IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-WC-01248-COA

TRAVON MCCALL **APPELLANT**

v.

SANDERSON FARMS, INC. AND NEW HAMPSHIRE INSURANCE COMPANY **APPELLEES**

DATE OF JUDGMENT:	08/05/2016
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANT:	LINDSAY ERIN VARNADOE
ATTORNEYS FOR APPELLEES:	RICHARD LEWIS YODER JR. WILLIAM LAWRENCE THAMES
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIBUNAL DISPOSITION:	DENIED APPELLANT'S CLAIM FOR WORKERS' COMPENSATION BENEFITS
DISPOSITION:	REVERSED AND RENDERED: 08/01/2017
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., FAIR AND WILSON, JJ.

FAIR, J., FOR THE COURT:

¶1. This workers' compensation case involves one issue: whether Travon McCall suffered a compensable injury under Mississippi Code Annotated sections 71-3-7 and 71-3-121 (Supp. 2016). The administrative judge (AJ) held that McCall's injury was compensable. The Mississippi Workers' Compensation Commission (Commission) reversed the AJ, holding his injury was not compensable because he had refused to take a breathalyzer test after the injury occurred. We find that the Commission's decision was not supported by substantial evidence. Thus, we reverse and render judgment in favor of McCall.

FACTS

¶2. McCall worked as a cook-line operator for Sanderson Farms. On May 10, 2014, he bent down to pick up a small tub of waste flour and injured his lower back. He testified that the tub weighed between thirty and forty pounds. McCall reported the injury to his supervisor. Someone brought McCall a wheelchair, but he was unable to sit because of the pain running down his right leg. So he used the wheelchair to scoot off the floor and went to the nurse's office to wait for the nurse, Suzan Crisler. Crisler was at home because it was a late shift. She was immediately called in to perform a urine drug test and arrived twenty to thirty minutes later.

¶3. Crisler testified that it is Sanderson Farms' policy to perform both a drug test and an alcohol test when an employee is injured on the premises. She also testified that McCall initially provided an untestable urine sample (under forty-five milliliters according to company policy), so she requested that he take another one, telling him he could wait up to three hours to take it. McCall immediately downed forty ounces of water given to him by Crisler, took a cup into the restroom, and failed to produce a sample. McCall testified that, due to his pain, he lost his temper and walked out, heading for a nearby hospital, instead of giving another sample. Crisler said that as McCall was leaving, the contracted breath-alcohol technician arrived to give the breathalyzer test. The bill submitted by the technician showed mileage of thirty miles and a charge of $100 for the callout on May 10, without any listed arrival time.

¶4. River Oaks Hospital's records show that McCall was logged in at River Oaks at 12:24 a.m. The hospital is approximately two miles from Sanderson Farms. When McCall arrived, one of his supervisors was already there with workers' compensation paperwork. McCall was diagnosed with acute, lower back pain. He received a shot in the back for pain relief and then provided a urine sample. The sample tested negative for amphetamines, barbiturates, benzodiazepines, cocaine metabolite, marijuana metabolite, methadone, opiates, phencyclidine, and propoxyphene. No breathalyzer test was ever offered or administered to McCall. He took prescribed medication for the pain, but declined a recommended opiate (dilaudid/hydromorphone) pain medication. He was discharged approximately two hours after arrival.

¶5. On May 12, 2014, McCall was terminated with the "[r]eason for [t]ermination: voluntarily resigned" because of "refusal of drug/alcohol test" and because he "left [without] permission." The AJ found that McCall's injury was compensable. The Commission reversed the AJ's ruling, finding that McCall was not entitled to compensation since he refused to submit to alcohol testing. McCall appealed.

STANDARD OF REVIEW

¶6. We will not reverse the Commission's decision unless it is unsupported by "substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law." *Weatherspoon v. Croft Metals Inc*., 853 So. 2d 776, 778 (¶6) (Miss. 2003). "No court can reweigh the evidence[.] [T]he Commission is the fact-finder and the judge of the

credibility of witnesses." *Short v. Wilson Meat House LLC*, 36 So. 3d 1247, 1251 (¶23) (Miss. 2010) (citing *Barber Seafood Inc. v. Smith,* 911 So. 2d 454, 461 (¶27) (Miss. 2005)). We view questions of statutory interpretation de novo. *Miss. Ins. Guar. Ass'n v. Miss. Workers' Comp. Individual Self-Insurer Guar. Ass'n*, 93 So. 3d 1, 3 (¶10) (Miss. 2012).

DISCUSSION

¶7. An employee is generally entitled to compensation for an injury arising out of and in the course of his employment (which was stipulated by the parties to be the case in this matter). Miss. Code Ann. § 71-3-7(1). However, "[n]o compensation shall be payable if the use of drugs illegally, or the use of a valid prescription medication(s) taken contrary to the prescriber's instructions and/or contrary to label warnings, or intoxication due to the use of alcohol of the employee was the proximate cause of the injury . . . ." Miss. Code Ann. § 71-3-7(4).

¶8. Section 71-3-121(1) provides that:

> In the event that an employee sustains an injury at work or asserts a work-related injury, *the employer shall have the right to administer drug and alcohol testing or require that the employee submit himself to drug and alcohol testing . . . . If the employee refuses to submit himself to drug and alcohol testing immediately after the alleged work-related injury, then it shall be presumed* that the employee was using a drug illegally, or was using a valid prescription medication(s) contrary to the prescriber's instructions and/or contrary to label warnings, or was intoxicated due to the use of alcohol at the time of the accident and that *the proximate cause of the injury* was the use of a drug illegally, or the use of a valid prescription medication(s) taken contrary to the prescriber's instructions and/or contrary to label warnings, or the intoxication *due to the use of alcohol of the employee*. The burden of proof will then be placed upon the employee to prove that the use of drugs illegally, or the use of a valid prescription medication(s) taken contrary to the

> prescriber's instructions and/or contrary to label warnings, or intoxication due to the use of alcohol was not a contributing cause of the accident in order to defeat the defense of the employer provided under [s]ection 71-3-7.

(Emphasis added).

¶9. The AJ and the Commission differed as to whether McCall "refused" drug and alcohol testing, triggering the rebuttable presumption. The AJ found that McCall did not refuse drug or alcohol testing and that McCall willingly submitted to a urine test at Sanderson Farms, even though the test was inadequate. Her decision to award McCall compensation was based on a finding that McCall's urine sample at River Oaks tested negative for drugs/alcohol. However, McCall was never tested for alcohol. The Commission reversed, finding that the greater weight of the evidence showed that McCall knew he was required to submit to drug and alcohol testing and refused to do so at Sanderson Farms. The Commission further found that McCall rebutted the presumption that he was using drugs with his negative urine sample at River Oaks. But the Commission ultimately held that since McCall did not rebut the presumption that he was under the influence of alcohol at the time of injury, his injury was noncompensable.

¶10. The record is silent as to when McCall's shift started, but he testified it would have ended at midnight. Crisler testified that she received the call about McCall's injury around 8 p.m. and arrived at the plant by 8:20 or 8:30. McCall reportedly left Sanderson Farms before the breathalyzer technician arrived, or close to the same time. Crisler testified that McCall left Sanderson Farms at approximately 9:30 p.m. McCall said he left at 11 p.m. and

that one of his supervisors was already at the hospital when he arrived. The only written record directly addressing submission by McCall concerning his acceptance or refusal of an alcohol test is a statement by him signed and dated by McCall and Crisler. The signed document referred to testing procedures, "including but not limited to urine testing or breath analyzing for drugs and alcohol," and stated that "by my signature below, I agree to submit to these tests." The record reflects nothing contradicting that document.

¶11. Finally, we note that the test conducted at the hospital occurred in the following context, according to McCall:

> Once I arrived at the hospital, I can say this, that a supervisor of mine, his name's Tim, he did actually go to the hospital and he went to look for me. He had already had the paperwork for the workers' comp, filled out everything. When I talked to the nurses, they said, "Now, you know, Mr. McCall, you're going to have to take a drug test." I said[,] "I don't have -- like I told them at my job, I don't have no problem with taking no drug test, just please can you do something for this pain in my back." Kindly and polite as I told them, they said, "Sure. No problem." . . . I gave them a drug sample, and they told me to follow my procedures with the workers' comp, get in contact with your job. I said, "No problem." I thanked them. I was happy because they -- whatever was going on down there, they made it stop.

¶12. Given that an employee supervisor was present at the hospital, that the hospital employees urged McCall to follow his employer's procedures, and that McCall gave written permission submitting himself to testing, we find that the evidence is insufficient to support an inference that McCall intentionally refused to cooperate with his employer's requirement that he submit himself to testing for alcohol. Moreover, according to the evidence presented by Sanderson Farms, McCall remained on the premises and available for alcohol testing for

an hour and a half *after* he reported his injury. Yet Sanderson Farms did not offer him a breathalyzer test during this time.

¶13. Therefore, after reviewing the record and applying the applicable standard of review, we find the Commission's decision was not supported by substantial evidence. We reverse the decision of the Commission and render a decision awarding benefits pursuant to section 71-3-7 to McCall.

¶14. **REVERSED AND RENDERED.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, WILSON, GREENLEE AND WESTBROOKS, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

CARLTON, J., DISSENTING:

¶15. I respectfully dissent from the majority's opinion and would affirm the Commission's decision. *See* Miss. Code Ann. § 71-3-121(1) (Supp. 2016).