IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00417 COA

HORACE MCLEOD

APPELLANT

v.

ALPO PET FOODS, INC. AND ZURICH AMERICAN INSURANCE CO. OF ILLINOIS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KATHY KING JACKSON

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

RICHARD HAMILTON

ATTORNEY FOR APPELLEES:

FORREST W. STRINGFELLOW

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: FINDING OF TEMPORARY TOTAL DISABILITY

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Horace McLeod filed a workers' compensation claim for a back injury which occurred while he was picking up a sack of wheat germ meal during his employment with Alpo Pet Foods, Inc. The administrative law judge ruled that McLeod had sustained an injury on December 16, 1987, while in

the scope of his employment. The administrative law judge also found that the claimant was temporarily totally disabled from January 12, 1988, through March 12, 1988. In addition, the judge found that claimant had not suffered any loss of wage-earning capacity as a result of his injury at work. The full commission affirmed the decision of the administrative law judge. Thereafter, the claimant appealed the decision to the Circuit Court of Jackson County, Mississippi. The Circuit Court of Jackson County affirmed the commission's order. Feeling aggrieved, McLeod appeals to this Court and asserts the following error:

> THE WORKERS' COMPENSATION COMMISSION ERRED IN FINDING THAT THE CLAIMANT REACHED MAXIMUM MEDICAL IMPROVEMENT ON MARCH 12, 1988, THEREBY TERMINATING CLAIMANT'S TEMPORARY TOTAL DISABILITY BENEFITS.

Finding that the decision of the Workers' Compensation Commission is not supported by substantial evidence, we reverse and remand the case for a finding of fact, consistent with this opinion.

THE FACTS

McLeod was, on December 16, 1987, employed by Alpo Pet Food, Inc. He had been employed by the company since 1975 for approximately twelve years. On December 16, 1987, McLeod injured his back while lifting sacks of wheat germ meal. He was examined and treated by four physicians, all of which agreed that the claimant had lower back problems and a ruptured disc at L5. The testimony of the doctors who examined the claimant follows.

Dr. Victor Bazzone testified by deposition that after examining the claimant on August 4, 1988, he found that the claimant was suffering from spinal, as well as cervical stenosis. He testified that the claimant was temporarily disabled from gainful employment at the time of the examination. He further testified that the claimant's problems would not be alleviated unless he had surgery. Dr. Bazzone did not assign a permanent impairment rating and also stated that the injury may or may not be preexisting.

Dr. John J. McCloskey stated by deposition that he first had an opportunity to treat the claimant on February 25, 1988, and had continued to treat the claimant as of that date. He stated that the claimant told him that he had injured his back in March of 1987 and then reinjured his back in December 1987. The doctor testified that the claimant had carpal tunnel syndrome as a result of the prior injury suffered at work. Dr. McCloskey testified that he performed a release of the right carpal tunnel which was related to a prior injury. He also stated that both injuries were the cause of claimant's complaints, but he did not know if the present problems the claimant was experiencing were preexisting. Dr. McCloskey further testified that the claimant had reached maximum medical improvement on June 28, 1990, and assigned a fifteen percent physical impairment to the body as a whole. He restricted the claimant to light work. Furthermore, Dr. McCloskey testified that if the claimant's carpal tunnel problems were disregarded, he would have reached maximum medical improvent on February 22, 1990.

Dr. Daniel J. Enger, an orthopedic surgeon, first examined the claimant on July 7, 1987, as a result of

his prior injury in March of 1987. At this time Dr. Enger determined that the claimant was suffering from lower back problems. He again treated the claimant on July 21, 1987, and then again on August 4, 1987. On October 14, 1987, Dr. Enger released the claimant. He stated that at this time, the claimant was at maximum medical improvement and could return to work free of any restrictions.

Dr. Enger again saw the claimant on January 15, 1988, as the result of the new injury which occurred in December 1987. Dr. Enger testified that the claimant could return to light work activities on March 12, 1988, but the claimant refused to do so. Dr. Enger examined the claimant again on October 16, 1989, and said that the claimant should have reached maximum medical improvement six weeks from the date of the carpal tunnel release performed by Dr. McCloskey on April 14, 1989. He also stated that the claimant had no permanent disability with regard to his back, and that the claimant could return to work at this time subject to restrictions.

Dr. George Wilkerson testified by deposition that he examined the claimant pursuant to an order by the administrative law judge on March 18, 1992. Dr. Wilkerson testified that the claimant did have a genuine problem with his back, but a large part of the problem was due to the claimant's obesity. He also testified that part of the claimant's present problem was caused by the injury in March of 1987. He further stated that he did not think that the claimant was temporarily totally disabled at this time, and that he was able to return to work. He placed restrictions on the claimant's physical activities limiting the claimant from lifting, stooping, pulling, or pushing. He assigned the claimant a five percent permanent disability to the body as a whole due to his back problems.

The claimant's job consisted of lifting fifty 100 pound bags of ingredients used in pet foods and pouring the contents into a retort. McLeod testified that his back was continuously hurting and that he suffered from carpal tunnel syndrome and neck problems.

McLeod did not return to work after his last day with the employer on January 12, 1988. He also testified that this was the last day that he had worked at any job. He claimed that he made no attempt to find work because of the continuous pain in his back.

The administrative law judge stated the following in his conclusions of law and fact:

> 3. Because of this injury sustained in the course and scope of his employment, claimant was temporarily totally disabled from January 12, 1988, through March 12, 1988, and reached maximum medical improvement on March 12, 1988. I find the testimony of Dr. Enger probative on this point due to the fact that claimant's carpal tunnel syndrome was not in any way related to the injury of December 16, 1987. The record indicated that Dr. Enger released the claimant to return to work on March 12, 1988, but that the claimant refused to work. Claimant did not produce any credible evidence to dispute Dr. Enger's date of maximum medical improvement, and did not produce any evidence to show he was unable to work at that time.
>
> 4. That as a result of his injuries, claimant sustained no anatomical impairment due to his injury. Neither Doctors Bazzone nor Enger assigned an impairment rating to the claimant as result of his work injury. Dr. McCloskey assigned a ten-percent impairment due to

> claimant's back problems, but was unable to say whether this impairment was a result of this work injury or a preexisting condition. Dr. Wilkerson assigned a five-percent permanent disability to the body as a whole due to claimant's back problems but did not address what portion might be preexisting. Therefore, I find the testimony of Doctors Bazzone and Enger more probative on this issue than that of Dr. McCloskey, and therefore will follow their opinion that the claimant had no anatomical impairment as a result of this injury.

The administrative law judge went on to state that any permanent disability the claimant suffered was the result of a prior existing condition and/or his obesity. In addition, the judge stated that even if the claimant had proved permanent impairment, he failed to prove a loss of wage earning capacity as a result of his injury because he had not attempted to find gainful employment.

ARGUMENT AND DISCUSSION OF LAW

> WHETHER THE CIRCUIT COURT ERRED IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT THE CLAIMANT ONLY SUFFERED TEMPORARY TOTAL DISABILITY FROM JANUARY 12, 1988, THROUGH MARCH 12, 1988, THEREBY TERMINATING HIS DISABILITY BENEFITS.

Standard of Review

This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that the commission is the ultimate fact finder and determines the credible evidence. *See Metal Trims Indus., Inc. v. Stovall*, 562 So. 2d 1293, 1297 (Miss. 1990). This Court has stated numerous times the standard of review on appeal and will not reverse the commission's order unless it is clearly erroneous and contrary to the overwhelming weight of the evidence. If the commission's findings are supported by substantial evidence, all appellate courts are bound by the commissions' findings, even if the evidence would persuade this Court to find otherwise. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994); *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988). Where the evidence is conflicting, this Court will not decide where the preponderance of the evidence lies because the commission is the fact finder and determines the credible evidence. *Stovall*, 562 So. 2d at 1297. Obviously, however, neither this Court nor the supreme court will "rubber stamp[] the commission's verdict." *Reichold Chem., Inc. v. Sprankle*, 503 So. 2d 799, 801 (Miss. 1987). Where the findings of the commission are not supported by substantial evidence, we will not hesitate to reverse. *Delaughter v. South Cent. Tractor Parts*, 642 So. 2d 375, 378 (Miss. 1994).

The Date of Maximum Medical Improvement

On appeal, McLeod claims that the order of the commission was not supported by substantial evidence. McLeod claims that the commission erred in finding that he reached maximum medical improvement on March 12, 1988. After examining the testimony and depositions contained in the record, we must agree.

In order to analyze this case, the deposition testimony of the doctors must be closely examined. Dr. Enger initially testified that the claimant could return to light work on March 12, 1988, but the claimant refused. He then stated that after examining the claimant at a later date that the claimant would have reached maximum medical improvement six weeks from the date of a carpal tunnel release performed by another doctor. The carpal tunnel release occurred on April 14, 1989. In other words, the date that Dr. Enger assigned as the date of maximum medical improvement was sometime in May of 1989. Specifically, Dr. Enger's testimony reads as follows:

> Q. All right, sir. Doctor, based upon reasonable medical probability when did this individual
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> A. T
> the
>
> Q. And do you have the date that he did the carpal tunnel release?
>
> A. 4-14-89.

In their brief, the employer contends that the date of maximum medical improvement was the date that Dr. Enger released the claimant to return to light work. Here, Dr. Enger testified that he released the claimant on March 12, 1988, to return to work with restrictions. Later in the deposition, Dr. Enger testified that he saw the claimant again on October 16, 1989. When asked about this examination, and what his prognosis was for the date of maximum medical recovery for the claimant, the doctor stated the date for maximum medical improvement would be six weeks from the carpal tunnel release which occurred in April of 1989. He testified that when he examined McCleod in October of 1989, he still had a variety of physical problems.

Furthermore, Dr. Enger's testimony was not the only testimony as to the date of maximum medical improvement. The other doctors testified that the date of maximum medical improvement was after March 12, 1988. There was no other testimony in the record to support a finding that the claimant reached maximum medical improvement on March 12, 1988. In fact, there was a great deal of testimony to the contrary. Dr. Bazzone who examined the claimant in August of 1988 stated that the claimant was temporarily totally disabled at the time of his examination. Another doctor, Dr. McCloskey who has continuously treated the claimant since February 25, 1988, stated that even if the carpal tunnel syndrome was disregarded, the claimant would not reach maximum medical improvement until February 22, 1990.

In this case, the commission's finding was not supported by substantial credible evidence. The commission relied on the testimony of one doctor who later contradicted his own statements and placed the date of maximum medical recovery at a later time than he previously stated. Dr. Enger's testimony, which was contradicted by his own testimony after a later medical examination, cannot be the basis on which to find the date of maximum medical improvement. We therefore find that the commission erred in finding March 12, 1988, to be the date of maximum medical improvement.

Permanent Disability

Next, we address the issue of disability. Disability is defined as the incapacity to earn wages that the employee was receiving at the time of the injury in the same or other employment. Miss. Code Ann. § 71-3-3(i) (1972); *DeLaughter,* 642 So. 2d at 379. Industrial disability "is the functional or medical disability as it affects the claimant's ability to perform the duties of employment." *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994) (quoting *Robinson v. Packard Elec. Div.*, 523 So. 2d 329, 331 (Miss. 1988)). To establish industrial disability, the burden is on the claimant to prove both (1) medical impairment, and (2) that the medical impairment resulted in a loss of wage-earning capacity. *DeLaughter,* 642 So. 2d at 379; *see* Miss. Code Ann. §§ 71-3-3(i), 17(c)(25) (1972). "An employee is entitled to compensation to the extent that he has been incapacitated to earn wages." *Marshall Durbin, Inc. v. Hall*, 490 So. 2d 877, 880 (Miss. 1986). McLeod must demonstrate that he attempted to obtain work in the same or similar employment without success to prove loss of wage earning capacity. *See Barnes*, 637 So. 2d at 870. When a claimant proves the above elements, the claimant has shown a prima facie case of disability and the burden of proof shifts to the employer. *Pontotoc Wire Prod. Co. v. Ferguson*, 384 So. 2d 601, 604 (Miss. 1980). A claimant makes a prima facie case by meeting his initial burden of showing that he sought and was unable to obtain work in similar or other jobs. "Once he 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." *Barnes v. Jones Lumber Co.,* 637 So. 2d 867, 869-70 (Miss. 1994) (citations omitted).

> [W]here there is a finding of permanent partial disability, the claimant bears the burden of making a prima facie showing that he has sought and has been unable to find work *"in the same or other employment"* pursuant to Miss. Code Ann. § 71-3-3(I). When the claimant, having reached maximum medical recovery, reports back to his employer for work, and the employer refuses to reinstate or rehire him, then it is prima facie that the claimant has met his burden of showing total disability. The burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity.

Id. at 183 (citations omitted) (emphasis in original); *see also McNeese v. Cooper Tire & Rubber Co.,* 627 So. 2d 321, 325 (Miss. 1993); *Hall*, 490 So. 2d at 880. Several factors are relevant in the determination of loss of wage earning capacity. Among these factors are the amount of claimant's training and education, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances. *DeLaughter,* 642 So. 2d at 379; *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 166 (Miss. 1991). Therefore, "determination should be made only after considering the evidence as a whole." *Delaughter*, 642 So. 2d at 379 (citation omitted).

The problem with McLeod's claim lies in his duty to prove the prima facie requirement that he has suffered industrial disability. The commission held that McLeod had failed to prove this prima facie requirement, and we must agree. The commission found that McLeod failed to offer *any* evidence that he sought post-injury reinstatement or new employment. A review of the record confirms the commission's findings that McLeod did not offer any evidence that he even attempted to find the same or similar employment. As such, we affirm the commission's finding that McLeod failed to prove permanent disability.

Accordingly we affirm as to the award of temporary total disability but remand to the commission for a reconsideration as to the date of maximum medical improvement. We also affirm the commission's refusal to grant permanent disability benefits.

THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT IS REVERSED AND REMANDED IN PART AND AFFIRMED IN PART. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

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

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McMILLIN, J., DISSENTING:

I respectfully dissent. In my view, the majority has misapprehended the import of Dr. Enger's testimony regarding the course of McLeod's recovery from his December 1987 back injury. This has led the Court, in my view, to an incorrect conclusion that Dr. Enger equivocated on his opinion of

the date that McLeod reached maximum medical improvement from that injury. The majority has then proceeded to determine, based upon this misapprehension, that there is no substantial evidence to support the conclusion reached by the commission as to McLeod's recovery date. I believe this analysis of the evidence has led to an erroneous result in this case.

In order to fully understand where I perceive the majority's error to be, it must be understood that the parties to this proceeding all agreed to several things. McLeod suffered an earlier back injury in March 1987. McLeod also suffered from arm or wrist problems diagnosed as carpal tunnel syndrome, and these problems had manifested themselves in March 1987. Any claims by McLeod

for compensation for the earlier back injury and the carpal tunnel syndrome problems were stipulated to be noncompensable in this proceeding.

The record reflects that McLeod had a subsequent surgery for his carpal tunnel syndrome problems in 1989, after his December 1987 back injury, but that surgery had no connection with this proceeding, and any interruption in McLeod's ability to be employed arising out of that surgery does not give rise to a right of compensation for temporary total disability.

Dr. Enger stated that he released McLeod to return to work on March 12, 1988, and he did not withdraw from that position during the course of his testimony. His speculation that McLeod probably would have recovered in about six weeks from the carpal tunnel release performed by another doctor in April 1989 has no relation to the issue of McLeod's course of recovery from the back injury. The two matters are simply not connected. Thus, any temporary disability during the recovery period from the wrist surgery cannot be used to enlarge the period of permanent partial disability for the back injury. The majority appears to be taking Dr. Enger's testimony on one subject and applying it, out of context, to the other.

Dr. Enger, as primary treating physician, released McLeod on March 12, 1988, to return to light duty work. There was no evidence that McLeod was undergoing any further treatment at the time from Dr. Enger, or that Dr. Enger expected any further significant recovery for McLeod from his back injuries. This evidence, therefore, is competent evidence to establish McLeod's date of maximum medical improvement. *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 168-69 (Miss. 1991). This testimony was neither recanted by Dr. Enger nor impeached by any other evidence. Thus, it is clearly "substantial" within the meaning of *Olen Burrage Trucking Co. v. Chandler*, 475 So. 2d 437, 439 (Miss. 1985). As a result, any conclusions reached by the commission in reliance on the evidence are beyond our authority to disturb. *Georgia-Pacific Corp. v. Gregory,* 589 So. 2d 1250, 1253 (Miss. 1991). The fact that McLeod suffered a subsequent period of total disability while he recovered from wrist surgery is irrelevant to the issues now before this Court.

Certainly, I can agree that other medical experts testifying in the proceeding gave differing opinions as to when they thought had McLeod reached maximum medical improvement from his back injury. The resolution of conflicting evidence is singularly within the province of the commission as finder of fact. *Metal Trims Indus., Inc. v. Stovall,* 562 So. 2d 1293, 1297 (Miss. 1990). Whether the commission chose to believe the testimony of Dr. Enger and the logical conclusions that necessarily flowed from his testimony or whether it chose to believe one of the other physicians who examined McLeod is of no moment in the proper decision of this case on appeal. We are not permitted to make our own determination of where the preponderance of the evidence lies on disputed issues of fact.

Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So. 2d 356, 360-61 (1953). Rather, having determined that there was substantial evidence to support the decision of the commission, as there unquestionably was in this case, this Court has no authority to proceed further, and we exceed our proper function by doing so.

I would affirm the order of the commission as subsequently affirmed on appeal by the Circuit Court of Jackson County.

FRAISER, C.J. , AND SOUTHWICK, J., JOIN THIS DISSENT.