IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-00870 COA

DEPENDENTS OF JERRY MAITEN, DECEASED: QUINTARUS ROBINSON, RENITA MAITEN AND JEREMY DION WILSON — **APPELLANTS**

v.

CLEAVER-BROOKS, A DIVISION OF AQUA-CHEM, INC. AND ALLIANZ 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:	7/3/96
TRIAL JUDGE:	HON. BETTY SANDERS
COURT FROM WHICH APPEALED:	CIRCUIT COURT OF WASHINGTON COUNTY
ATTORNEYS FOR APPELLANTS:	WILLIAM R. STRIEBECK
	VERNITA K. JOHNSON
	KINNEY M. SWAIN
ATTORNEYS FOR APPELLEES:	ROBERT P. THOMPSON
	JEFF SKELTON
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	AFFIRMANCE OF THE COMMISSION'S DECISION
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY

This workers' compensation claim arose out of the death of Jerry Maiten, who collapsed on April 23, 1992, shortly after beginning his shift at the Cleaver-Brooks plant in Greenville, Mississippi. Following Maiten's death, a petition to controvert was lodged by Renita Maiten against Cleaver-Brooks. The administrative law judge held that reasonable expenses for funeral, medical services, and supplies were to be paid, and that the death benefits to the three dependant children, apportioned by one-half from the date of death, were to be paid pursuant to the Workers' Compensation Act. Feeling aggrieved, the claimant perfected her petition for review, and employer and carrier filed their cross-petition for review with the Commission. Having heard the evidence, the Commission affirmed in full the order of the administrative law judge. Thereafter, the claimant perfected his appeal to the Circuit Court of Washington County, Mississippi. The circuit court affirmed the Commission, and we find that substantial evidence exists to support the previous findings and that the Commission's decision was not arbitrary or capricious. We therefore affirm the Commission's decision and the circuit court's affirmance.

FACTS

On the morning of April 23, 1992, Jerry Maiten was working at the Cleaver-Brooks facility in Greenville, when he collapsed. His collapse occurred during the regular working hours. At this time, he was assisting a welder, Willie Harris, in repairing a leak in a tank.

According to fellow employee Lenell Winners, who spoke with Maiten immediately prior to Maiten's collapse, Maiten already would have taken the cover off the tank which Harris was to repair. The steel cover that was to be physically removed was between 5/8 of an inch to a full inch thick and was bolted to the tank. In order to remove the steel cover, Maiten would have to utilize a twenty four inch wrench to remove the 3/4 inch bolts on the cover. Fellow employee Willie Harris admitted that Maiten had taken these steel covers off the day before.

In the area where the welding team worked, there were usually some fifty odd welding machines being operated at any given time. This area where Maiten had been working was climatically jinxed a good part of the year. As fellow employee Jerry Williams described it, the "hydropit" was the hottest place in the summertime and the coldest place in the wintertime.

After being rushed to the emergency room located on the grounds of the Delta Regional Medical Center, Dr. Isaac Newton treated the deceased. At that time, the claimant had no vital signs and was in the process of being resuscitated in an emergency fashion. The resuscitation episode took approximately twelve hours. During this time, Dr. Newton compiled an ad hoc medical history of the claimant. From speaking with several attendees[(1)] at the hospital, he surmised that the claimant drank and suffered from high blood pressure. Dr. Newton treated Maiten from April 23 forward until the date of his death. Testifying from his notes, the doctor noted that the claimant's family informed him that Maiten drank heavily and had a known hypertensive condition for the past three years for which he had been treated on an intermittent basis.

Later that day, and after his collapse, Maiten suffered from another traumatic event. Additional CPR had to be performed. A blanket was used to control his failing body temperature. Based on the evidence of some brain function and the desire of his family that every effort should be employed to

save him, the medical team did everything medically feasible to facilitate those wishes. The claimant never regained consciousness, remained comatose, and was unresponsive except for reflex movements during the period of hospitalization. Maiten died on June 9, 1992.

The real controversy in this case centers on medical evidence of a pre-existing condition as it pertains to the theory of apportionment. Thus a review of the claimant's medical records as interpreted by the physicians is pertinent to this dispute.

In his discharge summary of the patient, Dr. Newton characterized Maiten as having suffered from a cardiac death with severe hypoxic brain damage and myocardial infarction. Another notation on the death certificate was that of hypertensive cardiovascular disease. The claimant's blood pressure problems were controlled partially by Dopamine during his hospitalization, but Dr. Newton noted that the claimant did not have significant high blood pressure to his knowledge while in the hospital.

Dr. Newton indicated to a reasonable degree of medical certainty the proximate cause of Maiten's death to be sudden cardiac death syndrome. More specifically, Dr. Newton's final diagnosis of Maiten read:

> FINAL DIAGNOSIS
>
> Sudden cardiac death with severe hypoxic brain damage.
>
> Myocardial infarction.
>
> Hypertensive cardiovascular disease.
>
> Multiple bouts of ventricular tachycardia and ventricular fibrillation.
>
> Chronic alcoholism.
>
> Multiple infections including Methicillin resistant Staphylococcus aureus and Pseudomonas.

Along those lines, Dr. Malcolm P. Taylor, a licensed practicing physician in the field of cardiology, trained in internal medicine and board certified in cardiology and internal medicine, testified that after reviewing all of the records pertaining to the deceased, it was his opinion that Maiten experienced a cardiac arrest caused by a cardiomyopathy condition determined to be pre-existing. Consistent with this pre-existing condition, the doctor stated that the hypertensivity was present at the time of the deceased's admission to the hospital, indicating high blood pressure of a longstanding, uncontrolled variety. The testimony of Dr. Taylor is beneficial here.

> Q. Did you have anything in the records on the history concerning hypertension--
>
> A. Yes, but I didn't really need anything in the record to confirm that [hypertension] because he [Maiten] was hypertensive when he came in [admitted]. He was hypertensive intermittently throughout his hospitalization with high blood pressure as high as 120 diastolic on some occasions.

Q. So you didn't need anyone to tell you a history of hypertension to diagnose that in this person?

A. No, he already had that . . . .

Q. So your opinion based upon a reasonable degree of medical certainty is that he suffered from cardiomyopathy.

A. That is correct.

The doctor further confirmed that cardiomyopathy is caused by at least one of three things: (1) hypertension, uncontrolled hypertension, (2) chronic alcohol abuse, or (3) a virus. Dr. Taylor testified that even had he spoken with Maiten, his diagnosis would have been the same. History or no medical history, a talk with Maiten would have only disclosed if Maiten had been exposed to a viral infection, but this latter option is of no relevance here.

Referencing the alcohol abuse, the doctor noted that Maiten entered the hospital with a low magnesium count. Dr. Taylor characterized this low magnesium count as being "borderline low." In his own words Dr. Taylor observed, "So if you are a heavy drinker, low magnesium or borderline low magnesium and have a heart problem, then you're more at risk of developing arrhythmia." Several witnesses stated that Maiten drank. Later in the record, Dr. Taylor explained that Maiten was given Dopamine and that it is unusual for someone who is not hypertensive to become hypertensive with Dopamine. Dr. Taylor further testified that it was his opinion that Maiten's condition existed for probably three to six months prior to his death.

The basis of Dr. Taylor's opinion was due in large part to Maiten's abnormal electrocardiogram (EKG) reading and upon the fact that when Maiten was initially interned into the hospital he was hypertensive. According to Dr. Taylor, the EKG reflected left ventricular hypertrophy with a strain type pattern. In his own words he stated that condition (hypertrophy) is a "classical finding in patients who have long standing uncontrolled hypertension." Furthermore, Dr. Taylor stated that the emergency room team administered a drug which maintains blood pressure. Likewise, Dr. Taylor made note of the two echocardiograms. This first echo was taken on April 24th, the second was taken on May 26th. He stated that Maiten's heart was markedly dilated (enlarged acutely), indicating that the heart, over the past few months or maybe over the last year, had gradually tried to compensate for some underlying problem, and it had done that by enlarging in order to maintain the status quo. According to Dr. Taylor, the enlargement of the heart coupled with the low pump volume of blood (ejection factor) clinically denoted that the heart was "not pumping good at all."

ARGUMENT AND DISCUSSION OF THE LAW

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 *Mitchell Buick v. Cash*, 592 So. 2d 978, 980 (Miss. 1991)). 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 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 Commission correctly applied the law. Thus, we uphold their decisions.

ANALYSIS OF THE ISSUE PRESENTED

I. WHETHER JERRY MAITEN'S DEATH WAS COMPENSABLE.

Mississippi statutory law dictates 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).

It is undisputed that the deceased employee was in the course and scope of his employment at the Cleaver-Brooks facility in Greenville when he collapsed on April 23, 1992. The only required remaining element to be proven by the claimants in this matter was the causal connection between the injury and death, or claimed disability Maiten sustained. However, in circumstances such as discussed here, where the claimant falls dead, or is found dead at work, the found dead presumption applies to the third and final element of the claimant's proof. The found dead presumption was described in ***Washington v. Greenville Mfg. & Mach. 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.

There is absolutely no evidence that Maiten was not about his master's business when he met his

untimely collapse which led to his demise. At the time of his collapse, Maiten was busy handing tools to the welder, and no evidence was produced which intimated that Maiten was "horsing" around. Assuming that the testimony of Dr. Newton is sufficient evidence to support the finding by the Commission that Maiten died as a result of myocardial infarction,[(2)] there is still the presumption that the heart attack resulting in death was causally connected to Maiten's work activities. Thus, the more important question is whether the employer overcame this presumption by substantial evidence. ***Id.* at 646.** In the case of ***Holman v. Standard Oil Co. of Ky.*, 242 Miss. 657, 136 So. 2d 591,** the Mississippi Supreme Court stated the rule relative to the strength of this presumption as follows:

> In the recent case of ***Russell v. Sohio Southern Pipe Lines,* 236 Miss. 722, 112 So. 2d 357, 360, 113 So. 2d 667,** this Court said: 'It has been heretofore recognized by our decisions that there is a presumption of a causal connection between the employment and the injury or death when the onset of a heart attack occurs while the employee is about his work and engaged in the duties of his employment, and that the fatal consequences arise out of and in the course of the employment.'

***Id.* at 666, 136 So. 2d at 594.**

The evidence presented to the administrative courts below revealed that Maiten worked in an area where fifty machines were usually operating at any given time, that in the summer the heat was oppressive, and in the winter, biting, and at the time of the incident there were only fans ventilating the area. At the time of the attack, Jerry Williams testified that in the springtime the plant was cool. However, Dr. Taylor, the medical expert for Cleaver-Brooks admitted that if Jerry Maiten had been exposed to sufficient amounts of heat, stress, sweating, or other things in his job, these factors could have contributed or aggravated an underlying medical problem. More importantly, Dr. Taylor concluded that he could not deny that Maiten's work activities did in some way contribute to Maiten's sudden cardiac death syndrome, but he did note that in his opinion Maiten's work did not contribute to his death. He also opined that Maiten had not done anything out of the ordinary wear and tear of life, and he was not in a hot environment. Dunn notes that "any substantial exertion or stress over and above the ordinary wear and tear of life is sufficient to meet the requirement that the attack be accidental. . . . For example, awards have been sustained when at the time of the attack, the employee was operating an automatic chisel as usual; taking measurements in a ditch; operating a delivery truck. . . ." **V. Dunn, Mississippi Workmen's Compensation, § 93 at 113-114 (3d ed. 1982).** From this passage, it can be surmised that the extent of exertion or strain, beyond the ordinary wear and tear of life, is significant only as it may have some bearing upon medical opinion as to the causal connection, and we find that Maiten's activities constituted a substantial exertion under our case law. In order to overcome the found dead presumption of causal connection, not only must the cause of death be explained, but the employer must fully develop the work activities of the decedent to show that such activities did not cause or contribute to the heart attack. ***Nettles v. Gulf City Fisheries*, 629 So. 2d 554, 557 (Miss. 1993).** The employer fails in this regard. Therefore, since substantial evidence supports the Commission's decision that the found dead presumption applied and that the employer and carrier had not rebutted the presumption, that factual decision stands and should not be

disturbed.

II. WHETHER AS A MATTER OF LAW IT WAS ERROR TO APPORTION THE DECEASED WORKER'S DEATH BENEFITS BASED UPON LAY TESTIMONY OF UNKNOWN DECLARANTS AND NOT COMPETENT MEDICAL EVIDENCE.

Mississippi Code Annotated § 71-3-7 (Rev. 1995) provides language applicable to the question of apportionment:

Where a pre-existing physical handicap, disease or lesion is shown by medical findings to be a material contributing factor in the results following injury, the compensation which, but for this paragraph, would be payable shall be reduced by that portion which such pre-existing physical handicap, disease, or lesion contributed to the production of the results following the injury.

In order for apportionment to apply, the employer must first establish the four factors which were set forth in ***Delta Drilling Co. v. Cannette*, 489 So. 2d 1378, 1381(Miss. 1986)**:

> (1) That there must be a pre-existing physical handicap, disease or lesion; (2) this pre-existing condition must be shown by medical findings; (3) to be a material contributing factor to the results following injury; and (4) the compensation otherwise payable is reduced by the proportion which the pre-existing condition contributed to the production of the results following the injury.

After reviewing all of the medical records compiled on Maiten, Dr. Taylor determined with a reasonable degree of medical certainty that Maiten suffered from a pre-existing condition called cardiomyopathy. The evidence Dr. Taylor reviewed included: two echocardiograms, electrocardiogram, and Dr. Newton's notes and records. Dr. Taylor testified that this pre-existing condition caused Maiten to have irregular heart beats which contributed to his collapse and ultimately his death. Thus, his diagnosis was that cardiomyopathy was a material contributing factor in Maiten's death.

Although neither Dr. Taylor nor Dr. Newton had the benefit of medical records concerning Maiten's heart condition prior to his collapse on April 23, 1992, Dr. Newton had many tests run and Dr. Ben Folk had run two echocardiograms which Dr. Taylor reviewed. These tests, the EKG readings, and the medical notes are extensive in volume, numbering some seven to nine hundred pages of data. This information, coupled with their medical backgrounds, gave both doctors the needed information on which to base their respective opinions.

"The issue of apportionment, particularly in heart-injury cases, is a difficult task which can only be made on an ad hoc basis." ***Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1265 (Miss. 1990).** The Commission's fact-finding must remain undisturbed by the reviewing court if its finding is supported by substantial evidence. ***Id.* at 1266**. The Commission had adequate medical findings on which to determine a pre-existing condition contributed to Maiten's death, and thus

apportionment was correctly applied. This was not a case where lay opinion defined apportionment. This was a case where experts in the medical profession augmented their diagnoses with the aid of and not sole reliance on statements of lay persons.

As it stands to date, Mississippi case law gives no guidance by which to determine the percentage of apportionment. It would be helpful for the legislature or the supreme court, when it has such a case before it, to set forth a standard by which pre-existing conditions could be evaluated. Confronted with the difficulty inherent in a case such as before us, this Court is reminded of the applicable standard of review, which is: the Commission's fact-finding "must remain undisturbed by the reviewing court" if its finding is "supported by substantial evidence." ***R.C. Petroleum, Inc. & The Travelers Ins. Co. v. Hernandez,*** **555 So. 2d 1017, 1021 (Miss. 1990).**

III. CONCLUSION

For the foregoing reasons, this Court holds that substantial evidence was presented to prove that Maiten suffered from a pre-existing condition and that condition, coupled with his work activity on the morning of his collapse, contributed to his death. After reviewing the record, we are satisfied that the Commission's order was undergirded by substantial evidence, and the circuit court was correct in upholding that decision.

THE JUDGMENT OF THE CIRCUIT COURT OF WASHINGTON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS/CROSS APPELLEES.

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

1. This reference to family members was a collective group which Dr. Newton stated consisted of Maiten's girlfriend, ex-girlfriend, and ex-wife or wife.

2. Dr. Newton's deposition testimony reveals that in his opinion the decedent died from a cardiac death syndrome, and it was his position that he did not know whether the myocardial infarction preceded or followed the syndrome.