

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00549 COA

CLIFTON D. EALEY

APPELLANT

v.

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

APPELLEE

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

TRIAL JUDGE: HON. RICHARD WAYNE MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID H. NUTT

ATTORNEY FOR APPELLEE:

JOHN E. WADE, JR.

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: JUDGMENT FOR EMPLOYER - BENEFITS DENIED

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

PAYNE, J., FOR THE COURT:

Workers' compensation law is at the heart of this case, but the facts themselves drive the ultimate outcome. St. Dominic-Jackson Memorial Hospital denied Clifton Ealey's claim for workers' compensation benefits. On petition to controvert, an administrative judge found Ealey's injury to be

compensable. The Workers' Compensation Commission reversed this order and dismissed Ealey's benefits claim. The Forrest County Circuit Court subsequently affirmed the commission's order denying benefits. Ealey now appeals to this Court. We find that the commission's findings were clearly erroneous, not supported by substantial evidence, and against the overwhelming weight of the evidence. Accordingly, we reverse the commission's order.

FACTS

Ealey, an employee of St. Dominic, was injured on August 12, 1988, in an automobile accident while traveling to Biloxi to attend a surgical technician convention. He and Marie Hardy, a friend who was to visit friends on the Mississippi Gulf Coast, were traveling in his vehicle and had just returned to state Highway 49 after visiting his relatives in Simpson County, a few miles off the highway. Ealey lost control of his vehicle as they approached Hattiesburg due to the rain-slick highway surface. His injury rendered him a paraplegic. Ealey had previously worked for St. Dominic from 1982 through 1985 and had returned in 1987. Following the accident, he filed a workers' compensation claim for benefits, which St. Dominic denied. The Workers' Compensation Commission's administrative judge found that Ealey's injuries arose out of and in the course of his employment with St. Dominic and that his injuries were compensable. St. Dominic filed a petition for review before the full commission, and Ealey filed a motion to remand to the administrative judge to determine remaining issues. The commission reversed the judge's order and found that Ealey's injuries did not arise out of and in the course of his employment. It also denied Ealey's motion to remand and his subsequent motion for reconsideration. The Forrest County Circuit Court affirmed the commission's decision. Ealey now appeals the circuit court's affirmance.

ANALYSIS

1. DID THE INJURIES SUSTAINED BY EALEY ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH ST. DOMINIC-JACKSON MEMORIAL HOSPITAL AND WAS THE WORKERS' COMPENSATION COMMISSION'S ORDER DENYING BENEFITS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, CLEARLY ERRONEOUS, AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE, OR RESULT IN MANIFEST INJUSTICE?

Ealey contends that his injuries arose out of and in the course of his employment because he was traveling to a work-related seminar. He argues that St. Dominic agreed to his attendance in every aspect. He believes that the commission's order denying benefits was not supported by any evidence and that the administrative judge was correct in finding that his injury was compensable.

On the other hand, St. Dominic argues that the commission's order was supported by substantial evidence and not against the overwhelming weight of the evidence. It contends that Ealey's attendance was strictly for his own benefit and interest, not a company-sponsored requirement, and simply an excused absence from his normal job duties.

The standard of appellate review of a decision of the Workers' Compensation Commission is well-settled: the findings and order of the commission are binding as long as they are supported by

substantial evidence. *Vance v. Twin River Homes*, 641 So. 2d 1176, 1180 (Miss. 1994) (citations omitted). Substantial evidence has been defined as relevant evidence that reasonable minds could accept as adequate to support a conclusion and that affords a substantial basis of fact from which the fact in issue can be properly inferred. *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991) (citations omitted). "Evidence which is not contradicted by positive testimony or circumstances, and which is not inherently improbable, incredible, or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected." *Morris v. Lansdell's Frame Co.*, 547 So. 2d 782, 785 (Miss. 1989). Uncontradicted testimony is to be taken as conclusive and binding on the trier of facts, unless one party shows it to be untrustworthy. *Id.* (citation omitted). An appellate court will reverse a commission order only where it is clearly erroneous and contrary to the overwhelming weight of the evidence. *Vance*, 641 So. 2d at 1180 (citations omitted); *see also Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993) (citations omitted) (commission is ultimate finder of facts in compensation cases; its findings are subject to normal deferential standard upon review, and this Court will not disturb commission's findings as long as latter's decision has no error of law and is based on substantial evidence).

Mississippi statutory law states that, in a workers' compensation context, 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) (1972).

In the present case, Ealey testified at the evidentiary hearing that he first saw the seminar notice and sign-up sheet posted on an official employer bulletin board at work. He stated that the head nurse: (1) authorized him to attend the seminar; (2) told him that it was a good idea for him to go to the seminar; and (3) told him that he would be paid his regular wages while at the seminar. He further testified that she told him that he would be reimbursed for his expenses, including the registration fee, if he could show proof that he had attended the seminar. Ealey said that, although other expenses were not specifically mentioned, he assumed that expenses meant all costs, including lodging and travel expenses as well. Finally, he stated that she told him that another technician would cover his shift while he attended the seminar.

Ealey further testified that he had attended the same seminar in 1982 while employed with St. Dominic as a surgical technician. St. Dominic paid Ealey his regular wages while he attended the 1982 seminar, prepaid his registration fee, and provided for his lodging. St. Dominic did not pay his mileage expenses in 1982 because he did not take his own car but instead traveled with someone else. Ealey stated that St. Dominic currently reimburses employees for seminar costs, and no longer prepays expenses, because in the past not all employees for which St. Dominic had prepaid would actually attend. St. Dominic did not contradict Ealey's testimony, with the exception of Ealey's statement that he had been paid for August 12 when St. Dominic's records showed that he had not been paid for that day.

Lamar Nesbit, vice-president of Human Resources at St. Dominic, testified that Ealey was not paid for August 12. Regarding time card procedures, Nesbit testified that St. Dominic's employees manually enter their time on their own time card and sign it at the end of each two-week period. The department head then submits each card to the payroll department for processing. In the present case, Ealey's time card, specifically the times "ON" and "OUT" for that day, had been altered with white

correction fluid and the words "excused absence" had been written on the same line. Nesbit stated that he did not know why this alteration had been made.

The record shows that Ealey's time card originally had been filled out with a blue ink pen for all but one of the twenty "ON" and "OUT" entries for the two-week period from August 1 through August 12, 1988, in addition to his signature in blue ink. It seems probable that Ealey filled out his time card prior to leaving for the seminar because he never returned to St. Dominic's after the accident. The August 12 entries were subsequently altered with white correction fluid, and the words "excused absence" were written on the same line. The altered starting and quitting times originally written in for August 12 correspond to the prior starting and quitting times written in for the previous nine days that Ealey had worked. Nesbit testified that Ealey could have entered his time for August 12 prior to leaving for the seminar if he had been told by the head nurse that he would be paid for that day.

The commission found that Ealey failed to prove that his attendance at the seminar was contemplated by his employment with St. Dominic as an incident of his work. It found that St. Dominic did not require, urge, or expect him to attend and stated that the hospital only minimally acquiesced by posting the seminar notice on its bulletin board. The commission admitted that, if true, St. Dominic's agreement to reimburse Ealey for the registration fee and expenses would be definite evidence of encouragement to attend. It gave no weight to Ealey's testimony that his head nurse told him he would be paid for the time off while attending the seminar. On the other hand, it gave much credence to Nesbit's testimony that Ealey was not paid for that day and the hospital's production of the altered records showing that Ealey had in fact not been paid. In determining the seminar's connection with the employment, the commission found that Ealey also failed to show a specific employer benefit from his attendance. It held that Ealey's attendance at the same seminar in 1982 did not show a custom of St. Dominic regarding seminar attendance by its surgical technicians. Finally, the commission found that the benefit of attending the seminar was personal to Ealey, and the risk to which he was exposed and the injury he sustained were not work-related. In the present case, we believe there existed a clear absence of substantial evidence to support the commission's findings and order denying benefits. The evidence used by the commission in its findings cannot reasonably be considered adequate to support its conclusion. All of Ealey's testimony, except for his belief that he was paid for August 12, was uncontradicted. This evidence, therefore, cannot be disregarded or rejected, but must be taken as conclusive and binding on the commission, particularly since St. Dominic failed to show it to be untrustworthy.

Ealey testified that he attended the same seminar in 1982, when St. Dominic prepaid his registration and prearranged his lodging. St. Dominic clearly posted the 1988 seminar notice on its bulletin board for the benefit of its employees and itself. Ealey's supervisor authorized him to attend and assured him that his expenses would be paid by St. Dominic if he proved that he attended. His supervisor also told him that his shift would be covered and that he would be paid his regular wages while at the seminar. Record evidence shows that Ealey's time card had been altered to reflect his "excused absence." Although not necessarily suspicious, this fact clearly indicates a rather curious and abrupt reversal in St. Dominic's approval of Ealey's status regarding the seminar attendance and in its agreement to pay his expenses.

We believe St. Dominic positively encouraged Ealey to attend the seminar, particularly because it approved the posting of the notice, told him it was a good idea to attend the seminar, and assured

him of payment of his normal wages and reimbursement if he did in fact attend. Ealey's testimony that his head nurse approved his attendance deserves far greater weight than that given by the commission, particularly since that testimony was unrefuted. The fact that Ealey was not paid for that day deserves little, if any, weight due both to the alteration of the time card itself and to Ealey's uncontradicted testimony that his head nurse told him he would be paid while at the seminar. The commission's finding that no specific benefit accrued to St. Dominic by Ealey's attendance is misguided. A specific benefit to the employer is simply one factor that *may* bolster the connection between attending a seminar and the employment itself. This lack of a particular benefit is certainly not dispositive of the issue, nor is the fact that Ealey was not a member of the Surgical Technicians Association, the sponsor of the seminar. The important fact is that Ealey was a surgical technician who was injured on his way to attend a surgical technicians' seminar--a seminar that his employer supported and the costs for which he would be reimbursed while being paid his normal daily wages.

The fact that Ealey attended the same seminar in 1982 deserves much more weight than that given it by the commission. While not completely indicative of St. Dominic's custom or philosophy regarding technical seminars or employees' attendance at these seminars, its past practice of allowing its surgical technicians to attend this same seminar should be afforded much greater weight toward approval of Ealey's attendance as a work-related experience than the commission gave it. The benefit of Ealey's attendance clearly flowed to St. Dominic first, and to Ealey second. That benefit was not merely personal only to Ealey, nor was the risk of injury and the actual injury he suffered not work-related. We believe that Ealey's attendance at the seminar was not as tenuous a connection to his employment as the commission found. There is simply not enough evidence to support its finding on this issue.

We find that the commission's order and the circuit court's subsequent affirmance of that order were both clearly erroneous and against the overwhelming weight of the uncontradicted evidence. Moreover, we find that Ealey was within the course and scope of his employment with St. Dominic when he was injured, as the term "injury" is defined in section 71-3-3(b) of the Mississippi Code. The evidence clearly indicates that Ealey's employment with St. Dominic included his attendance at this seminar, as well as the 1982 seminar. Simple logic entirely supports the fact that St. Dominic would directly benefit from Ealey's attendance, particularly in light of its willingness to pay him and to find a replacement employee for him while he was away and to finance the seminar costs and expenses for him. The fact that Ealey was subsequently not paid his wages for that day or reimbursed for any travel expenses does not undermine our determination that his injury arose out of and in the course of his employment with St. Dominic. Ealey was told, and St. Dominic never contradicted, that he would be paid his normal wages and would be reimbursed for the seminar costs and expenses if properly documented. St. Dominic failed to contradict Ealey's testimony that the former's conduct indicated that his attendance would be within the course and scope of employment. These facts support our conclusion that both Ealey and St. Dominic clearly considered attendance at the seminar incident to the former's employment.

We therefore reverse the order of the commission and reinstate the order of the administrative judge awarding workers' compensation benefits to Ealey.

CONCLUSION

We find that Ealey's attendance at the seminar was contemplated by both parties to be, and was in fact, within the course and scope of his employment with St. Dominic. Furthermore, Ealey's injury en route to the surgical technician's seminar arose out of and in the course and scope of his employment. Consequently, his injuries are compensable under the Workers' Compensation Act. Substantial evidence simply did not exist for the commission to find that Ealey failed to prove that his attendance at the seminar was connected to his employment, such that the seminar would have been considered contemplated by the employment itself. The order of the commission denying benefits and the subsequent affirmance by the circuit court are hereby reversed, and the order of the administrative judge is reinstated.

THE ORDER OF THE CIRCUIT COURT OF FORREST COUNTY, AFFIRMING THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION'S ORDER DENYING BENEFITS TO CLIFTON EALEY, IS REVERSED. THE ORDER OF THE ADMINISTRATIVE JUDGE IS REINSTATED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.

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

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00549 COA

CLIFTON D. EALEY

APPELLANT

v.

ST. DOMINIC-JACKSON MEMORIAL HOSPITAL

APPELLEE

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

SOUTHWICK, J., concurring

I agree that the commission's decision to deny benefits is not supported by substantial evidence and must be reversed. I write separately because of statements in the majority opinion with which I disagree.

Case law requires workers' compensation coverage if an employee was involved in an "activity, out of which the injury results, . . . related to the employment in the sense that it carries out the employer's purposes or advances his interests directly or indirectly." *Cook Constr. Co. v. Smith*, 397 So. 2d 536, 537 (Miss. 1981). There is no Mississippi case law on attendance at seminars being within the scope of employment, but I would adopt the commission's own interpretation of the law as stated in this case. The section from Larson's *Workmen's Compensation Law* cited by the commission says scope of employment for attendance "may be supplied by varying degrees of employer encouragement or direction." Arthur Larson, *Workmen's Compensation Law*, § 27.31(c), at 5-398 (1995). The cases cited draw distinctions based on the level of employer involvement with the worker's decision to attend. The rule seems well-accepted that regardless of other factors, if the employer both pays the normal wage and reimburses for most expenses, that attendance was within the course of employment.

If Ealey was on his way to a conference for which his employer had agreed to pay his registration, expenses, and normal wage, then St. Dominic's itself made the decision that his attendance was of sufficient benefit to them to pay him as if he were at work. I do not think we need to go further than deciding whether the evidence required a finding of fact that St. Dominic's had consented to make those payments. The hospital's consent does not appear with great clarity, but it is the only picture that appears at all in this record.

Ealey testified that the head nurse told him he could have the day off with pay, that his expenses would be paid, and that his "shift would be covered." There was an inconsistency between Ealey's deposition, when he said his hotel room would not be reimbursed, and his testimony at the hearing when he asserted the room would be paid. At the hearing, Ealey finally stated that no one had promised that the hotel and travel expenses would be paid, but only that he would be "reimbursed." Thus his testimony on balance could be seen as expressing an assumption regarding the breadth of this alleged commitment. He did not equivocate on whether there would be some reimbursement, and that his head nurse had told him his wages would be paid him for the day he attended.

At the hearing Ealey could only remember the nurse's first name, Margaret, and such a nurse was not called by either side. Ealey in a deposition before the hearing identified by first name a charge nurse, Julie, who was his supervisor during the shift he worked, and may have named the head nurse who allegedly called him to authorize the trip, reimbursements, and wage payment. The deposition was not introduced into evidence and there was some dispute whether the deposition had named the head nurse or only the charge nurse. A St. Dominic's witness testified that Margaret still worked at the hospital, and that the charge nurse Julie could be identified through hospital records, but the witness had not done so. The hospital could have called any nurse identified in the deposition to deny Ealey's allegations, or shown why she had neither the actual nor the apparent authority to permit Ealey to attend, or even shown there was no such nurse. This is not a criticism of the case put on by the hospital, as I assume both sides made the best available presentation. It does demonstrate that direct

rebuttal to Ealey's case was not attempted.

The hospital limited itself to arguing that Ealey was not paid for his time and expenses. The fact that after the accident he was not paid for the day of the accident lends itself to at least two inferences, one supporting the hospital's position that he was never told he would be paid, and the other only supporting a finding that the hospital decided after-the-fact not to pay him regardless of what he had earlier been told. There is no testimony by the hospital's witness that there was a policy prohibiting such payments despite argument to that effect, or anything else introduced into evidence that would make one inference from the fact he was not paid more probable than the other. I do not find the evidence that he was not paid to be probative of anything, and therefore Ealey's testimony was un rebutted.

Even so, I take exception to the majority's conclusions about the alteration to the time sheet. The majority hints at a dark conspiracy since the card on which Ealey's start and finish time for each day of the relevant two-week period initially had entries for the day he left for the conference, but then the entries were "whited out" with correction fluid. The change is obvious -- part of what is written is still visible -- so no one has argued that the correction fluid was intended to disguise the fact a change was made. The majority says the alteration "indicates a rather curious and abrupt reversal in St. Dominic's approval of Ealey's status regarding the seminar attendance and in its agreement to pay his expenses." With all deference, this evidence does no such thing. It shows time was initially entered by someone, and a determination then made that start and finish times for that day should not be shown. There was testimony that the employee usually enters the hours, and the record custodian witness assumed Ealey had made the entries here. That same witness also testified that necessary changes would probably have been made by the director of surgery (not the Margaret who allegedly spoke for the hospital in giving permission). Since the employee usually fills in the card, Ealey's doing so here does not prove St. Dominic's "approval of Ealey's status," any more than St. Dominic's failure to pay is proof he was never told he would be paid. There are various conclusions possible to draw from these circumstances, and we err in boldly choosing among them.

I do not necessarily "believe St. Dominic positively encouraged Ealey to attend the seminar," as does the majority. However, since the only evidence on the issue of whether Ealey had been told his expenses and wages would be paid was not incredible nor impeached in its essential character, the commission had to accept that version as true. The commission and the circuit judge placed a burden on Ealey to show this sort of reimbursement and wage payments were pursuant to a recognized policy. I think it is enough that the only evidence was that St. Dominic's through Ealey's supervisor agreed to make payments here and no evidence was introduced showing such payments were against hospital policy.

The evidence on Ealey's part was not as strong as it might have been. His evidence was not hearsay, though, as the issue was whether he was told by his supervisor that he had permission to attend, and that his wages and expenses would be paid. His testimony was direct evidence of that. The doubts regarding that evidence that underlay both the commission and the circuit court's rejection of benefits overlook that there was no contrary probative evidence. This testimony fits the definition stated in the majority opinion of evidence which is not rebutted by positive testimony or circumstances, and which is not inherently improbable or unreasonable. Ealey's version therefore had to be accepted. I would reverse and remand to the commission for a determination of benefits.

FRAISER, C.J., THOMAS, P.J., AND MCMILLIN, J., JOIN THIS OPINION.