

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00244 COA

VEARLENE HENDERSON

APPELLANT

v.

**BATESVILLE MANOR NURSING HOME AND THE TRAVELERS 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. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK R. DODSON

ATTORNEY FOR APPELLEES:

J. FRANKLIN WILLIAMS

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: DENIAL OF TEMPORARY AND PERMANENT BENEFITS
RELATED TO BACK INJURY.

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Vearlene Henderson brought this workers' compensation claim against her employer, Batesville Manor Nursing Home. The administrative law judge, after a hearing on the merits, determined that Henderson had not proved her injury to be work related and therefore denied all temporary and permanent disability benefits. The Workers' Compensation Commission affirmed the denial of benefits. The circuit court of Panola County subsequently affirmed the commission's order denying benefits. Henderson now appeals to this Court. We find that the commission's findings were clearly erroneous, not supported by substantial evidence, and against the overwhelming weight of the evidence. Accordingly, we reverse the commission's decision, and the circuit court's affirmance.

FACTS

On January 31, 1991, Vearlene Henderson was employed as a nurse's aide at the Batesville Manor Nursing Home. Henderson testified that her shift hours on January 31, 1991, were 2:30 P.M. to 10:30 P.M. Henderson indicated that her work activities included bathing patients, feeding them, getting them in and out of bed, and taking them to the bathroom. Henderson also indicated that she was required to do various housekeeping duties such as sweeping and mopping. Henderson testified that on January 31, Batesville Manor was short of aides and as a result, she was required to do more work than usual. Henderson testified that at the end of her shift she was more tired than usual, and her back hurt a little. Henderson stated that she thought it was nothing more than having had a hard day of work and immediately went home and went to bed. The next morning, however, she could not get out of bed, sit up, or move her legs. Henderson testified that she required her mother's assistance to get out of the bed. Henderson testified that on the same morning she called her supervisor, Kay Hull, and told her that she had hurt her back that night and was getting ready to go to the doctor. Kay Hull testified that she asked Henderson how she had hurt her back, and Henderson said that she did not know.

Henderson visited Dr. Waller on February 1, 1991, and told him that she had hurt her back. Dr. Waller told Henderson that she had pulled some muscles and advised her to take off work for five days. Dr. Waller stated, in his deposition, that he could not recall whether Henderson had told him that her injury was work-related. Dr. Waller also stated that his notes contained nothing pertaining to the cause of Henderson's back injury. Henderson testified that she returned to work after five days and worked for two to three weeks but continued to experience back pain. Henderson then went to Dr. Aiello who checked her vital signs, examined her back, and advised her to take off work for five days. Henderson returned to work after five days but was suffering from pain every day. Henderson subsequently consulted with Dr. Hill who told her that she had pulled some muscles and advised her to take off work for a few days. Henderson testified that she eventually went back to Dr. Waller after receiving no relief from the medical treatment. Meanwhile, Henderson was placed on administrative leave due to her recurring painful condition and number of absences from work. The administrative leave commenced on October 16, 1991.

Dr. Waller referred Henderson to Dr. Engleberg at the Semmes-Murphy Clinic in Memphis, Tennessee, whom Henderson saw on October 16, 1991. Dr. Engleberg diagnosed Henderson as having symptomatic lumbar disc syndrome but upon discovering that Henderson did not have insurance coverage, Dr. Engleberg referred her to the Baptist Monroe Clinic where she saw Dr. Parsioon, the chief resident of neurosurgery. After conducting a variety of tests, Dr. Parsioon

determined that Henderson was suffering from a large herniated disc. Henderson attempted to take Dr. Parsioon's deposition but due to hospital policy forbidding residents from giving depositions, she had no alternative but to consult Dr. Parsioon's supervisor, Dr. Robertson. Henderson asked Dr. Robertson to review Dr. Parsioon's reports, to examine Henderson himself and to give a deposition. Dr. Robertson agreed but did not examine the Appellant until December 12, 1992. In his deposition, Dr. Robertson stated that he concurred with Dr. Parsioon's findings that Henderson suffered from a large herniated disc and needed surgery. Dr. Robertson also stated that Henderson's case was "classical" and explained how such injuries can develop gradually. Dr. Robertson stated that he gathered from his interview with her that something happened on January 31, 1991, while she was working which resulted in the painful condition.

The administrative law judge discounted Dr. Robertson's testimony on the grounds that he only saw Henderson one time, and that his examination took place nearly two years after the injury. The administrative law judge also indicated that Henderson's failure to tell Dr. Waller or her supervisor, Kay Hull, that she had been injured at work was detrimental to her case and thus warranted a denial of benefits. This denial of benefits was affirmed by the Workers' Compensation Commission and the Panola County Circuit Court. Henderson, feeling aggrieved, now appeals.

ANALYSIS

I. DID THE INJURIES SUSTAINED BY HENDERSON ARISE OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH BATESVILLE MANOR NURSING HOME AND WAS THE WORKERS' COMPENSATION COMMISSION'S ORDER DENYING BENEFITS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, CLEARLY ERRONEOUS, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, OR RESULT IN MANIFEST INJUSTICE?

Henderson contends that the decision by the commission was not based on the credible evidence presented. Henderson argues that, although she put on substantial and admissible evidence showing the causation of her injury, the commission "chose to ignore this evidence and rely on evidence that was conjectural and speculative, and in some cases, simply untrue or irrelevant. Henderson contends that the sole deciding factor considered by the commission was its determination that Henderson did not initially tell Dr. Waller that she had injured her back at work. Henderson contends that Dr. Waller never stated that she did not tell him the cause of her injury, but that he could not recall whether she told him or not. Henderson argues that reliance on the fact that no mention of the cause of injury was found in Dr. Waller's medical record is misplaced because Dr. Waller did not include any history whatsoever of the cause of injury. Henderson argues that at the time she consulted with Dr. Waller, she did not know how she had injured her back but later came to appreciate that her injury must have been caused by something she had done at work because she had not performed any other physical activities in the interim. Henderson contends that, in light of Dr. Waller's diagnosis that she had pulled some muscles, she had no reason to realize the seriousness of her condition and only after she was forced to quit her job because of her back condition did she file a claim for compensation.

Henderson argues further that her employer had actual notice of her back injury on February 1, 1991, and either knew or should have known that the injury was caused by her work. Henderson contends

that her employer made no attempt to find out if the work she had been doing was the cause of her injury.

Henderson also argues that the commission erroneously discounted the testimony of Dr. Robertson. Henderson contends that the factual circumstances coupled with the testimony of Dr. Robertson clearly prove the causal relationship between her injury and the tasks that she was required to perform on her job. Henderson argues that this case should be reversed and remanded with an order that the employer and carrier pay for all of Henderson's medical bills, and that a hearing to determine the extent of her disability should be conducted.

On the other hand, Batesville Manor Nursing Home argues that the commission was correct in its determination that Henderson did not suffer a compensable work-related injury. Batesville Manor contends that the commission's decision to deny benefits was based not only on medical evidence but also on the fact that Henderson had failed to tell Dr. Waller that she had injured her back at work; the fact that she did not tell anyone at work that she had been injured; the absence of witnesses to the alleged incident; and that her testimony was inconsistent. Specifically, Batesville Manor points to the fact that Henderson did not initially tell Dr. Waller or subsequent physicians that she had been injured on the job, nor did she tell her supervisors that her injury was work-related until September of 1991.

Batesville Manor argues further that Henderson had a prior history of back pain beginning in 1982 and continuing for nearly a decade. Batesville Manor takes issue with the fact that Henderson failed to fully disclose her medical history to treating physicians. Finally, Batesville Manor contends that Henderson's appeal is based on an incorrect application of the law regarding proof of causation as she seeks to prove when and how she was hurt through the testimony of Dr. Robertson, a physician that only examined her once and was not privy to her medical history.

The standard of appellate review of a decision of the Workers' Compensation Commission is well-settled: The findings and order of the commission are binding as long as they are supported by substantial evidence. *Vance v. Twin River Homes*, 641 So. 2d 1176, 1180 (Miss. 1994) (citations omitted). Substantial evidence has been defined as relevant evidence that reasonable minds could accept as adequate to support a conclusion and that affords a substantial basis of fact from which the fact in issue can be properly inferred. *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991) (citations omitted). "Evidence which is not contradicted by positive testimony or circumstances, and which is not inherently improbable, incredible, or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected." *Morris v. Lansdell's Frame Co.*, 547 So. 2d 782, 785 (Miss. 1989). Uncontradicted testimony is to be taken as conclusive and binding on the trier of facts, unless one party shows it to be untrustworthy. *Id.* (citation omitted). An appellate court will reverse a commission order only where it is clearly erroneous and contrary to the overwhelming weight of the evidence. *Vance*, 641 So. 2d at 1180 (citations omitted); *see also Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993) (commission is ultimate finder of facts in compensation cases; its findings are subject to normal deferential standard upon review, and this Court will not disturb the commission's findings as long as the latter's decision has no error of law and is based on substantial evidence).

Mississippi statutory law states that, in a workers' compensation context, an injury means "accidental injury or accidental death arising out of and in the course of employment without regard to fault

which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner." Miss. Code Ann. § 71-3-3(b) (1972). The Mississippi Supreme Court has held that the claimant has the burden of proving by a "fair preponderance of the evidence" the following elements: "(1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the death or claimed disability." *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 13 (Miss. 1994) (citations omitted). The court stated further that "once the claimant makes out a prima facie case of disability, the burden of proof shifts to the employer." *Id.* (citations omitted).

In the present case, the uncontested facts show: (1) that Henderson worked hard lifting patients and doing other demanding physical tasks the evening before her injury became apparent; (2) that there was no intervening injury between the time she got off work and went home to bed; (3) that Henderson was in considerable pain the following morning when she awoke; (4) that the pain never abated and got progressively worse over time; (5) that Henderson missed so much time from work that she was required to go on administrative leave; and (6) that Dr. Robertson, an expert in the field of neurosurgery, stated that her injury was "classical" and that he presumed, based on Henderson's recitation of her work duties and the description of the onset of the pain, that the injury was caused by something she had done at work. Henderson also offered corroborating testimony of her mother who confirmed that Henderson was unable to get out of bed on the morning of February 1, 1991, without assistance, and that Henderson had been suffering with back pain from that date forward. Henderson's mother also stated that she was present when Henderson called her supervisor, Kay Hull, and reported that she had hurt her back.

A review of Dr. Waller's deposition and medical notes taken during visits with Henderson since 1982 indicate the following: (1) Prior to February 1, 1991, Dr. Waller saw Henderson twenty-five times and according to the doctor's notes, although some back pain was described, the primary diagnosis never related to an injury of the back. Each diagnosis involved a number of ailments ranging from pelvic infections to a cold to menstrual problems. Dr. Waller indicated in his deposition that these types of ailments could cause back pain. Dr. Waller also indicated that at no time prior to February 1, 1991, did Henderson suffer from a neurological problem involving the back as was subsequently diagnosed by Dr. Engleberg. (2) From February 1, 1991, until September 13, 1993, Henderson went to Dr. Waller eleven times. Henderson's primary complaint during ten of the eleven visits was back pain, and each time she was treated for back pain.

Also, during the period between February 1, 1991, and September 13, 1993, Henderson consulted with Dr. Hill, Dr. Aiello, Dr. Engleberg, Dr. Parsioon, and Dr. Robertson. Henderson's primary complaint during each of these visits was back pain. Dr. Engleberg was the first to diagnose Henderson with a herniated disc, and Dr. Parsioon and Dr. Robertson subsequently confirmed the diagnosis. On January 3, 1993, Henderson was hospitalized by Dr. Waller and was diagnosed as having degenerative joint disease pertaining to the back.

The testimonies of Kay Hull and Antoinette Lambert, Henderson's supervisors, indicate that they knew that Henderson had injured her back and was being treated for the injury. Kay Hull testified that she had received three notes from doctors indicating that Henderson had a back injury and would need time off work to recover. However, Hull and Lambert testified that they had no idea that Henderson had been injured at work until September of 1991. Hull and Lambert testified that they

asked Henderson how she had hurt her back, and Henderson stated that she did not know.

The orders of the administrative judge and the commission stated that Henderson did not meet her burden of establishing by a preponderance of the evidence that she suffered a compensable accidental injury. This Court finds no basis for the commission's findings. It appears that the commission, in reaching a decision, relied heavily on the issue of whether Henderson did or did not tell Dr. Waller that her injury was a result of something that happened at work. A review of Dr. Waller's deposition indicates that he was asked three times whether Henderson told him that she had hurt her back at work, and each time Dr. Waller responded that he had no record of that information and had no personal recollection of Henderson telling him how she had hurt her back. The Appellee asked Dr. Waller if he normally recorded such information in his notes and he stated, "Generally, I do. This is-- you know certainly not every time" We do not find Dr. Waller's responses to be conclusive of the issue. Henderson stated that she also could not recall whether she indicated to Dr. Waller that the injury occurred at work. Henderson stated further that at the time she initially consulted with Dr. Waller she really did not know how she had injured her back.

In *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 674 (Miss. 1991), the Mississippi Supreme Court stated:

When an injury with physical results develops gradually from the work and cannot be traced to a single event or to a precise time, the injury meets the requirement of accidental injury if it is causally connected to the work activities or environment and the events are "within a reasonably definite and not too remote period of time."

The court went on to hold that "[r]equiring the work and injury to be causally connected in a significant manner is nothing more than a requirement that the work connection be supported by substantial evidence as minimally causative of the injury." *Id.* at 676. In the present case, we know that Henderson's job consisted of lifting and moving patients. We know that she worked the night before her injury became apparent, and we know from her mother's testimony that Henderson was unable to get out of bed the following morning. We also know from Kay Hull's testimony that workers' compensation claims for back problems are not unusual for employees of Batesville Manor Nursing Home.

During oral arguments before this Court, the Appellee was asked to compare and contrast *KLLM, Inc. v. Fowler* with the present case. The Appellee responded that the difference was the fact that there was no credibility issue of the claimant in *KLLM* and, in the present case, Henderson's credibility was an issue considered by the commission. The Appellee states that Henderson's credibility was suspect because she did not tell anyone that the injury was work related until nine months later when she was able to relate the injury to a specific incident at work. When the Appellee questioned Henderson about her sudden memory of this incident, Henderson simply stated that at the time of her deposition she did not recall any specific incident that occurred on January 31, 1991, that might have caused the injury but later remembered that a wheel chair had slipped when she was moving a patient. Henderson indicates throughout her case, however, that she still does not recall any pain when this particular incident occurred. Henderson has consistently maintained that her back hurt a little at the end of her shift, and she thought nothing of it until the next morning.

The Appellee continues to attack Henderson's credibility based on her prior medical history. The Appellee maintains that Henderson concealed the fact that she had suffered from back pain in the years prior to January 31, 1991. As we discussed previously, a review of Dr. Waller's medical notes reveals that some back pain was a symptom of various ailments Henderson suffered from in the past decade, but nowhere in his notes does he indicate a back injury that even closely relates to the neurological problem from which she is currently suffering. We find the Appellee's credibility argument to be void of any credible evidence.

CONCLUSION

It is apparent from a reading of the record in this case that substantial evidence does not support the commission's finding that Henderson did not suffer a compensable work-related injury. Quite to the contrary, the evidence that Henderson did suffer a work-related injury is overwhelmingly in favor of the Appellant. Henderson made out a prima facie case demonstrating that her back injury occurred at work, arose out of and in the course of her employment, and was causally connected to her disability. The employer failed to offer any affirmative testimony contradicting those elements.

Therefore, the circuit court erred in affirming the commission's denial of workers' compensation benefits to Henderson. Accordingly, the judgment of the circuit court is reversed, and the case is remanded to the Mississippi Workers' Compensation Commission for further action consistent with this opinion.

THE ORDER OF THE CIRCUIT COURT OF PANOLA COUNTY AFFIRMING THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S ORDER DENYING BENEFITS TO VEARLENE HENDERSON, IS REVERSED AND THIS CAUSE IS REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEES.

BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, AND KING, JJ., CONCUR. MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00244 COA

VEARLENE HENDERSON

APPELLANT

v.

**BATESVILLE MANOR NURSING HOME AND THE TRAVELERS INSURANCE
COMPANY**

APPELLEES

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

McMILLIN, J., DISSENTING:

I respectfully dissent. There is no basis under the facts of this case and the applicable law to reverse the decision of the commission. The commission determined, as a matter of fact, that the claimant had failed to prove by a preponderance of the evidence that her back injuries were the result of a work-related accident. On such issues, this Court is constrained to affirm if there is substantial evidence in the record to support the findings of the commission. We are not permitted to reweigh the evidence and change the result upon a conclusion that the preponderance of the evidence is in favor of the claimant. *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992) (citation omitted).

The only evidence that this claimant suffered a work-related injury was her own testimony; however, the record is quite clear that she did not claim that her medical problems were the result of a work injury until some seven months after the alleged incident. In September, when she originally asserted that her back problems were work-related, she claimed that she was injured on May 7 rather than January 31. It was only after filing her petition to controvert that she changed her claim to assert that she had been injured in January. When she was deposed, she was unable to relate a particular event that caused her injury. It was only when she testified at the hearing that she claimed to have remembered after her deposition that she had hurt her back while assisting a patient in a wheel chair.

The claimant did not report her injury to her employer in the days after it allegedly occurred. She saw a physician on the morning of February 1, and he testified that his records did not reflect anything concerning the patient reporting the source of her injury, a fact which he normally, but not always recorded. When asked by her supervisor how she had hurt her back, the claimant indicated that she did not know.

The commission, as the trier of fact, is entitled to assess the credibility of a witness and give such weight to the testimony as the commission deems appropriate. *Miller Transporters, Inc. v. Guthrie*, 554 So. 2d 917, 918 (Miss. 1989) (citation omitted). In the case where a witness relates a story that is, on its face, difficult to believe, there is no requirement that the commission accept that testimony as true, especially when it is contradicted by other witnesses and by the conduct of the witness herself. *Penrod Drilling Co. v. Etheridge*, 487 So. 2d 1330, 1333 (Miss. 1986) (citation omitted). In

this case, it would seem beyond doubt that the commission was entitled to discount this claimant's sudden recollection of the incident that led to her injury many months after it occurred as being unworthy of belief. Without that testimony, there is essentially no evidence in the record to connect her injuries found in the fall of 1993 to a specific incident at the nursing home in January of 1991. Dr. Robertson was unable to connect the event to the injury based upon anything other than what the claimant reported to him over two years after the fact.

The majority has decided that the claimant's version of the events is, in fact, worthy of belief and reverses the commission largely on that basis. The Court exceeds its authority when it substitutes its judgment as to the credibility of a witness for the judgment exercised by the commission as the trier of fact. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994) (citation omitted).

The majority also errs as a matter of law when it relies upon the holding of *KLLM, Inc. v. Fowler* to support its result. See *KLLM, Inc. v. Fowler*, 589 So. 2d 670 (Miss. 1991). That case dealt with the issue of an injury that "develops gradually from the work and cannot be traced to a single event or to a precise time . . ." *Id.* at 675. In this case, the claimant asserts her claim based upon a very specific alleged incident. She could have asserted a claim that her injury was the result of repeated events occurring over time, in which event *KLLM* might have some application, but she did not. It is erroneous to engage in speculation that her injuries could have arisen out of work-related injuries not specifically asserted by her and somehow suggest that this can become the basis for reversing the commission's conclusions.

Though the concept is somewhat confusing, the *lack* of credible evidence to support a proposition on which a litigant has the affirmative burden of proof can constitute *substantial* evidence to conclude that the burden has not been met. That is the situation in this case. I would affirm the commission upon a conclusion that there was substantial evidence in support of its decision.

FRAISER, C.J., COLEMAN AND SOUTHWICK, JJ., JOIN THIS SEPARATE OPINION.