

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-WC-01157-COA

**MISSISSIPPI BAPTIST MEDICAL CENTER AND
THE VIRGINIA INSURANCE RECIPROCAL
v.**

APPELLANTS

DEPENDENTS OF FRANK E. MULLETT

APPELLEES

DATE OF TRIAL COURT JUDGMENT:	6/3/2002
TRIAL JUDGE:	HON. W. SWAN YERGER
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DOUGLAS R. DUKE
ATTORNEY FOR APPELLEE:	JOHN GRIFFIN JONES
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS AFFIRMED.
DISPOSITION:	AFFIRMED - 6/24/2003
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

EN BANC

MYERS, J., FOR THE COURT:

¶1. Frank E. Mullett was found dead at his work station at Mississippi Baptist Medical Center (Baptist) on January 12, 2000. Baptist prevailed before the administrative law judge, but the Full Workers' Compensation Commission (Commission) reversed the administrative law judge's decision in an order dated September 11, 2001. On June 3, 2002, the Circuit Court of the First Judicial District of Hinds County affirmed the Commission's decision. Baptist appeals the circuit court's decision to this Court. Baptist and Virginia Reciprocal Group (Virginia Reciprocal), Baptist's carrier, assert ten issues:

I. THE FULL MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THE DECEASED RECEIVED A COMPENSABLE INJURY AS A RESULT OF HIS HEART ATTACK AND DEATH AT WORK.

II. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT ERRED IN AWARDING ANY COMPENSATION BENEFITS, AND SUCH AWARD IS CONTRARY TO LAW, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND IS MANIFESTLY WRONG.

III. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN ITS FINDINGS OF FACTS AND LAW.

IV. THE COMPENSATION ACT HAS NOT BEEN FAIRLY CONSTRUED ACCORDING TO THE LAW AND EVIDENCE IN THIS CAUSE AS REQUIRED BY THE MISSISSIPPI WORKERS' COMPENSATION ACT.

V. THE COMMISSION AND THE CIRCUIT COURT JUDGE ERRED UNDER THE FACTS AND LAW IN THIS CASE, IN REVERSING THE DECISION OF THE ADMINISTRATIVE JUDGE.

VI. THE DECISION OF THE COMMISSION AND THE CIRCUIT COURT IS CONTRARY TO THE CREDIBLE AND CONVINCING EVIDENCE ADDUCED IN THE TRIAL AND IS CONTRARY TO REASON, AND IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VII. THE COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN DISREGARDING UNCONTRADICTED EVIDENCE AND MISCONSTRUING AND MISAPPLYING THE HEREIN REBUTTED FOUND DEAD PRESUMPTION.

VIII. THE FINDING AND AWARD OF THE FULL COMMISSION AND THE CIRCUIT COURT IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

IX. THE ORDER OF THE FULL COMMISSION AND THE CIRCUIT COURT JUDGE WAS ARBITRARY AND CAPRICIOUS IN RELYING ON FACTS NOT IN THE RECORD.

X. IN THE ALTERNATIVE, AND ONLY IF THE APPELLATE COURT AGREES WITH THE FULL COMMISSION ORDER AND THE CIRCUIT COURT THAT THIS CLAIM IS IN ANY WAY COMPENSABLE, WHICH IS DENIED, THEN THE APPELLANTS' ASSERT THAT THE FULL COMMISSION ERRED IN FAILING TO ORDER APPORTIONMENT.

Statement of the Facts

¶2. Baptist hired Frank Mullett in May 1997. His job title was project manager (or process improvement manager) for Baptist's information technology department. He had three dependents, his wife, Benita Shurdan Mullett; a son, Michael; and a daughter, Molly. Doctors diagnosed Frank with high blood pressure sometime around August 1997. This was the first chronic health problem Frank had, and he had to take regular medication for it. Frank regularly took his medication (Diovan); he filled his last prescription on December 17, 1999. Additionally, Frank monitored his blood pressure at home with a home monitor. Shortly before his death, Frank began to take Norvasc to help control headaches he began to experience in December 1999.

¶3. Frank regularly exercised, usually in the form of weight lifting, running, and/or tennis. He never smoked and continued exercising until the day of his death. He stood five feet eleven inches tall, and maintained a weight of approximately 160 pounds.

¶4. At the time of his death, Baptist was setting up a new computer record system. Frank was the liaison between Baptist and the system's vendor. Baptist had difficulties with the system and this apparently added to Frank's stress level. Additionally, Frank had to work extra hours, as did many in his department, trying to ensure systems were "Y2K compliant." All of this was in addition to helping others at Baptist with computer problems.

¶5. The day of Frank's death was largely uneventful. He had not complained of any unusual blood pressure readings, nor of any headaches. Frank attended a meeting at 10:00 that morning. Following the meeting, Frank worked out during his lunch break, as was his usual practice. Frank returned from his workout at around noon, and commented to a coworker that it had been a "rough workout," or words to that effect. At approximately 1:20 p.m., a co-worker heard a wheezing, choking sound coming from

Frank's cubicle. The co-worker hurried over, and found Frank unconscious in his chair. Frank was not breathing and did not have a pulse. Co-workers attempted CPR, but failed to resuscitate Frank. The death certificate stated 1:30 p.m. as the approximate time of death.

¶6. An administrative law judge found that there was sufficient evidence to rebut the "found dead" presumption, and dismissed the workers' compensation claim of Frank's widow on April 2, 2001. The Full Workers' Compensation Commission reversed the judge's findings, and ordered full death benefits to Frank's dependants. The Circuit Court of the First Judicial District of Hinds County affirmed this decision. Baptist and Virginia Reciprocal now appeal to this Court.

Standard of Review

¶7. Under our standard of review, it is difficult to overturn the decision of the Full Commission.

The standard of review in worker's compensation cases is limited. The substantial evidence test is used The Workers' Compensation Commission is the trier and finder of facts in a compensation claim. This court will reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

Smith v. B.C. Rogers Processors, Inc., 743 so. 2d 997, 1002 (¶13) (Miss. Ct. App. 1999) (quoting *Inman v. Coca-Cola/Dr. Pepper Bottling Co. of Memphis, Tennessee*, 678 So.2d 992, 993 (Miss.1996)).

Legal Analysis

I. THE FULL MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN FINDING THAT THE DECEASED RECEIVED A COMPENSABLE INJURY AS A RESULT OF HIS HEART ATTACK AND DEATH AT WORK.

II. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT ERRED IN AWARDING ANY COMPENSATION BENEFITS, AND SUCH AWARD IS CONTRARY TO LAW, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND IS MANIFESTLY WRONG.

III. THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN ITS FINDINGS OF FACTS AND LAW.

IV. THE COMPENSATION ACT HAS NOT BEEN FAIRLY CONSTRUED ACCORDING TO THE LAW AND EVIDENCE IN THIS CAUSE AS REQUIRED BY THE MISSISSIPPI WORKERS' COMPENSATION ACT.

V. THE COMMISSION AND THE CIRCUIT COURT JUDGE ERRED UNDER THE FACTS AND LAW IN THIS CASE, IN REVERSING THE DECISION OF THE ADMINISTRATIVE JUDGE.

VI. THE DECISION OF THE COMMISSION AND THE CIRCUIT COURT IS CONTRARY TO THE CREDIBLE AND CONVINCING EVIDENCE ADDUCED IN THE TRIAL AND IS CONTRARY TO REASON, AND IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

VII. THE COMMISSION AND THE CIRCUIT COURT JUDGE ERRED IN DISREGARDING UNCONTRADICTED EVIDENCE AND MISCONSTRUING AND MISAPPLYING THE HEREIN REBUTTED FOUND DEAD PRESUMPTION.

VIII. THE FINDING AND AWARD OF THE FULL COMMISSION AND THE CIRCUIT COURT IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

IX. THE ORDER OF THE FULL COMMISSION AND THE CIRCUIT COURT JUDGE WAS ARBITRARY AND CAPRICIOUS IN RELYING ON FACTS NOT IN THE RECORD.

¶18. Baptist asserts that the "found dead" presumption of workers' compensation law does not apply to the facts of this case. Our supreme court has described the "found dead" presumption as follows:

The rule is firmly established in this state when an employee is found dead at a place where his duties require him to be or where he might properly be in the performance of his duties during work hours in the absence of evidence that he was not engaged in his employer's business, there is a presumption that the accident arose out of and in the course of his employment.

Nettles v. Gulf City Fisheries, Inc., 629 So. 2d 554, 556-57 (Miss. 1993). The presumption may be rebutted upon showing substantial credible evidence that the employee's duties did not contribute to the cause of death. *Id.* at 557. It is up to the employer/carrier to rebut the presumption, and it is not the burden

of the claimant to support the presumption. *U.S. Rubber Reclaiming Co. v. Dependents of Stampely*, 508 So. 2d 673, 676 (Miss. 1987) (citing *Okolona v. Dependent of Harlow*, 244 So. 2d 25, 26 (Miss. 1971)). While this is, admittedly, a difficult burden to overcome, it belies “the likelihood that, if anything, greater unfairness would attend its placement on [a] claimant whose principal witness has been silenced by death.” *Road Maintenance Supply, Inc. v. Dependents of Maxwell*, 493 So. 2d 318, 322 (Miss. 1986).

¶9. The presumption applies in the instant case, as Frank was found dead in his cubicle, where he performed most of his duties. We find that Baptist has not carried the burden to rebut the presumption.

In summary, these are the facts that they claim rebut the presumption:

- (1) Frank was in relatively good health.
- (2) He suffered from chronic hypertension.
- (3) Frank met with a co-worker approximately ten to fifteen minutes before his death for about three or four minutes. The co-worker could not tell if Frank was under any stress or if Frank did not feel well.
- (4) Frank talked to a co-worker who could not tell from Frank’s voice that anything was wrong.
- (5) A medical doctor, who never examined Frank, stated that Frank’s job did not contribute to his heart attack.¹

¶10. We cannot say that these facts add up to “substantial credible evidence.” Baptist’s evidence is based on assumptions. Since the workers’ compensation statutes are to be construed liberally in favor of the employee, assumptions could just as well, and should, be made in favor of Frank’s dependents. *Harper v. North Mississippi Med. Ctr.*, 601 So. 2d 395, 398 (Miss. 1992).

X. IN THE ALTERNATIVE, AND ONLY IF THE APPELLATE COURT AGREES WITH THE FULL COMMISSION ORDER AND THE CIRCUIT COURT THAT THIS CLAIM IS IN ANY WAY COMPENSABLE, WHICH IS DENIED, THEN THE APPELLANTS’ ASSERT THAT THE FULL COMMISSION ERRED IN FAILING TO ORDER APPORTIONMENT.

¹The same doctor admitted that extreme emotional stress could have caused the heart attack, and that he did not know what Frank was doing or feeling immediately prior to the fatal heart attack.

¶11. Baptist urges that any recovery should be apportioned according to section 71-3-7 of the Mississippi Code of 1972 (Rev. 2000). We disagree. Where the cause of death is unknown, apportionment is inappropriate. *U. S. Rubber Reclaiming Co.*, 508 So. 2d at 677. We know that Frank died of a heart attack, but the ultimate cause of his death—what caused the heart attack—remains unknown. Since the cause of the heart attack is unknown, we cannot apportion benefits.

¶12. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, THOMAS, AND LEE, JJ., CONCUR. GRIFFIS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING AND CHANDLER, JJ.

GRIFFIS, J., DISSENTING:

¶13. The Mississippi Supreme Court described the “found dead” presumption in *Washington v. Greenville Mfg. & Machine Works*, 223 So. 2d 642, 645 (Miss. 1969) as follows:

The rule is firmly established in this state when an employee is found dead at a place where his duties require him to be or where he might properly be in the performance of his duties during work hours in the absence of evidence that he was not engaged in his employer’s business, there is a presumption that the accident arose out of and in the course of his employment.

In *Road Maintenance Supply, Inc. v. Dep. of Maxwell*, 493 So. 2d 318, 321 (Miss. 1986), the court held that the presumption would disappear upon “credible evidence that the deceased employee’s work ‘activities did not cause or contribute to the heart attack.’” In *Johnston v. Hattiesburg Clinic, P.A.*, 423 So. 2d 114, 119-20 (Miss. 1982) the court ruled:

In order to overcome the presumption of causal connection not only must the cause of death be explained, but the work activities of the decedent must also be fully developed to show that such activities did not cause or contribute to the heart attack.

¶14. In this case, the Commission failed to consider several undisputed facts. These facts clearly support Baptist's position that the "found dead" presumption was rebutted and that Frank Mullett's death was not caused by or contributed to through his employment.

¶15. In overturning the administrative law judge's decision, the Commission first concluded that Mr. Mullett's activities were not accounted for during the sixty to seventy-five minutes prior to his death. Next, the Commission concluded that no credible medical expert testimony was presented to show that Mr. Mullett's death was not caused by work-related activities. Both of these conclusions are contrary to the evidence in the record.

¶16. First, *Johnston* provides that, for the presumption to be overcome, Mr. Mullett's activities immediately preceding his death must be "fully developed." *Id.* The Commission's order repeatedly states that his activities were not accounted for during the sixty to seventy-five minutes prior to his death. This conclusion is simply not supported by the record. Indeed, there was detailed evidence of what Mr. Mullett did from the evening before through the time of his death, at approximately 1:30 p.m. on January 12th.

¶17. The record reveals that Mr. Mullett was experiencing difficulty contacting his personal physician, Dr. Bob May, to obtain a prescription refill. Dr. May had previously treated Mr. Mullett for his high blood pressure and prescribed medication. In the days prior to his death, Mr. Mullett complained that he was not able to reach Dr. May to refill his high blood pressure medication prescription.

¶18. The evening before his death, January 11th, Mr. Mullett complained to his wife that it had been a "tough day." From 6:00 until 10:00 p.m. that evening, Mr. and Mrs. Mullett painted their bedroom in anticipation of the arrival of new furniture the next day. They had moved their furniture out of their bedroom and were "roughing" it until the new furniture arrived.

¶19. On the morning of January 12th, according to Mrs. Mullett, Mr. Mullett seemed a little bothered and commented that he needed to get the prescription from Dr. May. He did not complain about any headaches or a high reading on his blood pressure monitor, but his Day Timer indicated that he had called Dr. May at home that morning. Mr. Mullett went to work at 7:00 a.m. He had a 10:00 a.m. meeting. After the meeting, he went to workout at the fitness center. He returned to his office around noon. From noon until he began experiencing problems, at approximately 1:15 p.m., he was in or around his desk and cubicle.

¶20. Paula Katherine McCormack, a registered nurse, testified that she worked in the office with Mr. Mullett, and she attended the 10:00 a.m. meeting. She testified that there was nothing significant about the 10:00 meeting, and said it had been a “nice meeting.” She testified that her desk was about fifty feet from Mr. Mullett's desk. She said they were in the same office, but different cubicles. She testified that Mr. Mullett came to her cubicle, sat and spoke with her about ten or fifteen minutes prior to his collapse. She remembered that time to be approximately 1:00 p.m. She testified they were joking around, and she did not see anything physically wrong with Mr. Mullett. Their visit lasted approximately three or four minutes. Ms. McCormack was the first medical professional to respond and treat Mr. Mullett once he began experiencing problems.

¶21. Norval Yerger testified that his desk was next to Mr. Mullett's desk, only separated by a partition. Mr. Yerger testified that he was with Mr. Mullett at the 10:00 a.m. meeting and that Mr. Mullett left to go to lunch at about 11:00 a.m. He too testified that it was a “good meeting.” He testified that some of the meetings had been stressful, but Mr. Mullett had accomplished several things and his supervisors were pleased. Mr. Yerger testified that “we all felt good about the meeting.” Mr. Yerger testified that Mr. Mullett returned to the office around noon and went to his desk. Mr. Mullett told Mr. Yerger that he had

been at the gym during lunch and that it was a “rough workout.” Mr. Yerger could hear Mr. Mullett sit down in his cubicle and make a telephone call. Mr. Mullett was on the phone when Mr. Yerger heard him began to wheeze. Mr. Yerger testified:

Then I heard him making a strange sound, kind of a wheezing sound. At first I thought he was laughing and then it kept on. And I said, “Frank are you all right?” And he didn’t answer. And so I kind of got up and looked, and he was slumped back in his chair like this, you know, like he was - something was wrong with him.

Mr. Yerger called Ms. McCormack for assistance.

¶22. The testimony of these witnesses chronicle Mr. Mullett's activities up to the moment he collapsed. From approximately noon until he began experiencing problems at 1:15 p.m., Mr. Mullett was either talking with or in the immediate vicinity of his co-workers. None of the co-workers could indicate any stressful event or problem that could have caused or contributed to Mr. Mullett’s death. The Commission’s conclusion that sixty to seventy-five minutes prior to Mr. Mullett's death were unaccounted for is not based on the evidence presented.

¶23. Second, the Commission held that no “credible expert medical testimony” was presented by the employer which rebuts the “found dead” presumption. Dr. James L. Crosthwait, a board-certified internist and specialist in cardiology, testified by deposition. Although he did not examine Mr. Mullett prior to his death, Dr. Crosthwait reviewed Mr. Mullett’s medical and employment records and determined that Mr. Mullett “suffered from sudden death syndrome.” Dr. Crosthwait testified that the most likely cause of this was “sudden failure of the heartbeat.” He also testified that Mr. Mullett's job did not contribute to his death finding that “the job did not cause or contribute to his heart disease or to the sudden death episode.” Dr. Crosthwait testified that the more likely cause of death was high blood pressure, concluding that “[p]oorly controlled hypertension is a risk factor for a heart attack and sudden death.” Dr. Crosthwait's testimony

refutes the Commission's determination that “no credible medical testimony” was presented by the employer to rebut the “found dead” presumption. Dr. Crothwait's opinion was credible medical evidence that Mr. Mullett died from a non-work related heart condition.

¶24. These two elements combined with the evidence that Mr. Mullett was suffering from high blood pressure, the testimony of all of his co-workers that the day in question was not a stressful one, and the evidence that Mr. Mullett's stress level had tapered off clearly demonstrate that the judgment of the Commission was not supported by substantial evidence.

¶25. This case is analogous to *Union Producing Co. v. Simpson's Dependents*, 251 Miss. 183, 168 So. 2d 808, 808 (1964). In *Union Producing Co.*, the employee died at work of a heart attack. *Id.* at 187, 168 So. 2d at 809. The employer presented evidence of a pre-existing condition, provided details of the employee's work, and developed the facts until the employee's death. *Id.* at 194, 168 So. 2d at 813.

The supreme court held:

Since the Employee was not under any mental strain resulting from his work, and the physical efforts of his job, in the words of claimant, required him to lift nothing heavier than a pencil and a piece of paper, it cannot be said that there is any substantial connection between his terminal heart attack and his employment.

Id.

¶26. Here, Baptist presented “credible evidence” that Mr. Mullett's work activities did not cause or contribute to his death. *Road Maintenance Supply, Inc.*, 493 So. 2d at 321. For the presumption to disappear, Mississippi law does not require the employer to prove this by clear and convincing evidence or by a preponderance of the evidence. Instead, the presentation of “credible evidence” is sufficient for the presumption to disappear. *Id.* See also *Washington v. Greenville Manufacturing & Machine Works*, 223 So. 2d 642, 647 (Miss. 1969) (“found dead” presumption disappears if credible evidence

exists that the deceased employee's work activities did not cause or contribute to the heart attack) (also cited and quoted with approval in *Johnston v. Hattiesburg Clinic, P.A.*, 423 So.2d 114, 119-20 (Miss.1982); *Alexander v. Campbell Construction Company*, 288 So.2d 4, 5 (Miss.1974); *McCarley v. Iuka Shirt Co.*, 258 So.2d 421, 422 (Miss.1972); *City of Okolona v. Dependent of Harlow*, 244 So.2d 25, 26 (Miss.1971)).

¶27. Accordingly, the Commission clearly erred in determining that Baptist did not satisfactorily rebut the “found dead” presumption to show that Mr. Mullett’s death did not arise out of or in the course of his employment. For these reasons, I disagree with the majority's decision and dissent.

IRVING AND CHANDLER, JJ., JOIN THIS SEPARATE OPINION.