

IN THE COURT OF APPEALS 09/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-01037 COA

MARY WILLIAMS

APPELLANT

v.

DELTA PRIDE CATFISH, INC.

APPELLEE

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

TRIAL JUDGE: HON. HOWARD Q. DAVIS

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM B. ALEXANDER

ATTORNEY FOR APPELLEE:

JOHN S. GONZALEZ

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: MWCC AWARD REVERSED

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Mary Williams appeals a circuit court's decision that denied her workers' compensation benefits from Delta Pride. The facts are not in issue. This case turns on one question of law: was the circuit court correct that a later employer, not Delta Pride, was liable for any compensation? We conclude that the

circuit court's determination was correct, and affirm.

FACTS

Williams was a catfish processing factory worker for Delta Pride. Her work involved repetitive hand and wrist motion. In May 1991, Williams experienced symptoms of carpal tunnel syndrome in her right wrist and hand that required her to miss work. She obtained medical treatment provided under Delta Pride's workers' compensation program and, ultimately, obtained rehabilitative surgery in August of 1991. Delta Pride paid wage benefits for Williams' periods of temporary total disability. She was released by her physician to return to work on light duty two weeks after surgery.

Though recovering from the surgery, she began to experience renewed carpal tunnel syndrome symptoms. In January 1992, she was diagnosed with the condition bilaterally and her doctor recommended surgery. In less than a month, however, she was no longer employed by Delta Pride.

Following her departure from Delta Pride, Williams went to work for Baxter Healthcare. The un rebutted testimony was that her work there significantly aggravated her carpal tunnel syndrome condition and required her to seek further medical treatment.

She filed a claim for compensation benefits against Delta Pride for the totality of her condition. The commission, by affirming the administrative judge's order, agreed that Williams had not reached maximum medical improvement. Since Williams' condition began while she worked at Delta Pride, the commission concluded that the company would remain liable for future medical treatment. The commission also found the claimant was not currently disabled, and thus disability benefits were denied. The denial was subject to reconsideration if Williams had additional surgery or if her condition deteriorated into a disability.

The circuit court reversed, concluding that Delta Pride had no remaining liability to Williams because the exacerbation of her condition at Baxter Healthcare constituted an intervening cause of her condition. Baxter is not a party to these proceedings.

DISCUSSION

In Mississippi, there is no provision allowing the commission to apportion responsibility for claims among employers. *Singer Co. v. Smith*, 362 So. 2d 590, 592-93 (Miss. 1978); *Thyer Mfg. Co. v. Mooney*, 252 Miss. 629, 639-40, 173 So. 2d 652, 656-57 (1965).

Our statutes make no provision for apportionment of awards except in the case of preexisting handicap or disease. Here, the apportionment is between successive employers or insurers. . . . [T]he Workmen's Compensation Commission is an administrative agency, not a court of law and that there is no method provided by law by which it may adjust equities between insurance companies. . . . Absent statutory provisions, the resolution of contribution between successive carriers whether based on contract or equity should be resolved in an action at law or equity, apart from the workmen's compensation determination.

Singer, 362 So. 2d at 592-93. The reduction in benefits that results from a preexisting condition "refers to benefits which the injured employee will not receive at all, not to benefits which will be paid by someone else." *Thyer Mfg. Co. v. Mooney*, 252 Miss. 629, 639, 173 So. 2d 652 (1965). In order to assign liability just to one employer, somewhat arbitrary but nonetheless useful rules of proof have been developed in other states.

Despite the suggestion in *Singer* that the employer held solely liable might have a right to seek contribution from another employer or carrier, seeking contribution does not appear to be a common practice. In fact, the general rule is that these allocations of responsibility are for all purposes, not just for administrative agency actions. For example, after noting the potential harshness of assigning total responsibility to one employer who may have been much less liable than another employer, one authority said that the potential unfairness in one claim was balanced by the overall impact of single assignment of liability in every case. 4 Arthur Larson, *Workmen's Compensation Law* § 95.24, at 17-224 (1996).

The starting point for assigning liability is that an employer takes an employee in the physical condition he or she is found. 1 *Id.* § 12.20. There can be reductions in benefits resulting from preexisting conditions, but the general rule is total liability for the employer in whose employ a worker becomes industrially disabled. Miss. Code. Ann. § 71-3-7 (1972).

Despite the general rule, "it is settled that the first or originating employer is exclusively liable when the recurrence of disability is solely attributable to the original injury. . . ." Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 188 (1990). The word "solely" is important. Another authority stated that a recurrence exists only "if the second incident does not contribute even slightly to the causation of the disabling injury." 4 Larson, *supra* § 95.23, at 17-185. The medical evidence is clear on this point—the repetitive motion job requirements at the second employer contributed significantly to Williams' disability. Thus Delta Pride is not liable under the recurrence argument. *Potts v. Lowery*, 242 Miss. 300, 311, 134 So. 2d 474 (1961).

Two theories are argued by Delta Pride that would assign to a subsequent employer all the liability for an injury that first manifested itself at an earlier employer. We have not found these theories to have been adopted explicitly in Mississippi. We are cited to treatises and *dicta* for their implications. The first theory is called the last injurious exposure rule. In one case, a claimant was exposed to dust during his employment for two successive employers. *Singer Co. v. Smith*, 362 So. 2d 590, 591 (Miss. 1978). Because of his inhalation of the dust, the claimant suffered a significant loss of lung tissue. *Id.* The question for the supreme court was how to decide which employer was responsible for compensating the claimant. The court quoted Larson's treatise on workers' compensation law to define "last injurious exposure":

When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.

Id. at 593 (quoting 4 Arthur Larson, *Workmen's Compensation Law* § 95 (1978)). The supreme

court explained that the rule's purpose "is to set a definite and certain time for liability to attach and thus avoid the often difficult task of determining which of a series of injuries caused the disability or which of a series of exposures caused the disabling disease. In the absence of difficulty in locating a definite and certain time, the rule has no application." *Singer*, 362 So. 2d at 593. The relevant uncertainty is in the date at which an injury and disability manifests itself. *Id.* The court found no uncertainty in that respect and therefore deferred deciding "the application of the rule in this state. . . ." *Singer*, 362 So. 2d at 593. The court again declined to decide whether the rule has any application in Mississippi in *Bolivar County Gravel Co. v. Dial*, 634 So. 2d 99, 103 (Miss. 1994) (citation omitted).

Whether we need to determine the rule's viability also depends on its factual relevance. The commission here found:

It is thus clear that left side carpal tunnel syndrome had manifested itself as a diagnosable injury related to her employment at Delta Pride as early as August 6, 1991, and certainly prior to February 6, 1992. Dr. Knutson was recommending surgery to the right hand only in January, 1992, because it was the most symptomatic, but that he expected the bilateral carpal tunnel injury to worsen without surgery. . . .

We interpret this to mean at Delta Pride, Williams became disabled at least in her right hand—indeed she received temporary total disability payments for some of that period. The commission also found she had not reached maximum medical recovery prior to leaving Delta Pride, so her disability was continuing. Less overwhelming but adequate is the evidence supporting the commission that an injury and disability in her left hand had also developed at Delta Pride. The contribution to her injury made by Williams's work at Baxter was found by the commission to be this:

Each physician, given the assumption that claimant between [January 16 and June 15, 1992] was not employed at Delta Pride, testified that the worsening in claimant's condition during that period could not be attributed to her work at Delta Pride.

These conclusions, supported by substantial evidence, indicate one level of disability from the work at Delta Pride, and a more serious disability from the claimant's work at Baxter. The most that can be said regarding last injurious exposure is that Williams' left-hand injury might fall under that rule, i.e., the gradual worsening of Williams's left-hand problem might be said to have no certain manifestation until the work at Baxter. We need not address that question further, because a different rule also applies in this case and compels the same result.

That second rule, also advanced by Delta Pride, is usually labeled "intervening cause." In successive injury cases, if the second injury is an aggravation that contributes independently to the final disability, then courts have found the subsequent employer liable for the entire claim. 4 Larson, *supra* § 95.20. The trial court relied on the following to conclude Delta Pride was not liable:

On the other hand, when both employments contribute to the ultimate disability, as when

the original injury is aggravated by the activity associated with the later employment to produce disability, the general rule, in the absence of statute, is that the last employer or carrier is exclusively liable.

Dunn, *supra* § 188. The Mississippi case cited for this proposition would seem more narrowly only to say that a subsequent illness was not clearly shown to be a recurrence of a previous illness. *Mid-South Packers Inc. v. Hanson*, 253 Miss. 703, 707, 178 So. 2d 689 (1965). Regardless of whether a Mississippi precedent exists, Mr. Dunn is correct that the general rule is that a clear aggravation of an initial injury makes the second employer solely liable. 4 Larson, *supra* § 95.22, at 17-175. Under this doctrine, the second workplace must independently contribute to the disability. *Id.* at 17-183.

The commission did not follow this rule, but instead held that since Williams had not reached maximum medical recovery, the "fact that claimant's activities [at Baxter] may have increased the need for treatment does not relieve Delta Pride of the responsibility of providing treatment for the injuries." The commission cited a case for this proposition, but that case discusses the natural progression of an injury or occupational disease that is intensified by reasonable nonindustrial exertion. *Jacks-Evans Mfg. Co. v. Adams*, 344 So. 2d 141,143 (Miss. 1971). In those situations—in *Jakes-Evans Manufacturing Co.*, the claimant had bent over at home to pick up clothes—the employer remains liable because of a work-related injury, even though the triggering event for more serious consequences is something outside the workplace. *Adams*, 344 So. 2d at 143. As mentioned before, the reason for these rules assigning liability is because only one employer is liable for a disability. When a nonindustrial, reasonable activity such as in *Medart* contributes to the injury, the employer remains liable.

Here, the commission found and the evidence conclusively supports that an aggravation of Williams' condition was caused by her work at Baxter. An orthopedic surgeon, a neurologist, and a plastic surgeon all rendered opinions that Williams' bilateral carpal tunnel syndrome had significantly increased in severity as a result of her employment at Baxter. There were no opinions that this increase was a consequence of the natural progression of Williams' condition at the time she left employment at Delta Pride. Instead, without contradiction, the medical evidence universally supports the conclusion that Williams' employment with Baxter independently caused an increased severity in Williams' condition.

In light of these opinions, there is no evidence disputing that claimant's employment at Baxter made an independent and aggravating contribution to her final disability. Though we find no Mississippi precedent, we adopt the rule discussed above that the worsening of a preexisting injury at a subsequent employer makes the second employer liable for all benefits. Under these principles, Baxter—who is not a party and therefore not legally affected by these pronouncements—appears to be liable. Regardless, there is not substantial evidence to support Delta Pride's liability under the rules requiring that one employer be assigned all liability.

One result of these arbitrary rules for assigning sole legal responsibility to two factually responsible companies is potentially to leave a claimant who has analyzed the law incorrectly and filed against the wrong employer, without any remedy. If the statute of limitations against the proper employer has expired as proceedings continue against the wrong employer, even one that would ultimately be liable for contribution to the other, then the claimant may receive no benefits. The rules' purpose is to

simplify the task for the commission and leave the allegedly more complicated allocation of fault for a court, should one employer seek contribution from another. In this case the more complicated task appears to have been the determining of initial liability. The commission found Delta Pride liable; the circuit court found Baxter liable based both on last injurious exposure and on independent intervening cause principles. This Court relies only on the latter. The injured claimant could care less, but just wants benefits for the injury.

It may have been preferable, at least based on what we see in the record before us, if the claimant had brought both employers before the commission. At the time of the petition to controvert, Williams was working at Baxter. That may be part of the reason why only Delta Pride was joined. Subsequently Delta Pride itself sought to join Baxter. It moved for the administrative judge to determine whether "An Essential Party Should Be Included In Cause." The record reveals no ruling on the motion. The worker's compensation statutes and the commission's rules make no explicit provision for mandatory joinder of necessary parties, and instead follow a premise that the claimant makes her own decisions on whom to join. The procedural authority for the commission includes doing "all things conformable to law which may be necessary to enable them effectively to discharge the duties of their office." Miss. Code Ann. § 71-3-61(2) (1972). Adopting a rule requiring the joinder of another employer in situations such as here might be within that statutory authorization.

The only Mississippi case that came close to applying any of these rules had both employers present in the action. *Singer*, 362 So. 2d at 590-91. The rules discussed here were created for efficiency, not to trap claimants. Nonetheless, some means to sort out sole responsibility for an injury are necessary unless the commission is going to get into the business of making decisions on relative fault. The supreme court said that is inappropriate. *Id.* at 593. We apply the nearly universal rule assigning responsibility to the second employer at whose workplace an injury became exacerbated.

The circuit court was correct in holding that Delta Pride had no liability for these injuries. We affirm.

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

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

**PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY FRAISER,
C.J., BARBER, DIAZ AND KING, JJ.**

**IN THE COURT OF APPEALS 09/03/96
OF THE
STATE OF MISSISSIPPI**

NO. 94-CC-01037 COA

MARY WILLIAMS

APPELLANT

v.

DELTA PRIDE CATFISH, INC.

APPELLEE

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

PAYNE, J., CONCURRING:

I concur in the reasoning of the majority and its adoption of the rule that a second employer is solely liable for all benefits due an employee if the worsening of a pre-existing injury occurs as a result of the second employment. However, I write separately because I am distressed with the harsh result for Williams, as well as other similarly situated claimants. Have we left Williams with no possibility of relief? In the present case, the first employer (Delta Pride) has no liability because the injured party had the initiative to try to work again instead of depending on others for support. Although Baxter, the second employer whose employment aggravated the condition, was found to be solely liable, it will never compensate Williams because the courts took such a long time to decide this case that the statute of limitations may have run on her claim.

"The singular purpose pervading the Workmen's Compensation Act is to promote the welfare of laborers within the state." *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 889 (Miss. 1980) (citing Miss. Code Ann. § 71-3-1 (1972)). As I study the history of worker's compensation, I believe the system was designed to make recovery quicker and easier for the legitimate claimant and to limit the amount of damages the employer would have to pay. By contrast, the present case allows this same system "to hide the ball" from Williams until the possibility of recovery is gone, thus leaving her with the entire burden of her pecuniary loss resulting from a work-related disability. Certainly this can not be considered promoting the welfare of laborers!

FRAISER, C.J., BARBER, DIAZ, AND KING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.