

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01268 COA**

MARSHALL DURBIN FARMS, INC.

APPELLANT

v.

JAMES H. CLARK

APPELLEE

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

DATE OF JUDGMENT:	09/09/96
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	LEAKE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	STUART G. KRUGER M. CHRISTINE CROCKETT
ATTORNEYS FOR APPELLEE:	WILLIAM E. CAVANAUGH DON H. EVANS
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	AFFIRMED
DISPOSITION:	AFFIRMED - 01/27/98
MOTION FOR REHEARING FILED:	2/11/1998
CERTIORARI FILED:	
MANDATE ISSUED:	8/17/98

EN BANC

DIAZ, J., FOR THE COURT:

The Full Commission of the Mississippi Workers' Compensation Commission found that James H. Clark was permanently and totally disabled, and from that order the employer, Marshall Durbin Farms, Inc., appealed to the circuit court. The circuit court affirmed the Full Commission's order. Aggrieved, Marshall Durbin appeals to this Court raising the following issues as error:

I. THE LOWER TRIBUNALS ERRED BY NOT ACCEPTING THE UNDISPUTED FACTS OF THE CASE AS CONCLUSIVE AND BINDING AND AS A MATTER OF LAW THE DECISION MUST BE REVERSED.

II. THE FINDING OF CAUSATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

III. CLARK IS NOT ENTITLED TO PERMANENT DISABILITY BENEFITS BECAUSE HE HAS SUFFERED NO LOSS OF WAGE-EARNING CAPACITY.

IV. THE LOWER TRIBUNALS ERRED IN AWARDING TEMPORARY TOTAL DISABILITY BENEFITS.

Finding no error, we affirm.

FACTS

On January 12, 1993, James H. Clark was employed by Marshall Durbin Farms, Inc. as a truck driver. At 4:00 a.m., he was driving in the course of his employment from Canton to Philadelphia, Mississippi with an empty trailer. He decided that he needed to readjust one of the cages he was hauling. While readjusting the cage on his truck, Clark fell to the ground landing on his feet and then to his left shoulder. He completed the adjustment to the cage and returned to the offices of Marshall Durbin. At his supervisor's insistence, Clark sought medical attention. Clark was seen by a doctor who fit Clark in a neck brace and took x-rays, which showed a fractured odontoid, a broken neck. Clark went to the Meridian hospital where he was seen by Dr. Rolando Abangan, who operated on Clark the following day. Dr. Abangan performed a posterior cervical wiring infusion. Clark was hospitalized for seven days and then released to recuperate for six to eight weeks. The surgery was unsuccessful, and Dr. Abangan referred Clark to Dr. John Neill. Dr. Neill performed a second surgery to stabilize the odontoid by wiring it together. This surgery was a failure as well. Dr. Neill referred Clark to Dr. Louis Harkey. Since Clark's vertebrae were still not aligned, Dr. Harkey and Dr. Neill suggested a third operation, but Clark refused since the proposed surgery was risky. Clark testified that his understanding of his condition was that if he stayed active, and declined the operation, his physicians had suggested that he is at risk of sudden death. Clark stated that he is unable to perform any substantial physical labor but is similarly unable just to sit and have his family feed him. Therefore, despite the warnings of his physicians, he remained active. Clark testified that he experienced numbness, partial paralysis, pains in his back, pains in his leg, and he stated that his leg would give way, causing him to fall.

Prior to this incident, Clark testified that he had been injured in 1968, and the chiropractor treating him at the time said he had broken his neck, although a medical doctor never confirmed this. Also, Clark testified that he was involved in an automobile accident while driving for Marshall Durbin prior to January 12, 1993, but, according to Clark, he suffered no symptoms of injury.

Dr. Neill testified that the x-rays he first saw of Clark reflected that the odontoid fracture occurred prior to the time Clark related that he fell off the truck on January 4, 1993. He testified that the fall *may* have pulled some ligaments and stretched the fibrous tissue holding the odontoid in place, with a resulting effect of re-injury on the odontoid causing misalignment. Dr. Neill testified that in his opinion Clark's broken neck was a condition that preexisted his fall. Dr. Neill opined that in order for Clark to be perfectly safe, he needed to get in a chair and remain there and not move out of the chair unattended. He stated that with Clark's unstable spine he cannot tolerate stresses or forces that may normally be applied to the spine in the course of normal living, so that an injury that a normal person

might tolerate could be fatal to Clark. Dr. Neill was the only doctor to testify in the hearing. The administrative judge found that Clark was seventy-five percent disabled. Upon review, the Full Commission agreed with the findings of the administrative judge, except that the Commission found that the totality of the circumstances indicated that Clark was one hundred percent disabled. From that order, Marshall Durbin appealed to the Circuit Court of Leake County. The circuit court found that substantial evidence supported the Full Commission's order and affirmed.

ISSUE

Because all the issues are so closely related in this case, we will not address them individually, but instead speak to them as a whole.

This Court's scope of review is limited. Where there is substantial evidence to support the findings of the Workers' Compensation Commission, we may not interfere. *Bolivar County Gravel Co. v. Dial*, **634 So. 2d 99, 103 (Miss. 1994)**. Basically, this Court will not determine where the preponderance lies when the evidence is in conflict, as long as there is substantial evidence to support the finding. We may interfere only when the agency's actions are seen as arbitrary and capricious. The supreme court of Mississippi has also held that in doubtful cases, the doubt should be resolved in favor of compensation so that the beneficent purposes of the Workers' Compensation Act may be reached. *Id.* at **103-4**. There is substantial evidence in the record upon which this court should affirm the decision of the Workers' Compensation Commission. It is not disputed that Clark may have had a broken neck prior to the work-related incident. However, this condition in no way kept him from fulfilling all of his duties at work. Clark was asymptomatic prior to the accident and lived a full and complete life. Now, after the work-related accident, he is constantly in pain and has numbness in different areas of his body.

Stuart's Inc. v. Brown, **543 So. 2d 649, 652 (Miss. 1989)** discusses the distinction between a medical disability and an occupational one. These two terms are not synonymous. *Id.* at **653**. One may enjoy the functional ability to work, while, at the same time, suffering from a congenital medical disability. However, if that person thereafter has an accident which causes a loss of functional ability to work, then he has an occupational disability. *Id.* While Clark had a medical disability prior to the work-related injury, he had no occupational disability in that he could perform all the tasks required of his position. Clark's occupational disability arose only after the work-related injury occurred.

There is conflicting evidence as to what Clark can and cannot do. No matter what the answer, it remains that Clark is no longer allowed to work because of the risk involved. This condition has arisen from Clark's on-the-job injury and is therefore compensable. In fact, Marshall Durbin has refused to re-employ Clark due to his inability to obtain a doctor's release to return to work. This in and of itself is substantial evidence that Clark has sustained a loss of wage-earning capacity. *Piggly Wiggly v. Houston*, **464 So. 2d 510, 512 (Miss. 1985)**.

While Dr. Neill testified that he could not determine what was causing Clark's symptoms, it was clear from Clark's testimony that the symptoms manifested themselves immediately following the fall. Likewise, although Clark may have had a medical disability prior to the fall, he was not occupationally disabled until after the work-related incident. The Commission, the finder of fact in this case, were free to believe or disbelieve the testimony of Dr. Neill. If the Commission did not

believe the testimony of Dr. Neill as to from where the symptoms arose, but did believe Clark when he testified that he started having pains and numbness after his fall, then this Court must find that there was substantial evidence to find causation and to likewise, grant disability benefits to Clark. We, therefore affirm the circuit court and award benefits to Clark.

THE JUDGMENT OF THE LEAKE COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO MARSHALL DURBIN FARMS, INC.

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

THOMAS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY HERRING AND HINKEBEIN, JJ.

THOMAS, P.J., DISSENTING:

Because the majority finds that Clark met his burden of proof, that he was occupationally disabled due to a work-related fall, I respectfully dissent.

The salient issue presented in any Workers' Compensation Commission claim is whether the claimant was injured while at work. It is well settled under Mississippi Workers' Compensation law that the claimant has the burden of proving by a fair preponderance of the evidence that he sustained an accidental injury arising out of and in the course and scope of his employment, and that the injury caused the disability for which he is claiming benefits. **Miss. Code Ann. § 71-3-3(b) (Rev. 1995).**

Marshall Durbin argues that it is undisputed that Clark's fall from the truck did not cause or aggravate his neck condition and that Clark had the burden to come forth with testimony or other evidence establishing that the fall either caused, aggravated, or accelerated his neck problems. ***Penrod Drilling Co. v. Etheridge*, 487 So. 2d 1330, 1332 (Miss. 1986).** A claimant must present evidence showing a causal connection between a work-related injury and any resulting medical treatment and disability to meet his burden of proof. ***Morris v. Lansdell's Frame Co.*, 547 So. 2d 782, 785 (Miss. 1989); *Penrod Drilling*, 487 So. 2d at 1332.**

Marshall Durbin argues that Clark wholly failed to meet his burden of proof of demonstrating a causal connection between his injury and his disability. I have to agree with Marshall Durbin. "In all but the simple and routine cases . . . it is necessary to establish medical causation by expert testimony." ***Cole v. Superior Coach Corp.*, 234 Miss. 287, 291, 106 So. 2d 71, 72 (1958).**

The courts have generally held that, expert or medical testimony is not essential in every industrial injury case to establish fact, character, and consequence of an accident or injury, but it is necessary in cases where there is a serious question resolvable only by skilled determination and which is not within the knowledge of lay witnesses or members of the fact-finding tribunal.

***Bates v. Merchants Co.*, 249 Miss. 174, 190-91, 161 So. 2d 652, 659 (1964) (citations omitted). See also *International Paper Co. v. Wilson*, 243 Miss. 659, 676, 139 So. 2d 644, 651-52 (1962).**

In her opinion, the administrative judge stated that Dr. Neill testified that "[t]he fall may have pulled some ligaments and stretched the fibrous tissue holding the odontoid in place, with a resulting effect of re-injury on the odontoid causing misalignment." However, after my review of the testimony given by Dr. Neill I found that he actually testified that Clark's fall "may have pulled some ligaments. It may have loosened things in some way. It may have stretched the fibrous tissue that was holding the odontoid in place." It is important to note that Clark is requesting benefits based on the odontoid fracture, not muscle strain or muscle pull. Dr. Neill clearly testified that he felt Clark's broken neck was a condition that preexisted his fall.

The majority makes much of the fact that Clark had no occupational disability before his fall occurred but his symptoms manifested themselves after the fall; however, Dr. Neill testified that he did not know what was causing Clark's pain and found no medical reason for these symptoms. The majority's decision would allow a claimant to allege that he had symptoms with no medical testimony to substantiate these claims and ignore the testimony of a doctor who found no medical reason for these manifestations. This is a very dangerous precedent indeed.

Clark's burden of proof here was to show that his neck was broken, exaggerated, or accelerated by his fall. The *only* medical testimony received at the hearing was from Dr. Neill who unequivocally stated that the fall neither exaggerated or accelerated his broken neck. Thus, Clark failed to meet his burden of proof showing "by a fair preponderance of the evidence that he sustained an accidental injury out of and in the course and scope of his employment." *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 13 (Miss. 1994); *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d1261, 1264 (Miss. 1990). It is clear from the record that Clark is severely injured and is willing, but unable to work. However, nowhere in the record does Clark present *any* medical evidence that his impairment was caused by a work-related injury. I would follow Mississippi precedent, which holds that in all but simple cases the claimant must establish medical causation by expert testimony, and find that Clark failed to meet his burden of proof, thus I would reverse and render.

HERRING AND HINKEBEIN, JJ., JOIN THIS SEPARATE WRITTEN OPINION.