

IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00834 COA

LINZELL MCFARLAND, JR.

APPELLANT

v.

BLAZON-FLEXIBLE FLYER, INC. AND

EMPLOYERS NATIONAL INSURANCE 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. LEE J. HOWARD

COURT FROM WHICH APPEALED: CLAY COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DENNIS HARMON

ATTORNEY FOR APPELLEES:

JOHN W. CROWELL

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: BENEFITS DENIED

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

DIAZ, J., FOR THE COURT:

The Appellant, Linzell McFarland, Jr. (McFarland), appeals to this Court seeking the reversal of a

judgment of the Clay County Circuit Court affirming the Workers' Compensation Commission's denial of benefits to him. Finding no reversible error, we affirm.

PROCEDURAL HISTORY

Linzell McFarland, Jr. filed a workers' compensation claim for a back injury occurring on August 24, 1990, while working at Blazon-Flexible Flyer, Inc. (Blazon). After a hearing on March 3, 1993, the administrative law judge found that the evidence did not support McFarland's claim of an on-the-job injury and denied compensation. Following a hearing, the Mississippi Workers' Compensation Commission held that McFarland had failed to meet his burden of proof and affirmed the administrative law judge's decision. On appeal, the Circuit Court of Clay County affirmed the commission's decision.

FACTS

Linzell McFarland began work at Blazon in 1974. During his last ten years of employment with the company he worked in the maintenance department. In January 1988, McFarland suffered a back injury while working at Blazon. As a result of this injury, McFarland received a lump-sum settlement in the amount of \$15,000.00.

McFarland claims that he reinjured his back while working at Blazon on August 24, 1990. McFarland testified that he was moving a fifty-five gallon drum when it slipped off a ramp and jerked his back. He claims that he felt an immediate pain in his back and right leg. This occurred at approximately 1:00 P.M., and he continued to work until the end of his shift at 3:00 P.M. That afternoon McFarland claims to have visited his family physician, Dr. Subnani, for the back injury. McFarland was treated by Dr. Subnani and sent home. McFarland was admitted to the Clay County Medical Center on Monday, August 27, 1990, and released on August 29, 1990.

On September 10, 1990, McFarland completed an application for short term disability benefits provided by Blazon through Travelers Insurance. In this application McFarland described his disabling condition as "chest pain and can't breathe." The application also asks the applicant to describe the injury, if any, and list the time and place it occurred. Also, the applicant is to state whether the injury was work related. McFarland stated that he had suffered no injury and that the condition was not work related.

DISCUSSION

The decisions and findings of the Workers' Compensation Commission are binding on this Court so long as they are supported by substantial evidence. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). We will reverse an order of the commission only if clearly erroneous and contrary to the overwhelming weight of the evidence. *Id.*

In the "Amended Commission Order" the commission found:

- (1) The claimant's average weekly wage at the time of his alleged injury was \$337.20.

(2) There is no medical evidence in the record as to the date of maximum medical recovery.

(3) Prior statements for other benefits show contradiction to the claim for workers' compensation. Those inconsistent statements were made by the claimant and made a part of the record.

(4) The evidence offered does not support the claim that the claimant sustained an on-the-job injury on August 24, 1990. However, the claimant's failure to give a timely notice is not the factor upon which this finding is based nor is the claimant's familiarity with the reporting procedure; rather the Commission finds that the claimant has failed to meet his burden of proof.

McFarland's brief contains five assignments of error. The first four issues concern notice, and the last issue concerns burden of proof. We will address the four notice issues together.

ISSUES 1-4: NOTICE

McFarland argues in his brief that the commission erroneously found that he had not complied with the notice requirements contained in Section 71-3-35 and that his wife should have been allowed to provide notice of the injury to his employer while he was hospitalized. McFarland also claims that Blazon supplied him with incorrect insurance forms and should not be allowed to claim lack of notice based on his signing them. Last, McFarland contends that Blazon was not prejudiced by the alleged lack of notice, and the commission erroneously found against the claimant based on this lack of notice.

The commission acknowledged in its order that failure to give notice was at issue. However, also at issue was the date of the alleged injury. The commission found that the claimant consistently maintained that his problems existed prior to the alleged on-the-job injury date and all other applications for benefits bear this out. Recognizing that a doubtful claim should be resolved in favor of the claimant, the commission found that the medical records were insufficient to prove the injury occurred on August 24, 1990. The lack of documentation by the treating physician led the commission to find that the pain and discomfort alleged by McFarland did not exist on the dates he claimed. Contained in the commission's order is a thorough discussion of notice. However, the commission specifically stated that its decision was not based on the claimant's failure to give notice, but on his failure to meet the burden of proof required to show that the injury occurred on the date claimed. Thus, McFarland's assignments of error concerning failure to give notice are without merit.

ISSUE 5: SOURCE OF INJURY

In a worker's compensation claim, the burden of proof falls on the claimant. *Bracey v. Packard Elec. Div.*, 476 So. 2d 28, 29 (Miss. 1985). He must prove by a "fair preponderance of the evidence" each element of his claim. *Id.* The elements to be proved are: (1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the claimed disability. Miss. Code Ann. § 71-3-7 (1972).

McFarland claims that he sustained an on-the-job injury on August 24, 1990. According to McFarland, he strained his back while attempting to move a barrel and sought medical attention for this injury later that day. McFarland also claims to have been hospitalized for this injury on August 27, 1990.

McFarland's physician during this time was Dr. Subnani in West Point. Although McFarland claims to have been treated for back pain, Dr. Subnani's medical records reveal no complaint or treatment for back pain on August 24, 1990. The record further reveals that McFarland was admitted to Clay County Medical Center on August 27, 1990, where he was treated for bronchitis. There is no record of treatment for back pain during McFarland's stay at the medical center.

On September 10, 1990, McFarland submitted an application for short term disability benefits. This application specifically asks whether the injury or illness resulting in the disability is work related. On this application McFarland stated that the illness was not work related and does not mention the alleged back injury.

Other than McFarland's testimony, the record fails to disclose any accident or incident sustained on August 24, 1990, by McFarland in the course of his employment with Blazon. McFarland's testimony concerning the date and cause of his back injury is contradicted by the medical records and his subsequent statements on the disability application. McFarland's testimony as to the time, place, and occurrence of the injury was not corroborated at all. Although the claimant is competent to prove his own claim without corroboration, if he is shown to have made statements inconsistent with the claim the commission is not bound to accept the testimony. *Penrod Drilling Co. v. Etheridge*, 487 So. 2d 1330, 1333 (Miss. 1986). There was "substantial evidence" upon which the commission could base the denial of this claim.

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

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