

IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CC-00590 COA

CONSOLIDATED WITH

NO. 93-CC-01028 COA

L. C. HANKINS

APPELLANT

v.

**PARKER TRUCKING CO. OF TUPELO AND LIBERTY MUTUAL INSURANCE
COMPANY**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROY O. PARKER

ATTORNEYS FOR APPELLEES:

MICHAEL D. GREER

DONALD V. BURCH

GEORGE E. READ

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: TEMPORARY DISABILITY AWARDED

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

FRAISER, C.J., FOR THE COURT:

On September 15, 1989, L. C. Hankins (Hankins), a truck driver for Parker Trucking Company of Tupelo (Parker Trucking), was injured in a work-related accident. Hankins was pinned between the sleeper of his truck and the trailer of another truck while he was hooking up his rig. He claimed that he sustained a permanent injury to his back. However, the administrative law judge (ALJ) found that Hankins suffered at most a temporary aggravation of his pre-existing bronchitis condition. The Mississippi Workers' Compensation Commission adopted the findings of the ALJ. The Lee County Circuit Court affirmed the commission's decision. On appeal to this Court, Hankins presents the following issues:

I. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT DID NOT SUFFER A PERMANENT PARTIAL DISABILITY AS A RESULT OF HIS INDUSTRIAL ACCIDENT.

II. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT'S BACK AND NECK INJURIES WERE NOT THE RESULT OF HIS INDUSTRIAL ACCIDENT.

III. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT THE CLAIMANT WAS ONLY TEMPORARILY DISABLED FROM SEPTEMBER 15, 1989, THROUGH NOVEMBER 10, 1989.

IV. THE WORKERS' COMPENSATION COMMISSION'S FINDINGS OF FACT ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE ORDER IS CONTRARY TO THE APPLICABLE LAW.

V. THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT HAD AN AVERAGE WEEKLY WAGE OF \$375.53.

Finding no error, we affirm.

FACTS

Hankins began working as a long haul truck driver for Parker Trucking in August 1989. He was in his late fifties at the time of an accident occurring on September 15, 1989, which he claimed left him unable to work because of a back injury. However, he continued working for Parker Trucking seven months after the accident, quitting in April 1990. Hankins contends he was injured when he was pinned between a sleeper of one truck and the trailer of a truck he was hitching together. Nonetheless, Hankins continued working immediately after the accident and drove his load to Buffalo, New York. Shortly into the drive, Hankins began spitting up blood. When he arrived in Buffalo, he was sore all over. He called Parker Trucking and notified them of the accident. Upon his return to Tupelo, Hankins on September 18, 1989, sought medical treatment from Dr. Jimmy Meeks.

Dr. Meeks is a family practitioner practicing in Tupelo, Mississippi. He saw Hankins only once. At that time, Hankins complained of pain in his chest and rib area, but made no complaint about neck, back, or leg pain. Dr. Meeks x-rayed Hankins and found no cracked or broken ribs. Dr. Meeks did find bruising and tenderness of Hankins' chest wall. Hankins was given medication and released to return to work on September 20, 1989. Dr. Meeks found no permanent disability and nothing that indicated Hankins could not return to his normal work and activity.

In October 1989, Hankins went to the emergency room at North Mississippi Regional Medical Center because of shortness of breath. Hankins was referred to Dr. David Moore, a pulmonary specialist in Tupelo. Dr. Moore saw Hankins on October 5, 1989. Hankins complained of shortness of breath, chest pain and coughing up blood. Hankins told Dr. Moore that these problems had begun shortly after his accident. Hankins also told Dr. Moore that he suffered from chronic obstructive bronchitis and had smoked heavily for years. Dr. Moore attributed all of Hankins' problems to his bronchitis, but could find no specific reason for Hankins' chest pain. There were no fractures or other changes to Hankins' ribs on the x-ray.

Dr. Moore testified that Hankins' bronchitis problems were not caused by his accident. If the blood Hankins coughed up was attributable to his accident, he would have had broken or cracked ribs or a lung contusion accompanying the coughed up blood, and Hankins did not. Additionally, if the accident had aggravated Hankins' existing condition, it would have been several days before he would have begun to cough up blood. Nonetheless, Dr. Moore stated that it was possible the accident could have aggravated Hankins' pre-existing bronchitis. Dr. Moore placed Hankins in the hospital where he stayed from October 5, 1989 to October 9, 1989 for treatment of his bronchitis.

Hankins did not see another doctor until April 20, 1990. On that date he saw Dr. John McFadden, a general practitioner specializing in pain medicine. Hankins went to Dr. McFadden in severe pain and told him that he had injured his back in a work-related injury. Dr. McFadden's examination revealed tenderness to the neck and upper back, restricted movement, and tenderness in the lower lumbar area. Dr. McFadden continued Hankins' pain medication and ordered an MRI. The MRI revealed a problem at the C6-C7 level, as well as an abnormality at the C4-C5 and C5-C6. Over the course of his treatment of Hankins, Dr. McFadden found that Hankins suffered a herniated disk at the C6-C7 level and degenerative changes in his back and neck. Based on the history given to him by Hankins, Dr. McFadden connected Hankins' neck and back problems to the September 15, 1989 accident. He found Hankins temporarily totally disabled, with a fifty (50) percent chance of recovery with surgery.

The MRI ordered by Dr. McFadden was read and interpreted by Dr. Charles Currie, a radiologist. Dr. Currie found that Hankins had a spondylitic condition (degenerative process of the spine), degeneration of disc and bony overgrowth, all most noticeably at the C6-C7 level. Dr. Currie felt that surgery would not benefit Hankins. Dr. Currie believed Hankins' problems stemmed from pre-existing conditions associated with age. He stated that the bony overgrowth takes a long time to form and could not have formed as a result of or in the length of time since the accident.

Dr. McFadden referred Hankins to two neurosurgeons. Dr. William Brown saw Hankins on August 30, 1990. Hankins gave a history complaining of neck, shoulder and chest pain, and numbness on the left side of his body. Dr. Brown found that Hankins suffered from limited neck movement and decreased sensation and strength. Because Hankins had suffered three previous heart attacks, Dr. Brown did not think Hankins a good candidate for surgery. Dr. Brown opined that Hankins was five to seven percent impaired because of the injury to his neck and left arm sustained in the accident. Dr. Brown also found that Hankins suffered from pre-existing arthritic spurs at the C6-C7 level not caused by the accident. In Dr. Brown's opinion, Hankins had reached maximum medical recovery as of August 30, 1990. He opined that Hankins' injury to his arm and neck coupled with his pre-existing arthritic condition rendered him totally functionally disabled.

Dr. Haynes Harkey saw Hankins on June 18, 1990. Dr. Harkey is a neurosurgeon with a subspecialty in conditions of the spine. Hankins complained of an injury to his neck that occurred during his accident with the two trucks. He complained of persistent neck pain and numbness in his arms and legs. Additionally, Hankins apprised Dr. Harkey of a problem with incontinence. Dr. Harkey stated that Hankins was difficult to communicate with and smelled of alcohol. Hankins did have a stiff neck and some tenderness, but Dr. Harkey did not find any indication of nerve injury or neuromuscular deficit. Because Hankins had decreased sensation to pinprick over his entire body, including the head and face, Dr. Harkey concluded that Hankins did not have a spinal cord injury because spinal injuries would not result in sensory abnormalities in the head and face. Dr. Harkey did find evidence of spondylosis and degenerative disks at the C6-C7 level brought about by the aging process. Dr. Harkey stated that Hankins' numbness and nerve damage most likely was not caused by the accident. While he opined that the accident could have aggravated Hankins' degenerative condition, Dr. Harkey stated that the aggravation would have been temporary. In Dr. Harkey's opinion, Hankins did not have any permanent disability from the accident.

The following is a portion of the ALJ's opinion which was adopted by the Workers' Compensation Commission and affirmed by the Lee County Circuit Court:

While claimant's testimony that he was involved in an industrial accident on September 15, 1989 is for the most part undisputed, the weight of the evidence at best shows he only suffered temporary problems because of any injury sustained in the accident. Although both Dr. McFadden and Dr. Brown testified that claimant has some permanent disability because of injuries sustained in the accident, I find the testimony of Dr. Currie, Dr. Moore, Dr. Harkey and Dr. Meeks to be of greater weight. The testimony of all four of the latter doctors indicated that claimant's accident did not cause him to sustain any significant injury or disability. Significant weight is particularly given to the testimony of Dr. Moore and Dr. Meeks, who saw claimant within a few weeks after his industrial accident. Both of those doctors testified that claimant's [sic] initially complained only of

injury to his chest and rib area. Dr. Meeks testified that if claimant had sustained an injury in his back or cervical area in his industrial accident, it would have manifested itself into a problem prior to his visit with claimant. While Dr. Moore's testimony primarily pertained to claimant's bronchitis condition, it indicated claimant did not complain of any cervical or back pain. Except for claimant's testimony, there is no corroborating testimony that he complained of any back, cervical, neck or similar problems prior to his initial visit with Dr. McFadden, which was on April 20, 1990. This was slightly more than seven (7) months from the date of claimant's injury. Prior to his initial visit to Dr. McFadden, claimant had continued at his pre-injury employment and had missed no significant work time because of his injury, except for the time immediately preceding his stay in the hospital for bronchitis problems.

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There was an abundance of medical testimony concerning Hankins' injuries. The commission adopted the following finding of facts pertaining to Hankins' medical condition:

1. Claimant was involved in an industrial accident on September 15, 1989, whereby he sustained an injury to his chest and rib cage while in the employment of employer;
2. Claimant's industrial injury temporarily aggravated a pre-existing bronchitis condition, which subsequently caused him to be temporarily totally occupationally disabled from October 5, 1989 through November 10, 1989;

3. Although at the time of claimant's industrial accident he had spondylosis and a degenerative disc problem, his industrial accident did not aggravate these conditions;

4. Claimant sustained no permanent disability because of his industrial accident;

Hankins' first four issues can be considered together under our familiar standard of review. Appellate review of compensation claims is a narrow one. It is well settled that "[t]he Commission is the ultimate fact-finder." *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990). "Accordingly, the Commission may accept or reject an administrative judge's findings." *Id.* In the case *sub judice*, the commission accepted and adopted the findings of the ALJ after thoroughly studying the record and applicable law. Our standard of review is set forth in *Delta CMI v. Speck*:

Under settled precedent, courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing evidence or otherwise evaluating evidence and determining facts; . . . "[W]hile appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the commission is that which is actually under review for all practical purposes."

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

Delta CMI v. Speck, 586 So. 2d 768, 772-73 (Miss. 1991) (citations omitted). "This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence." *Mitchell Buick, Pontiac & Equip. Co. v. Cash*, 592 So. 2d 978, 980 (Miss. 1991) (citations omitted). Therefore, we must examine the record and be satisfied that substantial evidence existed upon which the commission could base its decision.

Six medical experts testified and gave their opinion as to Hankins' condition and its cause. The very first doctor Hankins saw was Dr. Meeks. Hankins complained of chest pain and soreness, but not

back pain. However, Dr. Meeks did put in his notes that Hankins complained of back and neck pain. It is on these notes that Hankins relies for relief. Hankins contends that this is evidence of his back problem, and the commission blatantly ignored this crucial piece of evidence. Such is not the case. In his videotaped deposition, Dr. Meeks stated that Hankins complained of pain in his chest and "back," but not the "back" as we think of it in laymen's terms. Instead, Dr. Meeks explained, Hankins complained of pain in the back part of his rib cage on the right side. There was no injury to Hankins' neck or "back" meaning spine or low back. Dr. Meeks testified that if there had been any neck or spine injury, it would have shown itself. Dr. Meeks sent Hankins back to work. When Hankins returned a few days later to see Dr. Meeks' associate, Dr. Sabo, Hankins still did not complain of any injury to his neck or back.

Hankins saw Dr. Moore who treated him for bronchitis just a few weeks after the accident. Again, Hankins made no mention of any injury to his neck or back. He only complained of injury to his chest. Dr. Moore stated that the accident could have aggravated Hankins' pre-existing bronchitis condition.

Hankins continued to work for Parker Trucking, never complaining of any neck or back injury. There was no evidence of any back or neck injury until Hankins visited Dr. McFadden in April, 1990, seven months after his accident. Dr. McFadden found back problems due to the aging process as well as disability connected with Hankins' accident. Dr. McFadden felt that surgery was necessary for Hankins to have the chance of fifty (50) percent improvement.

Dr. Currie, the radiologist that read the MRI ordered by Dr. McFadden did not find any injury connected with Hankins' accident. Dr. Currie testified that Hankins' problems were associated with the aging process and consisted of spondylosis, bony overgrowth, and degenerative disks.

Dr. McFadden referred Hankins to Dr. Brown, a neurosurgeon. Dr. Brown disagreed with Dr. McFadden's opinion that Hankins needed surgery. Dr. Brown concluded that Hankins would be a poor risk for surgery because of pre-existing heart problems. However, Dr. Brown also attributed Hankins' back and neck problems to his work-related accident. Dr. Brown found Hankins to have a five (5) to seven (7) percent permanent anatomical impairment.

Dr. Harkey, another neurosurgeon Hankins was referred to by Dr. McFadden, found Hankins' problems to be related to the aging process. In Dr. Harkey's opinion, Hankins had no permanent disability, and had no need for surgery.

The commission had substantial evidence to support its findings that Hankins' did not suffer a permanent injury. Although two doctors did find evidence of disabling back and neck problems related to the accident, the overwhelming weight of testimony points to degenerative back problems related to the aging process. "The Commission is the trier of facts as well as the judge of the credibility of the witnesses." *Miller Transps., Inc. v. Guthrie*, 554 So. 2d 917, 918 (Miss. 1989). There was substantial evidence supporting the finding that Hankins was only temporarily totally disabled. In compliance with our scope of review, we are without authority to reverse the commission's findings.

V. THE WORKER'S COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT HAD AN AVERAGE WEEKLY WAGE OF \$375.53.

The method of determining wages is dictated by section 71-3-31 of the Mississippi Code of 1972:

Except as otherwise specifically provided, the basis for compensation under this chapter shall be the average weekly wages earned by the employee at the time of the injury, such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two. . . . When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results just and fair to both parties will thereby be obtained. Where, by reason of the shortness of time during which the employee has been in the employment of his employer, it is impracticable to compute the average weekly wages by the above method of computation, regard shall be had to the average weekly amount which, during the first fifty-two (52) weeks prior to injury or death, was being earned by a person in the same grade, employed at the same or similar work in the community.

Miss. Code Ann. § 71-3-31 (Rev. 1995). In this case, the commission determined Hankins' average weekly wage based on his earnings after the injury, which is not authorized by the statute. While the commission erred in computing Hankins' average weekly wage, the issue is rendered moot because he was awarded the maximum amount of available benefits.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT AFFIRMING THE WORKERS' COMPENSATION COMMISSION'S FINDING OF TEMPORARY TOTAL DISABILITY IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.

BRIDGES, P.J., NOT PARTICIPATING.