IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00763 COA

KENNETH GRANT **APPELLANT**

v.

UNITED PARCEL SERVICE 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

DATE OF JUDGMENT:	6/7/96
TRIAL JUDGE:	HON. ROBERT GIBBS
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KENNETH WATKINS
ATTORNEY FOR APPELLEES:	BENJAMIN U. BOWDEN
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	DENIED COMPENSABLE BENEFITS OTHER THAT TEMPORARY TOTAL DISABILITY FROM JULY 21, 1992 TO AUGUST 18, 1992, AND FOUND NO LOSS OF WAGE EARNING CAPACITY.
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE BRIDGES, C.J., COLEMAN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY

The claimant filed his Petition to Controvert on November 10, 1993, against United Parcel Service and Liberty Mutual Insurance Company. The administrative law judge denied any compensable benefits to the claimant outside temporary total disability from July 21, 1992, to August 18, 1992. The administrative law judge found no loss of wage earning capacity. The Mississippi Workers

Compensation Commission (Commission) affirmed the administrative law judge's order, and the circuit court affirmed the Commission. Grant now appeals the circuit court's affirmance of the Commission. We find that substantial evidence existed to support the previous findings, and that the Commission's decision was not arbitrary or capricious. We therefore affirm the Commission's decisions and the circuit court's affirmance.FACTS

Kenneth Grant was injured in a work related accident. The brakes of his truck failed while in the service of his employer, United Parcel Service "UPS". At the time of the accident, he was earning an average weekly wage of $708. 80. His knees, neck, and left shoulder were injured.

The claimant first sought treatment from Dr. Hale Byrd in Jackson, Mississippi, on July 16, 1992. Byrd limited the claimant's physical duties to the performance of light duty jobs and to the lifting of twenty pounds or less. The claimant returned to work at UPS shortly thereafter, on light duty status. Soon after he resumed driving, his condition intensified, and he again visited Dr. Byrd. Subsequently, the claimant voluntarily quit his job and moved to Houston, Texas.

The claimant found work at a church within the Houston metro area, earning roughly $350 to $400 dollars per week after he was first employed in October, 1992, and then $450 per week from October, 1993, forward. This work does not entail any heavy lifting or bending.

For the four month period between August and November 1992, there is no indication that Grant received any medical treatment. The claimant did start seeing Dr. Jack Pennington, an orthopedic surgeon, in the Houston area for treatment purposes beginning December 21, 1992. UPS referred the claimant to Dr. Pennington, who treated the claimant for a period of about a year and a half. On January 25, 1993, Dr. Pennington reviewed the results of a cervical MRI and left knee MRI performed at Herman Hospital in Houston, Texas, on January 7, 1993. These results revealed small spur formations at C3-4, C4-5, C5-6, and C6-7 on the left. It was also Dr. Pennington's opinion that the MRI of the claimant's left knee revealed an abnormality of the articular cartilage of the medial femoral condyles, suggesting some degenerative changes. Pennington treated the claimant until the claimant reached maximum medical recovery on March 10, 1994. Pennington gave him an eighteen percent whole body impairment due to his on the job injuries. More specifically, Pennington gave the claimant a five percent impairment to his lower extremity and a seventeen percent impairment loss of range of motion of the neck. Dr. Pennington opined that there was no objective evidence of impairment of the right knee or the lower back as a result of the accident, nor could he say with certainty that the accident caused the condition to the claimant's left knee. There is no evidence that Dr. Pennington placed any final restrictions on the claimant. However, Pennington did recommend the claimant undergo physical therapy for his neck and left knee and use Tylenol as needed.

The employer/carrier later instructed the claimant to see Dr. Terry Millette, a neurologist in Pascagoula, Mississippi. The claimant's medical examination took place on May 10, 1994. Dr. Millette testified that although he did not see the claimant until May 10, 1994, he believed that the claimant had reached maximum medical recovery six to eight months following the injury. Dr. Millette also noted that after reading the UPS feeder driver job description, the claimant would be able to perform his duties as a feeder driver, so long as the claimant did not lift any items exceeding the weight restrictions he had placed on the claimant. Dr. Millette testified that he reviewed the records of Dr. Byrd and Dr. Pennington and the results of the diagnostic studies. Combining those

evaluations with his own, he opined that the claimant was neurologically normal, was not experiencing any permanent partial impairment, and assigned specific restrictions to the claimant. Dr. Millette further stated that the claimant had no disability rating, but did state that the claimant should not lift over seventy-five pounds.

On October 26, 1994, a hearing on issues derived from this accident was held. Testifying in support of the employer and carrier's case was James Lott, the health and safety manager with UPS, and David Martin, the claimant's supervisor with UPS.

David Martin testified that following the claimant's return to work, the claimant underwent post accident classroom instruction. Martin also testified that upon the claimant's return, the claimant received his full pay.

James Lott, a certified tractor/trailor trainer and health and safety manager for UPS testified that he remained in contact with the claimant following the accident and until the claimant quit his employment with UPS on August 19, 1992. During this period of time the claimant informed Lott that he (claimant) was looking for a job in Texas because his wife had taken a job there.

After considering all of the evidence, the administrative law judge entered an order granting the claimant all reasonable medical expenses. Also the administrative law judge granted the claimant temporary total disability beginning July 22, 1992, through August 18, 1992.

ARGUMENT AND DISCUSSION OF THE LAW

I. STANDARD OF REVIEW

The standard of review utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well settled. The Mississippi Supreme Court has stated that "[t]he findings and order of the Workers' Compensation Commisssion are binding on this Court so long as they are 'supported by substantial evidence.'" *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). An appellate court is bound even though the evidence would convince that court otherwise if it were instead the ultimate fact finder. *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994). This Court will reverse only where a commission order is clearly erroneous and contrary to the weight of the credible evidence. *Vance*, 641 So. 2d at 1180; *see also Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). "This Court will overturn a [c]ommission decision only for an error of law, or an unsupportable finding of fact." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991) (citations omitted). Therefore, this Court will not overturn a Commission decision unless it finds that the Commission's decision was arbitrary and capricious. *Id.*; *see also Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991) (stating that where the court finds credible evidence supporting a commission decision, it cannot interfere with that decision any more than with a case from any other administrative body). We believe that the administrative law judge and the full Commission correctly applied the law. We do not believe that the judge or the full Commission abused their discretion in the fact finding process. Thus, we uphold their decisions.

II. ANALYSIS OF ISSUES PRESENTED

I. WHETHER OR NOT THE CLAIMANT/APPELLANT IS ENTITLED TO SUBSTANTIAL PERMANENT AND PARTIAL DISABILITY OR TOTAL DISABILITY AND LOSS OF WAGE EARNING CAPACITY DUE TO HIS ON-THE-JOB INJURY ON OR ABOUT JULY 15, 1992, WHILE WORKING FOR UNITED PARCEL SERVICE.

II. WHETHER OR NOT THE ADMINISTRATIVE LAW JUDGE FAILED DUE TO MANIFEST ERROR TO FIND THAT MR. KENNETH GRANT REASONABLY SOUGHT EMPLOYMENT.

Mississippi statutory law states that in workers' compensation matters, 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) (Rev. 1975). 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 shifts to the employer." *Id.* (citations omitted).

In the present case, it is uncontested that the claimant was injured while at work, but this litigation turns, among other things, on the topic of whether the claimant should receive permanent partial disability or permanent total disability, not that he would not receive *any* benefits. Dunn states:

[A] partial loss of functional use may result in total disability, and to reach this result it is not necessary that the employee be wholly incapacitated to perform any duty incident to his usual employment or business; but if he is prevented by his injury from doing the substantial acts required of him in his usual occupation, or if his resulting condition is such that common care and prudence require that he cease work, he is totally disabled within the statute.

V. Dunn, *Mississippi Workmen's Compensation*, § 86 at 102-103 (3d ed. 1982) (quoted in *McGowan*, 586 So. 2d at 166; *Piggly Wiggly v. Houston*, 464 So. 2d 510, 512 (Miss 1985)).

To establish disability, the injured employee bears the burden of showing that he has sought and been unable to obtain work "in similar or other jobs." *Georgia Pacific v. Taplin*, 586 So. 2d 823, 828 (Miss. 1991). By his own testimony, the claimant lists several businesses he applied to for prospective work. They include Nippon Pigment, C-Pack, Martin Gas Transport, and CP & C.

The law is clear that once the claimant has made a prima facie case, the burden shifts to the employer to show that his efforts were not reasonable or constituted a mere sham. *Id.*; *Pontotoc Wire Products Co. v. Ferguson*, 384 So. 2d 601, 603 (Miss. 1980). A determination of the "reasonableness" of the claimant's efforts (in seeking employment) includes "consideration of job availability and economics in the community, the claimant's skills and background, as well as the subject of disability itself." *Taplin*, 586 So. 2d at 828.

Subsequent to his injury, the claimant voluntarily left the employ of UPS, packed his bags, and

headed out West, giving his employer no opportunity to place him in his former position, or in another position within the organization such as a desk job. In fact, when the claimant did settle down in Texas, he did not attempt to find work with a UPS unit there. Rather, the claimant accepted employment within the ministry, and from his own admissions had secured ministerial work prior to leaving UPS. The claimant also failed to show that he was unable to find work "in similar or other jobs," thus relieving the carrier/employer from setting forth facts indicating that work was available to the claimant. *Hale v. Rulewille Health Care Ctr.*, 687 So. 2d 1221, 1227 (Miss. 1997). The administrative law judge's order made findings of fact to the effect that the claimant's efforts at securing employment did not involve reasonable diligence. "What constitutes a reasonable effort is not easy to determine. It is . . . a factual question which depends upon a variety of factors . . . ." Dunn, *Mississippi Workers' Compensation*, § 72.1 at 85 (3d ed. 1983).

While the claimant filled out several application forms, it appears that his actions were merely to conform to the requirements of settled workers' compensation law, with no apparent intent to work at one of these establishments. There are other findings of fact made by the administrative law judge and adopted by the Commission which indicate that the claimant's efforts to secure employment were less than diligent.

The claimant's testimony revealed misinformation of his physical abilities to prospective employers. He told C-Pack he could not lift, when in fact he could up to a point. Likewise, he told Nippon Pigment he could not pick up anything that might cause him to strain, an exaggerated characterization of his capabilities.

Joe Smith, with C.P. & C., offered information regarding his contact with the claimant. His letter indicated that the claimant had stated that he (claimant) did not know why he was there, that he could not work anyway, and that he could not lift over twenty pounds and could not climb a ladder.

In a similar vein, the claimant testified that he had applied for a position at Martin Gas. His application was tendered to Martin Gas the day *after* the hearing on the merits of his case. This blatant misrepresentation, coupled with those mentioned above, by the claimant caused the administrative law judge to question the veracity of the claimant. That is understandable. At the very least, one attempt by the claimant in seeking employment was a sham. Two other attempts are highly questionable. A determination from these facts show that the actions of the claimant were not reasonable attempts at seeking employment.

Testimony from Dr. Millette states that the claimant could resume activities as a "feeder driver," if he did not physically exert himself by lifting weight in excess of seventy-five pounds. From this accumulation of evidence, it appears the claimant's chief purpose was not to return to work at UPS. His failure to return, coupled with his failure to diligently seek out similar employment justifies the administrative law judge's findings. The administrative law judge correctly applied the law, and we are bound by his ruling unless he abused his discretion. Therefore, the Commission's order should be upheld as the "substantial weight of the evidence" test has not been rebutted.

The law is clear that the claimant bears the burden to establish loss of wage earning capacity. *Robinson v. Packard Elec. Div. GMC*, 523 So. 2d 329, 331 (Miss. 1988). The administrative law

judge held that the claimant failed to prove loss of wage earning capacity. The Commission upheld this finding. This issue was appealed to the circuit court and upheld. After a careful study of the briefs and record, we are of the opinion that the holding is justified.

To determine loss of wage earning capacity, the Court must consider factors such as "the amount of training and education which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances." *Id.* (quoting *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 167 (Miss. 1991)). "[The] determination should be made only after considering the evidence as a whole." *Id.*

The record indicates that the claimant was well suited for work as a "feeder driver," that he was mentally astute, and that he had studied at Hinds Junior College, Mississippi College and Texas Bible College. Having reached maximum medical recovery, the claimant should report back to his employer for work, and then if the employer refuses to reinstate or rehire him, it is prima facie that the claimant has met his burden of showing total disability. *Jordan v. Hercules, Inc.*, 600 So. 2d 179, 183 (Miss. 1992). However, the claimant's willingness to work or to allow himself to be hired in similar work is questionable. Likewise, the claimant failed to report back to work at UPS, thus failing to meet this requirement as articulated in *Jordan.*

III. WHETHER OR NOT THE ADMINISTRATIVE LAW JUDGE FAILED DUE TO MANIFEST ERROR, TO GIVE ANY CREDENCE TO DR. JACK PENNINGTON'S OPINION OF THE CLAIMANT/APPELLANT'S 18% IMPAIRMENT OF THE BODY AS A WHOLE EVEN THOUGH DR. PENNINGTON WAS THE CLAIMANT/APPELLANT'S PRIMARY TREATING PHYSICIAN.

The Commission is the trier of facts, as well as the judge of credibility of the witnesses, and the findings of fact supported by substantial evidence should be affirmed by the circuit court. *Roberts v. Junior Food Mart*, 308 So. 2d 232, 233 (Miss. 1975). The Commission affirmed the administrative law judge's findings in the case *sub judice* after viewing the evidence submitted by the claimant's attending physicians, Drs. Pennington and Millette. Based on the testimony of Dr. Millette, the administrative law judge found that the claimant reached maximum medical recovery on March 15, 1993. Millette placed physical restrictions on the claimant following treatment by Dr. Pennington. There is no proof in the record that suggests that Millette's testimony is false, inaccurate, or made with ill will. Likewise, there is no law which states that a judge may not give deference to one physician over another or give more weight to one fact over another.

The claimant cites *Johnson v. Ferguson*, 435 So. 2d 1191, 1195 (Miss. 1983) as authority in asserting that Dr. Pennington should be given more credence than Dr. Millette, stating, "when an expert opinion is based upon an inadequate or incomplete examination, that opinion does not carry as much weight or has little or no probabtive value when compared to the opinion of an expert who has made a thorough and adequate examination." However, this authority does not apply to the situation presented because Dr. Millette stated that he had been provided the evaluation prepared by the radiologist who had performed the MRIs on the claimant, the records of Dr. Pennington and Dr. Byrd, and the diagnostic studies that were taken by both of these physicians.

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. *Myles v. Rockwell Int'l*, 445 So. 2d 528, 536 (Miss. 1983). With the parameters of the aforementioned standard having been observed in resolving this issue raised by the claimant, we will not go behind the fact finding body, "even though that evidence would not convince us were we the fact finders." *South Central Bell Co. v. Aden*, 474 So. 2d 584, 589-590 (Miss. 1985).

IV. WHETHER OR NOT THE ADMINISTRATIVE LAW JUDGE FAILED TO FIND ANY TEMPORARY PARTIAL DISABILITY WITH MANIFEST ERROR AND FAILED TO FIND PENALTIES FOR FAILURE OF EMPLOYER/CARRIER/APPELLEES TO PAY BENEFITS FOR SUCH TEMPORARY PARTIAL DISABILITY.

The claimant states that he met his burden for establishing temporary partial disability by attempting to return to work at UPS. He further contends that UPS had a duty to find employment for the injured claimant which he could perform with his injuries and impairment.

In the instant case, the claimant was paid on temporary total disability benefits from July 22, 1992, to August 18, 1992. It is the claimant's contention that he be paid from October, 1992, the date the claimant started working for the church, to the date when Dr. Pennington granted maximum medical recovery which was March 10, 1994.

A catalog of evidence intimates that UPS attempted to place the claimant back at his usual position as a "feeder driver." The evidence also suggests that UPS, had they had the opportunity, would have situated the claimant in an environment commensurate with his disabilities until he had fully recovered. The claimant was a skilled nineteen year employee, and not someone easily replaced. Yet the claimant voluntarily left his employment, effectively abating UPS's efforts to work with him until he had functionally healed.

V. WHETHER OR NOT CLAIMANT/APPELLANT, KENNETH GRANT, SHOULD BE GRANTED ALL REASONABLE AND NECESSARY MEDICAL SERVICES AND SUPPLIES FOR THE INJURIES TO HIS BODY AND HIS KNEES.

Under Workers' Compensation law, the claimant must prove by a "fair preponderance of the evidence," each element of the claim. *Bracey v. Packard Elec. Div., Gen. Motors Co.*, 476 So. 2d 28, 29 (Miss. 1985). *See also* V. Dunn, *Mississippi Worker's Compensation*,§ 265 at 322-323 (3d ed. 1982).

These elements are: an accidental injury, arising out of and in the course of employment, and a causal connection between the injury and the death or claimed disability. Miss. Code Ann. §§ 71-3-3 & 71-3-7 (Rev. 1995). "With reference to causation, we [supreme court] have said: 'An injury arises out of the employment when there is a causal connection between it and the job.'" *Jenkins v. Ogletree Farm Supply*, 291 So. 2d 560, 563 (Miss 1974) (quoting *Earnest v. Interstate Life & Accident Insurance Co.*, 238 Miss. 648, 652, 119 So. 2d 782, 783 (Miss. 1960). By applying the law to the facts we can not find where the claimant has proved any causal relationship between the injuries sustained to the knee and the accident in question. In fact, neither Dr. Pennington on whose testimony the claimant relies, nor any of the attendant physicians, could affirmitively assert with any degree of medical certainty or probability that the claimant's left knee condition was in fact caused by the automobile

accident. Furthermore, Dr. Pennington opined that there was no objective evidence of impairment of the claimant's right knee or lower back as a result of the accident.

With this determination we cannot find that the administrative law judge misapplied the law, or that he acted in an arbitrary capacity. When viewed in its entirety, the evidence fails to establish that the claimant is entitled to any other benefits provided under the Mississippi Workers' Compensation Act other than what was given by the Commission.

III. CONCLUSION

Substantial evidence does not support the findings that the claimant suffered compensable workplace injury outside of temporary total disability benefits. It was uncontroverted that the claimant suffered some injury, and for that injury, he received remuneration.

Therefore, the findings of the administrative law judge and the Commission will be upheld. Likewise, the Hinds County Circuit Court did not err in affirming the Commission's denial of benefits other than temporary total disability.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., AND HERRING, J., NOT PARTICIPATING.