

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00965 COA**

**THE KROGER COMPANY AND
TRANSPORTATION INSURANCE COMPANY**

APPELLANTS

v.

ANTHONY CRAIG BOLING

APPELLEE

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

DATE OF JUDGMENT:	08/08/96
TRIAL JUDGE:	HON. GEORGE C. CARLSON, JR.
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	ROBERT H. PEDERSEN CLIFFORD B. AMMONS
ATTORNEY FOR APPELLEE:	JOHN L. BAILEY
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	COMMISSION AMENDED ALJ'S FINDINGS
DISPOSITION:	AFFIRMED - 11/4/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/25/97

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

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY

The employer and carrier filed its petition to controvert with the Mississippi Workers' Compensation Commission concerning an injury sustained by an employee in the course of employment on October 3, 1991. At a hearing on May 24, 1994, the administrative law judge ordered Kroger Company and Continental Casualty Company to pay the claimant temporary total disability from October 3, 1991 until July 16, 1992. The administrative law judge also granted the claimant permanent partial disability benefits of \$76.09 per week from July 17, 1992, and continuing for the statutory period and medical expenses. The Commission amended the administrative law judge's order dated October 19,

1994, concerning permanent partial disability benefits, affirming the remainder. The Circuit Court of Panola County affirmed the findings of the Commission. Feeling aggrieved, Kroger appeals. We find that substantial evidence existed to support the previous findings of the Commission's decision which was not arbitrary or capricious. We therefore affirm the Commission's decisions and the circuit court's affirmance.

FACTS

On October 3, 1991, Anthony C. Boling was injured in a work related accident while grabbing a case of orange juice. At the time he was employed by Kroger Company as a order puller/selector. As the order puller for Kroger, it was Boling's job to pull the orders which came into the company from the stocked shelves and place them on pallets for distribution. This work required physical effort. At the time of the accident, Boling was earning an average weekly wage of \$342 per week. Boling was initially treated by Dr. Haire, who x-rayed him but could find nothing wrong. Dr. Haire referred the claimant to Dr. Vick, who in turn referred Boling to Dr. David Cunningham. Dr. Cunningham indicated that Boling had a ruptured disc at L5 level protruding into a nerve. Thereafter, he performed back surgery on January 22, 1992. On July 21, 1992, Boling returned to his previous position at Kroger as an order puller.

Subsequent to the surgery and return to work, Boling's back hurt. Thereafter, he revisited Dr. Cunningham, who released him as able to return to work. Boling also saw Drs. D.J. Canale and Anthony Segal, each of whom ultimately released him to return to work. Finally, Boling saw Dr. Robert Christopher, who placed him on restrictions.

In January of 1994, almost a year and a half after Boling's back injury, he was terminated by Kroger for "wasting time." Boling counters this by claiming that his poor work performance was due to his back injury which he sustained while on the job. Boling has since failed to procure other employment, but he has indicated that he had applied for several jobs. These potential jobs included working for Inca, Schwabe Shirt Factory, Coca-Cola, Standard Welding Supply, Expert Auto Glass, International Chemical, Tucker Manufacturing and House Plumbing.

Numerous people, including the claimant's estranged wife, testified at the hearing. His wife observed him since the back injury and stated that he was in constant pain. She testified that he had been active prior to the injury, but since that time he had been unable to perform his chores as before.

In a similar vein, George Campbell, a forklift operator at Kroger, testified that after the injury he noticed the claimant get down on his knees to pull an order and be unable to get all the way back up. Campbell also testified that he had seen the claimant lie on his side in order to pick himself up from the floor and that in his opinion the claimant was in pain, was not wasting time, but took longer to perform his warm up exercises and was slower in performing his job than a normal individual would have been.

Dr. Sam Hunter, a practicing neurosurgeon who has actively taught neurosurgery in Memphis, testified that after the surgery performed by Dr. Cunningham, the claimant suffered from a degenerative disc disease at the L5 with sub annular disc protrusion. Also, he testified that the claimant should have a job with low incident flexion, bending, and twisting. Further, he indicated that the claimant would be best suited to perform desk jobs.

Likewise, Dr. Robert Christopher testified that his diagnosis indicated that the claimant suffered a post-laminectomy syndrome because of the scar tissue causing compression on the nerve roots in the low back region. He too opined that the claimant should find lighter work and that in his opinion the claimant would be permanently limited in his physical activity. Likewise, Dr. Christopher testified that he told the claimant to refrain from bending from the waist, crawling, stooping, squatting, or stair climbing on a frequent basis.

The claimant is twenty-nine years of age and has a twelfth grade education. He has no specialized training, and his work history includes working on a farm, driving a forklift, roofing, working as an auto mechanic, and pulling orders for Kroger.

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 Commission are binding on the 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).

II. ANALYSIS OF THE ISSUES PRESENTED

1. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT CLAIMANT BOLING CAN DO ONLY "SEDENTARY WORK."

2. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT "SEDENTARY" WORK PAYS ONLY \$4.25 AN HOUR.

The dispute on appeal centers around the absence or presence of substantial evidence to support the permanent partial disability benefits awarded by the Commission and affirmed by the circuit court for the claimant's work related back injury. In 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. 1995). 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, the Commission viewed the evidence to support a finding that the claimant had proved through medical testimony that he had incurred a substantial loss of wage earning capacity, because he would be unable to perform the manual labor he once had. As stated by Vardaman Dunn, a noted authority on Mississippi's Workers' Compensation law,

it is the province of the Commission to reconcile, weigh, and accept or reject, the testimony where conflicts appear therein, and draw logical and reasonable conclusions from the facts so adjudged and accepted by them, which includes the right to weigh the evidence in the light of common knowledge, experience and common sense and to draw permissible inferences therefrom, and such province may not be invalidated by the Court on appeal.

V. Dunn, *Mississippi Workers' Compensation*, § 288 (3d Ed. 1982).

After receiving the testimony, the Commission weighed the evidence and felt that the claimant could do some type of work which would pay at least minimum wage. The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the administrative law judge to the contrary notwithstanding. *See* Dunn, *Mississippi Workers' Compensation*, § 284 (3d ed. 1982).

The whole of this evidence indicates that Boling is certainly limited in the jobs he will be able to perform in the future. A vocational expert, Lamar Crocker, testified that pre-injury the claimant would have access to approximately 20,000 jobs and post-injury would have access to approximately 13,400 jobs or a thirty-four percent reduction. Also, after assessing the claimant's vocational skills, Crocker noted on April 12, 1994:

The claimant performed all requested tasks to the best of his ability. He has a definite problem in that his acquired skill level (High School Diploma) does not match his functional level of performance or intelligence. It would appear to me that the claimant was passed through the school system from grade to grade but did not master the essential skills of reading, math or spelling. I would classify the claimant as a below average individual.

Drs. Christopher and Hunter noted that the claimant should limit his physical labor and not perform jobs which cause him to bend, twist, or crawl. The jobs which he has performed in the past are no longer available to him. Boling will be forced to look for jobs that allow him to sit down, and with his limited education and training, such jobs might be difficult to find.

III. CONCLUSION

Upon review of the record and consideration of the applicable law, this Court is constrained to affirm the Full Commission's order, amending the order of the administrative law judge. It is beyond the authority of this Court to disturb the Commission's decision. Substantial evidence supports the findings that the claimant is entitled to \$115 per week for the statutory maximum period, rather than the \$76.09 awarded by the administrative law judge. We do not believe the Full Commission nor the

Panola County Circuit Court abused their discretion in the fact finding process. Thus, we uphold the decision of the Commission and the circuit court.

THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.