

IN THE SUPREME COURT OF MISSISSIPPI

ANTHONY THADISON

CLAIMANT/APPELLANT

v.

CASE NO. 2010-WC-01563-COA

UNIVERSAL LIGHTING TECHNOLOGIES,
INC. and TWIN CITY FIRE INSURANCE
COMPANY

EMPLOYER/INSURER/APPELLEES

BRIEF FOR APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

APPEALED FROM THE CIRCUIT COURT OF
LINCOLN COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

ANTHONY THADISON

CLAIMANT/APPELLANT

v.

2010-WC-01563-COA

UNIVERSAL LIGHTING TECHNOLOGIES, INC.
and TWIN CITY FIRE INSURANCE COMPANY

EMPLOYER/INSURER/APPELLEES

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.

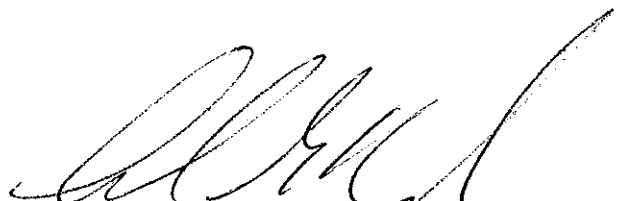
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STATEMENT OF ISSUES

1. The Circuit Court was within its discretion to dismiss the claimant/appellant's appeal from the Mississippi Workers' Compensation Commission to the Circuit Court of Lincoln County as claimant/appellant failed to timely file his appellate brief; and
2. The Circuit Court was correct in affirming the MWCC's ruling that the claimant/appellant's injury was non-compensable.

STATEMENT OF THE CASE

A. Underlying Facts of the Case.

Anthony Thadison ("Claimant") began suffering on and off neck and back problems some time during or before 2005. *See Workers' Compensation Hearing Transcript ("WCHT")* (Record Volume 5 of 5), p18. During this time, the Claimant was employed by Universal Lighting Technologies, Inc. (hereinafter "Universal Lighting") as a forklift operator. He testified that he began missing work because of pain in his neck in 2005, for which he was treating with Dr. Liverman. He further testified that "some time in 2006" he hit a bump while backing his forklift and "felt a jar" in his whole body and some time following the bump incident he "felt a pop" in his neck when he looked up while driving his forklift. He did not report either the "bump" or "pop" incident to his employer.¹

Claimant eventually went to King's Daughters Hospital in Brookhaven for his neck pain, whereupon he was referred to Dr. Barrett in Jackson. Dr. Barrett's partner, Dr. Senter, finally

¹*WCHT* pp 13-14.

A. ... I felt a jar. And it's stinged (sic), it burned, but I kept getting up because I was working. I didn't – you know, I just kept working.

Judge. When was this?

A. This happened in I want to say some part of '06. I don't remember what month. It was the early part.

...

Q. Any other kind of experience on the job?

A. Yes. It was another time I was putting a palette up on the shelf, up about the third or fourth shelf up. And when I went to look up, I heard like a pop inside your head like your ears pop, and I heard that pop.

Judge. When was this?

A. That was probably a couple of weeks or months after that first injury, first jar.

Q. And who did you report this to?

A. No one.

Q. And why not?

A. Kept working. It was just something I always done (sic). I just worked...

performed surgery on his neck when he could no longer perform his job. *WCHT* pp 19-21.

B. Procedural History.

On February 20, 2008, Claimant filed a petition to controvert a workers' compensation claim. *See Workers' Compensation Record ("WCR")* at 1. The claim was subsequently tried before Administrative Judge Homer Best on August 2, 2009, who found the claim non-compensable. *WCR*, 31-36. The decision of the Administrative Judge was appealed to the Full Commission, which upheld the Administrative Judge's ruling in the Employer/Carrier's favor on December 18, 2009. *WCR* at 50.

On December 23, 2009, Claimant filed a notice of appeal to the Circuit Court of Lincoln County, seeking review of the Mississippi Workers' Compensation Commission's ("MWCC") decision. *WCR* at 51. As of April 12, 2010, Claimant still had not filed his appellate brief. As a result, the Lincoln County Circuit Clerk issued a Clerk's Notice pursuant to Miss. R. App. P. 31(b), stating said brief was tardy. *See Lincoln County Circuit Court Record ("LCCCR")* at 7.

On May 13, 2010, Employer/Carrier filed a Motion to Dismiss alleging Claimant's appeal should be dismissed for failure to timely file an appellate brief. *LCCCR* at 10-14. Claimant did not file his brief until June 22, 2010. *LCCCR* at 31-39. The Motion to Dismiss was set for hearing. Claimant later set an oral argument hearing for the same day.

On August 16, 2010, after hearing oral arguments, the Court upheld the ruling of the Mississippi Workers' Compensation Commission and also ruled Claimant failed to timely file his brief. *LCCCR* at 58. On September 20, 2010, Claimant re-filed his appeal from the

Mississippi Workers' Compensation Commission to the Lincoln County Circuit Court.² *WCR* at 55. The following day, he also filed an appeal from the Lincoln County Circuit Court to the Mississippi Supreme Court. *LCCCR* at 63-64.

SUMMARY OF THE ARGUMENT

Claimant has been unsuccessful in arguing his injury was work related at every level at which his case has been heard. Administrative Judge Homer Best ruled that Claimant had failed to report a work injury to any of his doctors or his place of employment (Universal Lighting). Additionally, it was ruled that he failed to show causation to a reasonable degree of medical certainty. Administrative Judge Best's ruling was upheld by the Mississippi Workers' Compensation Commission, sitting as a finder of fact, upon appeal. The Administrative Judge's ruling was again upheld by the Circuit Court Judge of Lincoln County.

In addition to failing to report his injury or show causation, Claimant failed to timely file his appellate brief to the Circuit Court of Lincoln County. It took him an additional month to file the brief, even after receiving notice from the Circuit Court Clerk that his brief was delinquent. As a result, the Circuit Court was within its power to dismiss the appeal for failure to timely file a brief.

ARGUMENT

A. Standard of Review.

There are two principle issues in this appeal. The first is whether the Circuit Court acted

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The Lincoln Country Circuit Judge ruled he had no jurisdiction over Claimant's second appeal to his Court from the MWCC, as Claimant had also appealed to the Mississippi Supreme Court. The Court refused to enter a written order on the matter due to the lack of jurisdiction. This second appeal has no bearing on this immediate appeal and this note is added only to clear up any possible confusion over the record.

appropriately in dismissing Claimant's appeal for failing to timely file an appellate brief. In this respect, the Mississippi Court of Appeals has ruled "[t]he decision to grant or deny a motion to dismiss is in the discretion of the trial court and will not be reversed unless that discretion is abused." *Thomas v. Five County Child Dev. Program, Inc.*, 958 So. 2d 247, 249 (Miss. Ct. App. 2007) (citing *Williams v. Fornett*, 906 So. 2d 810, 812 (Miss. Ct. App. 2002)). *See also Zurich Am. Ins. Co. v. Beasley Contr. Co.*, 779 So. 2d 1132 (Miss. Ct. App. 2000)(Circuit Court did not abuse its discretion in dismissing workers' compensation appeal for failure to timely serve appellate brief, even though the record was erroneously sent to the wrong county).

The second issue is whether the Circuit Court was appropriate in ruling the Mississippi Workers' Compensation Commission was correct, as a matter of law, while acting as an appellate court. Claimant is asking this Court to overturn the ruling of the MWCC. Barring a finding of an arbitrary or capricious ruling, the courts "have no more authority to interfere with the decisions of the [Mississippi Workers' Compensation] Commission than [they] do in a case of any other administrative body." *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991). The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. "[An appellate court] will overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact." *Georgia Pac. Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991)(internal citations omitted). "If there is substantial evidence to support the Commission, absent an error of law, this Court must affirm." *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1125 (Miss. 1992).

[I]f there is a quantum of credible evidence which supports the decision of the [Mississippi Workers' Compensation] Commission, no court will reverse the decision. This Court will not determine where the preponderance of the evidence lies when the evidence is conflicting, the assumption being that the Commission,

as the trier of fact, has previously determined which evidence is credible, has weight, and which is not.

Metal Trims Industries, Inc. v. Stovall, 562 So. 2d 1293, 1297 (Miss. 1990)

B. The Circuit Court was within its discretion to dismiss the claimant/appellant's appeal from the Mississippi Workers' Compensation Commission to the Circuit Court of Lincoln County as claimant/appellant failed to timely file his appellate brief.

Claimant asserts Employer/Carrier has waived its right to assert that Claimant's brief was tardy in that Employer/Carrier "failed to renew its motion to the Circuit Court Judge on the Appellee's Motion to Dismiss claim before the Circuit Court heard and made its ruling based on the merits of the case." *Primary Brief of Appellant Anthony Thadison*, at 11. Claimant fails to cite any authority for this proposition, though does cite authority that generally states issues not previously raised are waived on appeal.

To recapitulate the facts relevant to this allegation, the Clerk of Lincoln County Circuit Court issued to Claimant a Clerk's Notice on April 21, 2010, notifying him that his appellate brief was tardy. *LCCCR* at 7. Twenty two (22) days later, Employer/Carrier filed a Motion to Dismiss on May 13, 2010, based explicitly on Claimant's failure to file an appellate brief to the Circuit Court. *LCCCR*, 10-14. Twenty eight (28) days later, on June 10, 2010, Employer/Carrier noticed its Motion to Dismiss for hearing. Approximately one month after Employer/Carrier noticed its hearing, Claimant noticed oral arguments for his appeal to be heard on the same date. *LCCCR* at 29. The hearing was set for August 16, 2010, sixty seven (67) days following the notice of hearing of the motion. *LCCCR* at 27.

At the hearing on August 16, Employer/Carrier argued its Motion to Dismiss. *See Motion Hearing Transcript ("MHT")* (Volume 2 of 5), p 2. It was only after the Motion to Dismiss had been argued and rebutted that the Court requested arguments as to the merits of the

appeal. *MHT* at 4.³

The issue of Claimant's untimely appellate brief to the Circuit Court was raised with that Court. It was timely noticed for hearing and was argued. The Circuit Court subsequently ruled the Motion to Dismiss was well taken due to the delinquency of Claimant's brief. *LCCCR* at 61. It is undisputed the Circuit Court, acting as an appellate court in this circumstance, has the inherent power to dismiss Claimant's appeal for failure to timely file an appellate brief pursuant to Miss. R. App. P. 31(d).⁴ Barring Claimant's showing the Circuit Court abused its discretion in dismissing the appeal, the order of dismissal must stand. Claimant has provided no legal authority that supports the proposition that the Circuit Court has abused its discretion, therefore the order of dismissal must stand.

C. The Circuit Court was correct in affirming the MWCC's ruling that the claimant/appellant's injury was non-compensable

Alternatively, should this Court find the Lincoln County Circuit Court abused its discretion in dismissing Claimant's appeal for failure to timely file his appellate brief, Claimant's

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Ms. Hollis(Claimant's counsel): ...it is still the claimant's position that the claimant should be allowed to have this extension and subsequently file their brief and hear the oral arguments concerning the brief today.

Court: Okay. Well, go ahead and argue.

Ms. Hollis: Sir?

Court: Let's go ahead. We are all here. Let's go ahead and argue it.

Ms. Hollis: Okay. The briefs?

Court: Yeah.

Ms. Hollis: Oh, okay.

Court: I'll rule on everything.

4

Miss. R. App. P. 31(d) reads in applicable part, "If an appellant fails to file the appellant's brief within the time provided by this rule or within the time as extended, the appeal may be dismissed on motion of appellee or on the Supreme Court's own motion as provided in Rule 2."

appeal still fails as he failed to report his injury to his employer and did not mention to his treating physicians that his injury was work related. Additionally, the Claimant paid his medical bills through his employer's health care plan and not his employer's workers' compensation insurance carrier, therefore employer and/or its carrier could not have been on either constructive or actual notice of a work related injury.

1. Claimant failed to timely report his injury

Mississippi Code Annotated § 71-3-35 states, "No claim for compensation shall be maintained unless, within thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer... Absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employees failure to give notice... ."

Claimant stated at his hearing that he did not report either of the two incidents mentioned above (the "bump" or the "pop") to his employer, but stated that neither of them caused him to stop working. He stated that his neck problem grew worse over time. However, he also did not tell his employer of his injury. *WCHT* at 28-29, 32

Additionally, the Claimant paid for his medical expenses through Blue Cross Blue Shield of Mississippi and/or Tennessee, the employee medical carrier for the employer. *See Workers' Compensation Exhibits ("WCE"), Exhibit "1",* p3 and *Exhibit "3",* p2. There is no evidence the workers' compensation carrier was placed on notice or paid for any medical bills related to the Claimant's alleged neck injury. *WCR* at 32. Therefore, it cannot be argued that the employer or carrier had actual or constructive knowledge of a work related injury.

Employer's first notice of a work injury came when Claimant filed his petition to

controvert in 2008. As a result, Employer/Carrier were not placed on actual notice of Claimant's injury until well after 30 days of his alleged work related injury, and Claimant's claim for workers compensation benefits is barred.

The allegation that the employer was informed was first raised at the Circuit Court level. It was not alleged at either the hearing on the merits nor at the appeal to the MWCC and should therefore be barred. *See e.g. Public Emples. Ret. Sys. v. Warner*, 983 So. 2d 342, 348 (Miss. Ct. App. 2008). In fact, Claimant's testimony at the hearing on the merits was quite different from his current contention:

Q. And who did you report this to?

A. No one.

Q. And why not?

A. Kept working. It was just something I always done (sic). I just worked...
WCHT, p14(emphasis added).

Q. ... You had testified on direct examination about two specific injuries. One where you felt a jar in your neck and then another where he felt a pop, and both of those in 2005[injuries actually occurred in 2006], and I want to ask you something about that. You said that you didn't report those to anyone and why?

A. Just like I say it was nothing that stopped me from working. It's nothing – it– I just was doing my job, working.

Id. p. 28

Q. Okay. Well, if you think that why didn't you tell anyone at Universal that you thought that that was what was causing your problems?

A. Because I was still able to perform. As I kept working, it gradually got worse. Like I said, it's something that happened out of the norm and it stayed in my mind.

...

Q. And if you in your mind thought that your neck condition was as a result of your employment, why didn't you tell someone at Universal Lighting that that's what you thought?

A. Like I said, it was – I kept working, and as I kept working, it got worse...
Id. p. 29

Q. But when it got so bad you still didn't think that you should go back and

tell anybody at Universal or – at Universal that this neck problem was – even after you talked to Dr. Barrett and you had that conversation with Dr. Barrett, you still didn't think to go back and talk to anybody at Universal about this?

A. No. I went back to go to work, to continue to work. I went back to work.

...

Q. But you didn't think to go back and tell Universal even though you were still working, hey, Dr. Barrett has told me now that this problem is related to work. You didn't think to tell anybody at Universal that?

A. No.

Id. p 32

Q. So, Mr. Thadison, I am just going to make sure I got your testimony correct. **You never reported the work-related injury to your employer?**

A. **No, ma'am.**

Q. And you never reported to them that your condition, that your neck condition, that you thought it was work related? **Did you ever report to your employer that you thought your neck condition was work related?**

A. **No, I didn't.**

Id. p 35(emphasis added).

As a result of the above testimony, it is beyond doubt Claimant failed to report his injury to his employer within the proscribed period of time.

2. Claimant failed to show causation

It is well established that the injured employee bears the general burden of proof of establishing every essential element of the claim. *See e.g. Penrod Drilling Co. v. Etheridge*, 487 So. 2d 1330 (Miss. 1986). The claimant also bears the burden of proof to show an injury arising out of employment and a causal connection between the injury and any claimed disability. *See Hedge v. Leggett & Platt*, 641 So.2d 9 (Miss. 1994). To establish the requisite causal connection between the injury in the surgery, the Claimant must not only have the weight of the evidence on his side, but his proof must be by expert medical testimony, and to the degree of a reasonable probability rather than mere possibility. *Georgia-Pacific v. Gregory*, 589 So.2d 1250, 1254

(Miss. 1991); *See also Howard Industries, Inc. v. Robinson*, 846 So. 2d 245 (Miss. Ct. App. 2002).

Claimant was seen by Dr. Stephen Liverman, a family practitioner in Wesson. Those records indicate the Claimant presented to him with a complaint of left sided neck pain on July 26, 2005. *WCE, Exhibit "2"*, p 13. Dr. Liverman prescribed medications and physical therapy. He saw the Claimant again for the same problem several times in August of 2005. The Claimant was released to return back to work on August 29, 2005. *Id.* at 14-16. His work related injury(ies) occurred in the early part of 2006. Later, in January of 2007, Dr. Liverman filled out some forms for the Social Security Administration when the Claimant filed for disability. His records do not mention any relationship between the Claimant's neck problem and his employment.

Claimant also treated at King's Daughter Medical Center in Brookhaven. The records indicate the Claimant presented on October 17, 2005, with a neck complaint. *WCE, Exhibit "1"*, p 4. An MRI was performed at the hospital on October 18, 2005, which showed herniated discs at C3-4, C5-6 and C6-7. *Id.*, pp 14-16. Claimant testified he suffered work related injury(ies) occurring in the early part of 2006. The Claimant next presented to the hospital on February 16, 2006, for treatment of a cough and nasal congestion. He did not mention any neck problems at that time. *Id.* p 10.

Claimant was also seen by Mississippi Spine Clinic in Jackson. The Claimant initially presented on October 25, 2005. The Claimant's history was listed as follows:

This is a 45-year-old patient who actually runs a forklift. He has been having off and on neck and back problems for a number of years, and has gotten gradually worse. Recently, his neck and left arm problems have been his worst symptoms. *WCE, Exhibit "3"*, p 7.

The Claimant filled out a form during the October 25, 2005, visit which indicated that he had not suffered any injury, the onset of his problem was gradual and that his problem was not work related. *Id.*, p 11. Claimant later presented on December 20, 2005, (his work related injury was allegedly suffered in early 2006) March 10, September 28, October 5 and 6, 2006, to the same clinic. There was no mention of a work injury at any of these visits. He was recommended for surgery on the final visit.

Dr. Senter, of Mississippi Spine Clinic, was the surgeon who performed neck surgery on Claimant on October 26, 2006. Dr. Senter was asked what effect forklift driving had on the Claimant's cervical spine condition. He responded, "I really don't think forklift driving had anything to do with his neck condition. I thought [the neck condition] was just probably more genetically related than anything else." *WCE, Exhibit "4"*, p 11. Later in his deposition, Dr. Senter stated that the assertion the Claimant's job had aggravated his existing spine condition was only a "possibility." *Id.*, pp 20-21.

Therefore, Claimant has failed to prove by a fair preponderance of the credible evidence that he suffered an accidental injury to his cervical spine arising out of an in the course of his employment and that there is a causal connection between the injury and a surgery performed.

Claimant also points to an addendum note from Dr. Barrett, Dr. Senter's partner at Mississippi Spine Clinic. The note from Dr. Barrett (*WCR* at 44) is not a contemporaneous business record. It is a note made on April 27, 2009, after an ex parte phone call solicitation from Claimant's counsel. It is not believed that Dr. Barrett had seen Claimant since October 6, 2006, over 2 ½ years earlier. Claimant chose not to depose Dr. Barrett prior to a hearing on the merits. The claimant was seen at the Mississippi Spine Clinic on several occasions, and there is

not one mention of a work injury or any relation of the Claimant's neck condition to his work made in any of the medical notes. Further, there is ample medical evidence from Dr. Liverman and Kings Daughters Hospital as well which again make no mention of the alleged work related nature of Claimant's neck problems. These records in addition to Dr. Senter's testimony make it clear that there exists no causal connection between Claimant's work and his neck problems.

It is incredible to believe that Claimant would not ever mention to his employer that he believed his condition to be work related if in fact he believed it to be. Also, the fact that there is no medical history, save the single addendum note from Dr. Patrick Barrett of a work related injury, can only lead to one conclusion. The Claimant's neck problems were not, in fact, related in any way to his work, but rather to genetics, as surgeon Dr. Senter opined in his deposition. Finally, and most importantly, the Mississippi Workers' Compensation Commission, allowed Claimant to supplement his record with Dr. Barrett's addendum note. Even considering the addition of this note, the MWCC, sitting as a finder of fact, found no causal link between Claimant's injury and his work. *WCR* at 50.

Claimant's reliance on *Spencer v. Tyson Foods*, 869 So2d. 1069 (Miss. Ct. App. 2004) is misplaced. In *Spencer*, as Claimant notes, the claimant suffered an injury she claims resulted from her work. However, unlike the case *sub judice*, in *Spencer*, the administrative law judge and the MWCC both found the injury to be compensable, the opposite of the facts in this case. When the *Spencer* appeals reached the Circuit Court, that court reversed the Full Commission's finding. The Court of Appeals held:

An appellate court must defer to an administrative agency's findings of fact if there is even a quantum of credible evidence which supports the agency's decision. This highly deferential standard of review essentially means that this Court and the circuit courts will not overturn a Commission decision unless said

decision was arbitrary and capricious... we do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye toward determining how we would resolve the factual issues were we the triers of fact; rather, our function is to determine whether there is substantial credible evidence to support the factual determination by the Commission.

...

The Commission had conflicting evidence that supported the positions taken by both [claimant] and [employer]. Following our standard of review, we cannot and will not reweigh the evidence. Instead, we consider whether there was substantial evidence to support the Commission's decision. Although we may have placed greater weight on Dr. Myers' opinion, we confine our review to determine whether substantial evidence existed before the Commission. Here, substantial evidence did in fact exist to support the Commission's finding.

Spencer v. Tyson Foods, Inc., 869 So. 2d 1069, 1073 and 1075 (Miss. Ct. App. 2004)

Here the Commission, the finder of fact, has reviewed all possible evidence and made a finding of fact that Claimant's injury is not compensable. The finding is clearly supported by a quantum of credible evidence and therefore should be left undisturbed.

CONCLUSION

Claimant's appeal fails for at least three reasons: 1) Claimant failed to timely file his appellate brief to the Lincoln County Circuit Court. That Court dismissed the appeal. Claimant has failed to show how the Court abused its discretion in dismissing the appeal. 2) Claimant failed to report his injury to his employer as required under Mississippi's Workers' Compensation Act. The MWCC made a finding of fact this was not done. Their finding can be overturned only if shown to be arbitrary or capricious. 3) Finally, even if this Court finds the first two reasons unconvincing, the MWCC also made a finding of fact, after weighing all possible evidence, that Claimant's injury was not caused by his work duties. As such, this Court must uphold the finding of every tribunal that has looked at the issues of this case and affirm the ruling of the Circuit Court of Lincoln County that Claimant's injury is not compensable under the Workers' Compensation Act.

RESPECTFULLY SUBMITTED THIS THE 9th day of May, 2011.

UNIVERSAL LIGHTING TECHNOLOGIES, INC. AND
TWIN CITY FIRE INSURANCE COMPANY

BY:



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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the **Brief of Appellees** to:

Carlos Moore, Esq.
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Honorable Michael M. Taylor
Lincoln County Circuit Court Judge
P.O. Box 1350
Brookhaven, MS 39602

THIS the 9th day of May, 2011.



Andrew G. McCullough