

IN THE COURT OF APPEALS 02/27/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CC-01260 COA

FIREMAN'S FUND INSURANCE COMPANY AND LAUREL FURNITURE COMPANY

APPELLANTS

v.

**JOHN DAVID GRAHAM AND UNITED STATES FIDELITY AND GUARANTY
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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

F. DOUGLAS MONTAGUE, III

ATTORNEYS FOR APPELLEES:

JOHN M. DEAKLE

CHARLES G. BLACKWELL

JAMES M. BROWN

KENNETH G. PERRY

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF THE APPELLEES

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

DIAZ, J., FOR THE COURT:

This case began in 1986 when John David Graham filed a petition to controvert with the Mississippi Workers' Compensation Commission and alleged that he suffered a work-related injury to his lower back on May 22, 1985. The procedural history of Graham's case presents this Court with the issue of whether the circuit court erred when it reversed the full commission's order in this cause. We find that the circuit court did err when it reversed the order of the full commission and therefore, reinstate the commission's findings and order.

I. FACTS

John David Graham had been a furniture salesman for Laurel Furniture Company since 1981. On or about May 22, 1985, Graham injured his lower back while unloading and delivering furniture at a customer's home. Dr. Ralph T. Wicker diagnosed Graham with having acute lumbosacral strain, and Graham was hospitalized from July 30 to August 5 of 1985, due to this injury. Graham returned to work on August 6, 1985. On or about May 14, 1986, Graham again suffered a work-related injury to his back while unloading furniture. However, Graham continued to work at Laurel Furniture Company until on or about August 14, 1986, when he left his employment after suffering a third and the "most disabling injury" to his back on or about August 3, 1986.

Fireman's Fund was the workers' compensation carrier for Laurel Furniture Company until September 15, 1985. United States Fidelity and Guaranty Company was the carrier for the period of September 15, 1985, through September 15, 1986. On November 17, 1986, Graham filed a petition to controvert against Laurel Furniture Company and Fireman's Fund. The administrative judge who heard the merits of the case found that Graham had suffered only one injury on May 22, 1985, and determined that Graham had suffered a total loss of wage-earning capacity. On appeal to the full commission, it concluded that Graham had actually suffered three separate injuries, as indicated by the facts, and was only ten percent permanently, physically impaired. The circuit court reversed the commission and concluded Graham had suffered one injury and was totally disabled.

II. DISCUSSION OF ISSUES ON APPEAL

On appeal to this Court, Laurel Furniture Company and its compensation insurer, Fireman's Fund Insurance Company, argue that the circuit court erred in reversing the full commission's findings and order because substantial evidence exists in the record to support the commission's holding that the claimant suffered three separate injuries. The Appellants also argue that the commission did not err when it found that Graham had not suffered an industrial disability. The Appellants further contend that it was error for the circuit court to conclude that the commission erroneously denied Graham the ability to see the physician of his choice.

Our standard of review of the case *sub judice* has been expressed many times. Because the circuit court reversed the full commission's findings and order, we will again clarify our review. The

Mississippi Workers' Compensation Commission is the finder of facts in a compensation case. *Cooper v. Marathon Freight Lines*, 635 So. 2d 855, 860 (Miss. 1994). The Mississippi Court of Appeals will employ a deferential standard to the commission's findings where they are supported by substantial evidence. *Id.* (citations omitted).

On appeal to the circuit court, the court must also defer to the commission's findings of fact. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991). In no case can the circuit court substitute its judgment of the facts in place of the full commission's findings when the commission's findings are supported by substantial evidence in the record. *Presto Mfg. Co. v. Teat*, 241 So. 2d 661, 662 (Miss. 1970). This is what occurred in the instant case.

A. Number of Injuries

On review to the circuit court, it did not have to pass upon the question of whether Graham's injuries were compensable. Instead, the question to be reviewed by the court was whether the record substantiated the commission's finding that Graham suffered three separate injuries and then verify when they occurred since more than one compensation carrier was involved. The finder of fact, the commission, found that Graham had suffered three separate injuries based on the evidence presented. Although the record supported the commission's finding of three separate injuries, the circuit court reversed the commission.

In determining that Graham suffered three separate injuries, the commission evaluated the testimony of three doctors. Dr. Ralph T. Wicker, a neurosurgeon, treated Graham after his first injury in May 1985. Wicker testified that he saw no evidence of a ruptured disc when he examined Graham in 1985. It was Dr. Wicker's opinion that the injury in May 1985 had not caused the ruptured disc for which surgery was performed in 1987. Dr. Russell A. Galaher, a chiropractor, also testified that he had treated Graham for the injuries to his lower back in 1986. Galaher stated that Graham told him that he had suffered three separate injuries to his lower back while working for Laurel Furniture Company. It was Galaher's opinion that Graham suffered from a herniated disc which Galaher attributed to the August 3, 1986, injury. Galaher recommended that Graham see Dr. Wicker for surgery.

Dr. Edward A. Attix, an orthopedic surgeon, was Graham's primary treating physician. Graham told Dr. Attix that he had suffered an injury to his lower back on May 22, 1985. Dr. Attix testified that it was his opinion that Graham required surgery to remove "bulging nucleus" from the L5-S1 disc. Attix, who performed the surgery, attributed Graham's herniated disc to the May 22, 1985, injury. Attix opined that, based on the information Graham had given, Graham had suffered one injury on May 22, 1985, and then subsequent "re-aggravations." However, it was repeatedly brought out in Dr. Attix's deposition testimony that Graham had given Attix a history of only one injury to his lower back. The full commission, as the finder of fact, found that "Dr. Attix was not given a complete history by the claimant, and therefore his testimony as to causation has little probative value."

It was the commission's finding that Graham had suffered three separate injuries to his lower back while employed by Laurel Furniture Company. This finding is supported by the record.

B. Percentage of Physical Impairment and Loss of Wage-Earning Capacity

The commission found that Graham suffered a ten percent permanent physical impairment to his body as a whole due to the August 3, 1986, injury. It also found that Graham had failed to prove a loss of wage-earning capacity because Graham had "not made a reasonable and diligent search . . . [to obtain] similar or other employment." On appeal to the circuit court, it concluded that Graham was one hundred percent disabled.

Dr. Lynn Stringer testified concerning the issue of Graham's extent of disability. Stringer was a physician who testified frequently before the commission and was consulted pursuant to a commission order requested by Fireman's Fund. It was Stringer's opinion that Graham suffered a "ten percent permanent partial impairment of the back and leg to the body as a whole." Stringer testified that Graham could perform full-time work, including driving long periods of time, which did not require lifting heavy objects or prolonged periods of stooping or bending. Stringer did not testify concerning the number of injuries Graham suffered, but only to the extent he was injured. Also before the commission was the testimony of Dr. Attix regarding Graham's disability. Dr. Attix rated Graham as having a twenty-five percent permanent partial impairment based on rating guidelines of the American Academy of Orthopedic Surgeons. Dr. Attix also placed the same type of restrictions, such as avoiding lifting heavy objects, on Graham's future activity.

The commission concluded that Graham had a ten percent permanent physical impairment to his body as a whole. This conclusion is supported by the testimony of Dr. Stringer. The commission also concluded that Graham had failed to prove a loss of wage-earning capacity. This conclusion was also based on and supported by testimony contained in the record.

C. Treatment by Dr. R.C. Llewellyn

One final issue this Court must address concerns the treatment by Dr. R.C. Llewellyn, a neurosurgeon in New Orleans, Louisiana. Dr. Attix referred Graham to Dr. Llewellyn for a second opinion of Graham's injuries to his back. Administrative Judge Thomas A. Webb denied Graham's request to be treated at the expense of Laurel Furniture Company and Fireman's Fund by Dr. Llewellyn. Judge Webb found that Graham had not proved that satisfactory treatment could not be obtained by another neurosurgeon in either Hattiesburg or Jackson, Mississippi. Administrative Judge W.A. Thornton, later assigned this cause, overruled Judge Webb's order and ordered that Fireman's Fund pay for the medical treatment rendered by Dr. Llewellyn. However, as this Court notes, Judge Thornton erred as a matter of fact in stating in his order that Graham's surgery was performed by Dr. Llewellyn. Dr. Attix performed the surgery.

When appealed to the full commission, the commission found that Laurel Furniture Company and USF&G would not be responsible for Dr. Llewellyn's medical charges, and it denied Graham's request to see Dr. Llewellyn at the expense of Laurel Furniture Company and USF&G. The commission commented that Judge Thornton had not made a finding of fact when he overruled Judge Webb's order. As stated previously, that order contained an error of fact. However, the circuit court

reversed the commission and found that Graham could see "his choice of [a] treating physician."

We find that the record supports the commission's original determination that Laurel Furniture Company and USF&G should not be responsible for Dr. Llewellyn's medical charges.

CONCLUSION

"Where the circuit court reverses the [c]ommission by simply supplanting its judgment for that of the [c]ommission, without regard to whether the [c]ommission's findings were substantiated by the weight of [the] evidence, the circuit court commits error." *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 274 (Miss. 1993). This Court finds that there was substantial evidence in the record to support the findings and order of the Mississippi Workers' Compensation Commission, and therefore, we reverse the circuit court's order.

THE JUDGMENT OF THE JONES COUNTY CIRCUIT COURT IS REVERSED, AND THE ORDER OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REINSTATED. ALL COSTS ARE TAXED TO THE APPELLEES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.