

IN THE COURT OF APPEALS 03/25/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-01164 COA

GEORGE W. JOHNSON

APPELLANT

v.

HOWARD TRANSPORTATION, INC.

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

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

TRIAL JUDGE: HON. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM B. SULLIVAN

ATTORNEYS FOR APPELLEE:

ROBERT D. GHOLSON

CRAIG NEWMAN ORR

NATURE OF THE CASE: WORKERS' COMPENSATION

**TRIAL COURT DISPOSITION: DENIED COMPENSATION DUE TO CLAIMANT'S
INTOXICATION (COCAINE) AND THAT BEING THE PROXIMATE CAUSE OF THE
ACCIDENT.**

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

PER CURIAM:

Claimant Johnson suffered injuries on January 20, 1992, while he was attempting to strap down a load of PVC pipe on his tractor trailer rig on the work yard of Certaineed Corporation in Social Circle, Georgia. Johnson was then employed by Howard Transportation, Inc. The employer/carrier denied compensation on Johnson's claim asserting that he was under the influence of cocaine at the time of the accident which resulted in his injury, and that his intoxication was the proximate cause of Johnson's injuries. Johnson denies that he was under the influence of cocaine. The administrative law judge and the full commission denied compensation to Johnson. The Circuit Court of Jones County affirmed. Feeling aggrieved, Johnson appeals to this Court arguing: (1) his alleged intoxication does not constitute a defense to this action; (2) there is no basis to support the findings that he improperly secured his load; (3) he is entitled to temporary total disability benefits from the date of the injury; (4) the employer should be required to furnish all medical, psychological, and psychiatric treatment; and (5) he is entitled to statutory penalties and interest. We find that there is substantial evidence to support the denial of benefits, and affirm.

STANDARD OF REVIEW

The standard of review utilized by this Court when considering an appeal of a decision of the Workers' Compensation Commission is well settled. The Mississippi Supreme Court has stated that "[t]he findings and order of the Workers' Compensation Commission are binding on this Court so long as they are 'supported by substantial evidence.'" *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Mitchell Buick v. Cash*, 592 So. 2d 978, 980 (Miss. 1991)). An appellate court is bound even though the evidence would convince that court otherwise if it were instead the ultimate fact finder. *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (Miss. 1994). This Court will reverse only where a commission order is clearly erroneous and contrary to the weight of the credible evidence. *Vance*, 641 So. 2d at 1180; *see also Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). "This Court will overturn a [c]ommission decision only for an error of law . . . or an unsupportable finding of fact." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991) (citations omitted). Therefore, this Court will not overturn a commission decision unless it finds that the commission's decision was arbitrary and capricious. *Id.*; *see also Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991) (where court finds credible evidence supporting a commission decision, it cannot interfere with that decision any more than with a case from any other administrative body).

DISCUSSION

Essentially, Johnson contends that he was not intoxicated and that the employer failed to meet its burden of proof. The Mississippi Workers' Compensation Act provides that in only two circumstances will an otherwise compensable injury not be compensable: where the intoxication of the employee was the proximate cause of the injury, and where the employee willfully intended to injure himself or another. Miss. Code Ann. § 71-3-7 (1972). Intoxication is an affirmative defense

with the burden of proof on the employer/carrier to plead and prove it. Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 155 (3d ed. 1982). "It is to be noted that the Act does not require that intoxication be the *sole* proximate cause in order to rule out an award, and as a general rule, it is sufficient if there exists some causal relation between intoxication and injury." *Id.* (citations omitted). Black's Law Dictionary states:

Intoxication. Term comprehends situation where, by reason of taking intoxicants, an individual does not have the normal use of his physical or mental faculties, thus rendering him incapable of acting in the manner in which an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like circumstances.

(citation omitted). We find that intoxication includes such by alcohol or by drug or by both. This is consistent with other Mississippi statutes. *See* Mississippi Code Ann. §§ 59-21-83, 61-11-1, 63-11-30.

Turning to the present case, there were two factual issues to be determined: (1) was Johnson intoxicated, and if so, (2) was his intoxication a proximate cause of his injury? The administrative law judge and the full commission answered these questions in the affirmative. The Circuit Court of Jones County affirmed the commission. After careful review of the record, we find that there is substantial evidence to support the Commission's denial of benefits to Johnson. We adopt the attached Order of the Administrative Judge and affirm for the reasons stated therein.

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

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