

**IN THE COURT OF APPEALS 10/31/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CC-00104 COA**

**BETTY PEARSON AND LAWANDA WILDER**

**APPELLANTS**

**v.**

**WASHINGTON COUNTY LIBRARY SYSTEM AND THE AETNA CASUALTY &  
SURETY 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. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

JAS C. PIERCE

ATTORNEY FOR APPELLEES:

TERRY B. GERMANY

NATURE OF THE CASE: WORKERS' COMPENSATION- MENTAL INJURY

TRIAL COURT DISPOSITION: AFFIRMED MISSISSIPPI WORKERS' COMPENSATION  
COMMISSION'S DENIAL OF BENEFITS

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

COLEMAN, J., FOR THE COURT:

Betty Pearson and Lawanda Wilder appealed the Mississippi Workers' Compensation Commission's denial of benefits to the Washington County Circuit Court, which affirmed the Commission's decision. We quote from the Appellants' brief to state the two issues which, they argue, require this Court to reverse the circuit court and remand:

A. Whether the circuit court erred in affirming the Workers' Compensation Commission Order which applied the "clear and convincing" burden of proof standard in determining issues other than causal connection in a "mental/mental" injury.

B. Whether the circuit court erred in affirming the Workers' Compensation Commission Order denying benefits by applying the "clear and convincing" standard to any issue involved in a compensation case in light of the statutory construction of workers' compensation law.

We resolve these issues adversely to the Appellants and affirm the lower court's decision in favor of the employer and its carrier.

## **I. FACTS**

Pearson and Wilder are former employees of the Washington County Library System at the Percy Memorial Library in Greenville, Mississippi. Both women worked at the library from 1969 to 1988 under various directors with no documented personality conflicts until 1987 when Robert Schalau was employed as director of the Washington County Library System. Schalau's office was located in the same facility where the Appellants worked. Schalau was responsible for the supervision of all employees at the Percy Memorial Library. Consequently, he came in contact with the Appellants quite regularly.

Quotations from the findings of the administrative judge show that Schalau "displayed obscene cartoon drawings and related off-color, sexually oriented jokes and stories to library personnel, including [appellants], on a daily basis between March 27, 1987 and . . . July 15, 1987." Both Pearson and Wilder indicated that Schalau had, on occasion, given unsolicited physical hugs to them and sometimes touched their clothing and jewelry. Additionally, there were three incidents involving the spreading of feces about the library which the Appellants attribute to Schalau. In reference to the above events, the Appellants did not make any formal complaints to the Washington County Library Board. Instead, they voiced their complaints privately to a member of the Percy Memorial Library Board, Jo Cille Hafter.

A private meeting at Hafter's home occurred on June 26, 1987 among Hafter, Pearson, and Wilder. June 26, 1987, is the day that the Appellants allege is the date of their respective compensable injuries which arose under workers' compensation law. The substance of the conversation at this meeting is a point in controversy. According to Hafter, Pearson's and Wilder's primary grievance centered on administrative matters such as a dispute between them and Schalau over the scheduling of holidays. The Appellants contend that they sought out Hafter to air their complaints of sexual harassment in private so as to avoid retaliation by Schalau. Nevertheless, after this meeting no action was taken until July 13, 1987, when the Appellants filed an Equal Employment Opportunity Commission

(EEOC) complaint.

After the EEOC complaint was filed, Schalau's alleged harassment of Pearson and Wilder ceased, and little or no communication transpired between them and Schalau. In November of 1987, the Washington County Library System terminated Schalau's employment. The Appellants contend that as a result of Schalau's termination a hostile work environment ensued. The hostile work environment contributed to their mental injuries. Finally, Wilder and Pearson quit their jobs at the library in May and June of 1988, respectively.

## **II. ADMINISTRATIVE HEARING**

Testimony from Wilder indicates that at no time did Schalau touch her in a sexual manner, proposition her sexually, or make any overt sexual advances toward her. Instead, Wilder testified that she interpreted Schalau's conduct to be sexually oriented because of his "tone of voice," "eye movement," and "body language." Both Pearson and Wilder testified that because they feared being fired, neither of them requested Schalau to desist from this course of conduct, which they considered offensive. However, they conceded that they were never threatened with termination by Schalau or anyone else in authority at the library. As to the three incidents of feces being spread about the library, there is no direct evidence which associates Schalau with these episodes. Furthermore, the evidence shows that other such incidents with feces have occurred since Schalau left the library in November, 1987, and since the Appellants left the library in the summer of 1988.

As to the secret meeting at Hafter's home, Hafter testified that the Appellants' only complaint of Schalau's sexual harassment was his telling offensive, off-color jokes. She further testified that each time an attempt was made to elicit specific instances of improper conduct on Schalau's part, Pearson and Wilder would change the subject by returning to administrative complaints. Additionally, Hafter testified that even with a guarantee of no retaliatory action, Pearson and Wilder refused her offer of contacting a library board member. About a week after this meeting, Wilder telephoned Hafter in regard to an argument between the Appellants and Schalau over the use of a walkie talkie system in the library. According to Hafter, Pearson later telephoned her and in a threatening tone stated that Hafter "would be sorry" if Schalau was not immediately fired. The administrative judge relied on the credibility of Hafter because she provided an objective view of this administrative "turf battle" with no apparent motivation to misrepresent any of the previously discussed matters.

As to Pearson's and Wilder's claims of mental suffering from their work environment after Schalau's departure, the only specific instances of alleged retaliation were: (1) someone's having tampered with Wilder's paper clips; (2) a telephone message containing an obscene word to Pearson; and (3) their being watched by security and custodial personnel. The administrative judge found that even if these episodes were genuine, it would be pure speculation to consider them as either extraordinary to the work place or a conspiracy of retaliation. Thus, the administrative law judge denied Pearson's and Wilder's claims for worker's compensation benefits.

The Workers' Compensation Commission affirmed the administrative judge's denial of benefits without written opinion on March 2, 1993. On October 28, 1993, the Washington County Circuit Court entered an order affirming the Commission's denial of benefits; and Pearson and Wilder appealed.

### III. ISSUES

#### **A. Whether the circuit court erred in affirming the Workers' Compensation Commission Order which applied the "clear and convincing" burden of proof standard in determining issues other than causal connection in a "mental/ mental" injury.**

Appellants point out the following language used by the administrative judge:

I deem Mr. Schalau's established conduct - telling obscene stories to the library staff and touching the claimant's shoulder without overt physical threat or explicit sexual design - to constitute "identifiable events". I find this conduct, although accomplished without objection by claimant, to have been unwanted by, and offensive to claimant. I do not find the evidence to establish misconduct as an extraordinary event in excess of normal wear and tear of the work place. I do not find clear and convincing evidence that this conduct constituted a traumatic mental insult which qualifies as an accidental injury arising out of and in the course of claimant's employment. I do not find clear and convincing evidence that claimant suffers a major depressive disorder. I do not find clear and convincing evidence that claimant suffers a disabling mental disorder. *I do not find clear and convincing evidence that claimant suffers from a mental injury or mental disorder which was caused, precipitated, or aggravated by work place events which exceed the normal stress, wear and tear of the work place.* (Emphasis added.)

The Mississippi Supreme Court has stated "when a claimant seeks compensation benefits for disability resulting from a mental or psychological injury, the claimant has the burden of proving by clear and convincing evidence the connection between the employment and the injury." *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988); *Smith & Sanders, Inc. v. Peery*, 473 So. 2d 423, 425 (Miss. 1985); *Miller Transporters, Ltd. v. Reeves*, 195 So. 2d 95, 100 (Miss. 1967). The Appellants contend that by applying the clear and convincing standard to issues other than causal connection, they were effectively precluded from demonstrating the existence of mental injury and thereby prejudiced. However, this reasoning is flawed in that it raises matters which are conditioned on and therefore follow the determination of causal connection between the employment and the injury. Since the administrative judge employed the correct standard (clear and convincing) for the determination of causal connection in disposing of this case, other issues lose their relevancy. More specifically, the issues with which Pearson and Wilder claim they were unreasonably burdened to prove were directly dependant upon proof of causal connection between the employment and their mental injuries. Here, the administrative judge used the proper standard of clear and convincing evidence to find there was no causal connection between the employment and the mental injury.

As to our scope of review, the Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the administrative law judge to the contrary notwithstanding.

*Fought*, 523 So.2d at 317. Furthermore, if these findings of fact and the order are supported by substantial evidence, then all appellate courts are bound thereby. *Id.* (citations omitted). In the case *sub judice*, the full Commission affirmed the administrative judge's findings of fact that the evidence did not establish Schalau's misconduct as "something more than the ordinary incidents of employment." *Smith & Sanders, Inc. v. Peery*, 473 So. 2d 423, 426 (Miss. 1985) (affirming Commission's findings of fact). Consequently, the mere proof of mental injury would be of no assistance to Pearson and Wilder because it could not be attributed to the work environment per the administrative judge's factual determination.

Workers' compensation claims based on mental injury pose a problem because "proof is difficult, feigning and malingering are thought easy, thus opening the system to fraud." *Fought* at 317. Therefore, the higher standard of clear and convincing evidence is imposed to deter fraudulent claims. In the case at bar, Appellants emphasize that the proper standard to use for all issues except causal connection is preponderance of the evidence. However, the administrative judge's use of the higher standard of "clear and convincing evidence" to decide these other issues had no bearing on the outcome of this case because the properly made determination of causal connection between the employment and injury disposed of all other issues.

**B. Whether the circuit court erred in affirming the Workers' Compensation Commission Order denying benefits by applying the "clear and convincing" standard to any issue involved in a compensation case in light of the statutory construction of workers' compensation law.**

The Mississippi Supreme Court has consistently held that:

[W]hen a claimant seeks compensation benefits for disability resulting from a mental or psychological injury, the claimant has the burden of proving by clear and convincing evidence the connection between the employment and the injury and that the mental injury must have been caused by something more than the ordinary incidents of employment.

*Bates v. Countrybrook Living Ctr.*, 609 So. 2d 1247, 1249 (Miss. 1992) (quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). This maxim compels us to rule that the administrative judge acted in accordance with Mississippi law by applying the clear and convincing standard of proof in the case *sub judice*.

Pearson and Wilder quote from the dissent in *Bates* which questions the validity of the clear and convincing standard in a workers' compensation mental injury claim. *Id.* at 1249-51. They also rely on a special concurring opinion written by Justice McRae in *Borden, Inc. v. Eskridge*, 604 So. 2d 1071, 1076 (Miss. 1991), in which he suggested that *Fought* and its progeny should be overruled. However, these opinions are contrary to the decisions of the majority and do not carry the force of law. Moreover, the use of the "clear and convincing standard" serves an important purpose by

safeguarding against fraudulent claims. In accordance with *stare decisis*, it is incumbent upon this Court to leave undisturbed the application of the clear and convincing standard in worker compensation claims for mental injury. For these reasons, we resolve adversely to Pearson and Wilder the issues which they have presented to us in this appeal; and we affirm the judgment of the Washington County Circuit Court.

**THE WASHINGTON COUNTY CIRCUIT COURT JUDGMENT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANTS.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., NOT PARTICIPATING. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY BARBER, J.**

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**PAYNE, J., CONCURRING:**

Because I believe that the majority correctly responded to the case presented to it by the parties, I concur; but I write separately only to disassociate myself from the administrative law judge's finding

that the identifiable, offensive conduct of the supervisor (Schalau) was no more than the "normal wear and tear of the work place." In order to be gainfully employed women are not required to work in a "hostile environment" to the point of a nervous breakdown.

*Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

As one might expect, I prefer a judicial mindset as expressed in *Ellison v. Brady*, 924 F. 2d 872, 879-80 (9th Cir. 1991):

By acknowledging and not trivializing the effects of sexual harassment . . ., courts can work towards ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'

Although not dispositive of the present case, this warning should be noted in environments that mirror the one in this case.

**BARBER, J., JOINS THIS SEPARATE WRITTEN OPINION.**