

work related in fear of losing her job, but at trial she testified someone else filled out the papers on her behalf without her ever seeing them. MWCC Transcript at page 77. One such person supposedly completing this paperwork for her was Carolyn Robins, a lady the Claimant says is so incompetent to testify that she (Robins) does not even know her own age. *Id.* at pages 63. Just as importantly, a person is charged with knowing the contents of a document she executes and a failure to read it does not suffice as an excuse. *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 726 (Miss. 2002); *Dunn v. Dunn*, 786 So.2d 1045, 1050 (Miss. 2001). Additionally, these forms were completed long after she had supposedly reported her injury, undermining any claim that she did not list the condition as work related out of fear of her employer.

10. The Claimant Reported the Injury To Other Folks Shortly After It Occurred

- a. The Claim: Sometime after her injury, while on the return trip to Saltillo, the Claimant made a four way phone call in which she disclosed the injury occurrence to her sisters and friend. MWCC Transcript at pages 22, 100.
- b. The Reality: Both the Claimant and her husband denied the occurrence of this four way phone conversation in their depositions. It was not until five days before trial that the witnesses and the conversation were disclosed in discovery for the first time. MWCC Transcript at pages 60-61, 107.

11. The Claimant Had Prior Disabilities

- a. The Claim: Prior to the injury at issue, the Claimant had no prior significant medical problems which prevented her from working or caused her to miss work. MWCC

Transcript at page 15.

- b. The Reality: The Claimant received short term disability benefits in 2005, 2004, 2003 and 1998 due to medical conditions which prevented her from working. MWCC Exhibit 8. The Claimant repeatedly told her short term disability carrier this condition was not work-related. MWCC Exhibit 11, 12 and 13.

e. The Medical Evidence Supports a Finding of Non-Compensability

Just as important as the Claimant's incredibility is the absence of any medical support for her injury. As noted earlier, causal connection between the claimant's injury and disability must be proven with competent medical proof and based upon a reasonable degree of medical probability. *Harrell*, 856 So.2d at 511; *Howard Indus.*, 846 So.2d at 252.

Contrary to the Claimant's testimony that she received treatment immediately upon her arrival home, her first treatment was not until the following day, February 9, 2006. MWCC Exhibit 4, page 19/28. At this visit with Dr. Allie Prater, the Claimant complained of blackouts, syncope, and slurred speech for a week preceding her appointment. *Id.* She did *not* complain of a work-related fall inside the cab of her truck earlier in the day and she was given no diagnosis that would relate to an acute work-related injury. MWCC Exhibit 4, page 19/28. The Claimant's inconsistency on when she first sought treatment, and the absence of any report of a work-related incident (in fact, she only provided a history of complaints preceding her injury) on the first presentation was regarded as extremely probative by the Commission, and rightfully so. As noted earlier, the Claimant did not provide a history of a work-related accident to any medical provider until long after her present claim was filed and her attorney had involved himself in the issue. The significance of this fact cannot be overstated.

The Claimant was evaluated by Dr. Johnny Mitias on March 15, 2006. MWCC Exhibit 3, page 2. She reported chronic right buttock and lateral thigh pain which had become worse over the preceding two to three months. *Id.* Dr. Mitias wrote that there was “No injury that started this.” *Id.* The Claimant argues that the Commission mischaracterized this evidence by referring to it as an express denial of a work injury. Brief of Appellant at pages 12-13. The words speak for themselves, especially when put in context of complaints which had preceded the alleged injury by months or even years. It has not been the experience of the undersigned, nor apparently that of the administrative judge or Commission, that physicians simply invent such a history.

On March 31, 2006, the Claimant was evaluated by Dr. Glenn Crosby, who noted neck pain of “insidious onset.” MWCC Exhibit 1, deposition transcript at pages 20-21; MWCC Exhibit 1, page 58/72. As Dr. Crosby explained in his deposition, an “insidious” onset is one *not* precipitated by an acute work injury. MWCC Exhibit 1, deposition transcript at page 20 (“meaning the pain began without any reported cause.”) So, not only did the Claimant not provide a history of an acute injury to her operative surgeon, she affirmatively provided a history which is inconsistent with her allegations in this suit. On April 13, 2006, Dr. Crosby completed an “Attending Physician’s Statement” indicating the condition was not due to an injury or illness arising out of her employment. Exhibit 1, page 72/72.

In further confirmation of the above, the patient history documented by Crossroads Rehabilitation on April 5, 2006, provided “Pt has had no accidents.” Exhibit 1, page 63/72. If the Claimant had experienced the injury she alleges, one must ask why three separate providers each took a history completely contrary to an acute injury inside the truck of cab, especially when it was allegedly so severe that the Claimant lost consciousness and was rendered permanently totally

disabled.

The Claimant makes much of Dr. Crosby's testimony that the injury she suffered would be consistent with an injury such as she described. What the Claimant would have the Court overlook is that Dr. Crosby did not receive this history initially (MWCC Exhibit 1, deposition transcript at page 20) but rather for the first time in May 2008 (*id.* at page 24), two years after he first saw her. Furthermore, Dr. Crosby confirmed that the history taken by Dr. Mitias was consistent with his own (*id.* at page 21) and that given to her physical therapist (*id.* at page 24). While it is certainly possible that an injury such as she alleges could cause these conditions, so could a variety of other factors. This is precisely why medical evidence must tie the alleged disability to the alleged injury to a reasonable degree of probability, not possibility.

Over two years and four surgeries, every provider who treated the Claimant was unaware of her alleged work injury. It was not until well after the present claim was filed and her attorney wrote the doctor a letter attempting to excuse the non-reporting (MWCC Exhibit 1, page 70/72) that such a report was documented. In response to that letter, the operative surgeon stated "In my records I did not have any indication of an injury. In fact, on the sheet that she filled out for me on the day of her first arrival, she did not indicate this was an injury." MWCC Exhibit 1, page 69/72.

CONCLUSION

The administrative judge and all three Commissioners thoroughly evaluated the testimonial and documentary evidence of this case. The Commission, the finder of fact, heard oral argument in the matter and two days later unanimously affirmed the administrative judge. The Circuit Court affirmed the Commission. This Court's limited standard of review requires it to affirm the Commission unless it is firmly convinced that there is essentially no evidence upon which the

decision is based. There is more than sufficient evidence in the record to support the Commission's decision and therefore it must be affirmed. The Employer/Carrier pray that the decision of the Commission be affirmed and this appeal dismissed with all costs assessed to the Claimant.

Respectfully submitted,

V.F. JEANSWEAR AND
FIDELITY & GUARANTY INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I, M. Reed Martz, attorney of record for the employer and carrier, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing to:

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Hon. Andrew Howorth
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1 Courthouse Sq., Ste. 201
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This the 4th day of April, 2011.



M. REED MARTZ