

IN THE COURT OF APPEALS 4/22/97
OF THE
STATE OF MISSISSIPPI
NO. 94-CC-00380 COA

MAXINE PERKINS

APPELLANT

v.

AMERICAN PLASTIC TOYS, 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. R. KENNETH COLEMAN

COURT FROM WHICH APPEALED: MARSHALL COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID L. WALKER

ATTORNEY FOR APPELLEE:

GARY P. SNYDER

NATURE OF THE CASE: WORKER'S COMPENSATION

TRIAL COURT DISPOSITION: TOTAL DISABILITY BENEFITS AWARDED

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

This action involves a workers' compensation claim brought by Maxine Perkins, the claimant/Appellant, against American Plastic Toys, Inc. (American Plastic), the employer/Appellee. After a hearing on all the issues, the administrative law judge ruled that Perkins was entitled to temporary partial disability benefits from September 26, 1991, through June 22, 1992. However, the judge concluded that the testimony of Perkins' physician, Dr. Howard Ellzey, was unreliable and that his treatment of Perkins was unnecessary. Thus, the judge ruled that the employer was authorized to refuse payment of medical expenses incurred by Perkins as a result of medical treatment rendered by Dr. Ellzey.

The Workers' Compensation Commission (Commission) generally affirmed the decision of the administrative law judge, except that the commission ruled that Perkins did not have a compensable disability after March 10, 1992. On appeal, the Circuit Court of Marshall County, Mississippi, affirmed the decision of the commission. Perkins now appeals to this Court and seeks: (1) reinstatement of the decision of the administrative law judge as to partial disability benefits; (2) a ruling that the treatment provided to her by Dr. Ellzey was reasonable and necessary and that her medical expenses incurred as a result of his treatment should be paid by the employer; and (3) that she suffers from a permanent partial disability as a result of an injury sustained by her during the course and within the scope of her employment. We find that substantial evidence was presented to support the findings of the commission and that its findings were not unreasonable, arbitrary or capricious. Thus, we affirm the rulings of the commission and the circuit court in this action.

FACTS

On September 26, 1991, Perkins was injured while working on an assembly line for the employer when she slipped in oil and fell to the floor. Perkins was subsequently taken by ambulance to the Marshall County Hospital in Holly Springs, Mississippi, and thereafter was transferred to Baptist Memorial Medical Center in Oxford, Mississippi, where she was hospitalized and treated by Dr. Ernest Lowe, an orthopedic surgeon. Perkins was discharged on September 28, 1991, and requested to return to Dr. Lowe for further treatment. Instead, she employed an attorney on October 4, 1991, and sought treatment from Dr. Howard Ellzey, a general practitioner, on the recommendation of her attorney.

Over an eight-month period from October 4, 1991, to June 12, 1992, Dr. Ellzey had thirty-four sessions with Perkins, during which he primarily administered physical therapy, accompanied by hypodermic injections for pain. As stated by the administrative judge, "Dr. Ellzey conducted no more than a superficial clinical examination of Perkins by testing her 'moving parts' and could diagnose nothing more than what amounts to multiple strains" No x-rays or other diagnostic testing were performed or requested by Dr. Ellzey, and he did not refer Perkins to a specialist. Moreover, during his treatment of Perkins, he did not have the benefit of the evaluations of the other physicians who saw Perkins during the same period of time.

Dr. Ellzey concluded that Perkins was temporarily totally disabled from September 26, 1991, through June 23, 1992, and that she thereafter had permanent medical impairment of more than ten percent with permanent industrial disability in excess of seventy percent. Dr. William Brown, a neurosurgeon, saw Perkins on November 27, 1991, and again on March 10, 1992, on the recommendation of her attorney. In arriving at his clinical evaluation of Perkins' condition, Dr. Brown could find no

objective basis upon which to predicate his analysis of Perkins' physical problems. He performed no diagnostic testing and no x-rays were taken. Nevertheless, he did believe that further tests should be conducted. According to Dr. Brown, his examination revealed that Perkins had a limited range of motion in her neck, right shoulder and back. He also recommended that Perkins submit to magnetic resonance imaging (M.R.I.) due to her continued complaints of pain. In summary, Dr. Brown testified that Perkins was disabled, could not perform her usual and customary job, and that further tests were recommended in order to determine the date of maximum medical recovery.

At the request of employer, Perkins saw Dr. Donald Henard, an orthopedic specialist, for an independent examination on January 17, 1992. As stated by the administrative judge in his opinion:

Dr. Henard is the only physician to actually have discrete diagnostic tests conducted; the tests included x-rays of claimant's right shoulder and cervical and lumbar spine, and EMG and nerve conduction studies of claimant's right arm, and all were reported as normal. Claimant did not return to receive word of her test results as instructed by Dr. Henard, who concluded that claimant had right shoulder, cervical back, and low back strain, from which she had recovered anatomically, and that claimant could return to work on January 21, 1992, without medical impairment or restriction. Dr. Henard did not find claimant to suffer any complaint or symptom which would necessitate an MRI or myelogram. Dr. Henard did find claimant to demonstrate a significant functional overlay, but the source of this condition is not disclosed in the record.

Perkins did in fact return to work on January 20, 1992, as instructed by Dr. Henard, and was given a light assignment that allowed her to sit while working. However, after being on the job for a very brief period, Perkins declared she was in extreme pain and could not work that day.

After January 20, 1992, Perkins did not return to work with her employer until March 9, 1992. On March 3, 1992, the employer mailed a written termination letter to Perkins. On the same day the termination letter was mailed to Perkins, she went to Dr. Ellzey and informed him that she wished to return to work with the employer. Dr. Ellzey then gave Perkins a medical authorization to return to work on March 9, 1992, following a final examination on March 7, 1992. However, when Perkins went to work on March 9, 1992, she was again informed that she had been terminated, this time by the plant manager.

Following her termination from American Plastic, Perkins applied with the Mississippi Employment Security Commission for unemployment benefits. Perkins admitted on cross-examination that she represented to State unemployment personnel that she was able to resume employment as shown by her testimony:

Q. Did you ever tell Dr. Ellzey that you had tried to work or attempted to work?

A. No.

Q. Did you apply for unemployment compensation benefits after you were terminated by American Plastic Toys?

A. Yes.

Q. Did you receive those benefits?

A. Yes.

Q. When you filled out those forms isn't it true that you had to advise the state unemployment people that you were fit to work?

A. Yes.

Q. That wasn't true, was it?

A. Well, Dr. Ellzey had turned me loose to work and if I would have went back out to work I was going to try to work.

Q. So, if Dr. Ellzey has testified that you were unfit to work during that period of time that you applied for those benefits you would disagree with that statement?

A. Yes.

The employer paid temporary total disability and medical benefits to Perkins from September 26, 1991, (the date of her injury) up to and until January 21, 1992, the date that Dr. Henard stated that Perkins could return to her regular employment. However, the administrative judge ruled that she was entitled to such benefits until June 23, 1992, the last occasion on which she saw Dr. Ellzey, as well as penalties for lack of payment since January 21, 1992, pursuant to section 41-3-37(5) of the Mississippi Code of 1972. However, the judge also found that Dr. Ellzey's opinion of Perkins' medical or functional impairment was unreliable and ruled that Perkins suffered from no permanent disability or any disability after June 23, 1992. In support of this position, the judge noted that none of the doctors who testified, including Dr. Ellzey, found any objective basis for any disabling injury suffered by Perkins. Finally, the administrative judge ruled that the employer was authorized to refuse the payment of all charges submitted by Dr. Ellzey for his treatment of Perkins, since his treatment of Perkins was "inherently disproportionate to the injuries diagnosed and the lack of substantial beneficial effect notwithstanding protracted application"

Both the employer and Perkins filed petitions for review of the administrative judge's ruling on June 21, 1993, and a hearing by the full commission was held on November 1, 1993. As stated, the commission affirmed the ruling of the administrative judge, except for its ruling that Perkins was only entitled to receive temporary total benefits from September 26, 1991, through March 10, 1992, the date of her last visit to Dr. Brown and when she applied for unemployment benefits. Thereafter, the circuit court affirmed the ruling of the Workers' Compensation Commission, and Perkins now appeals to this Court, seeking reinstatement of the decision of the administrative judge granting her temporary total benefits through June 23, 1992; seeking a finding that she is partially permanently disabled; and requesting a finding that the charges of Dr. Ellzey for medical services and supplies should be paid.

ANALYSIS

I. STANDARD OF REVIEW

It is well settled in Mississippi that in workers' compensation cases the Workers' Compensation Commission is the ultimate finder of fact, and its findings are subject to normal deferential standards of review. *Natchez Equip. Co., Inc. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993). Moreover, the commission can either accept or reject the findings of the administrative law judge. *Id.* The findings of the Workers' Compensation Commission will only be reversed by an appellate court where such findings are clearly erroneous and contrary to the overwhelming weight of the evidence. *Ray v. Mississippi State Bd. of Health*, 598 So. 2d 760, 764 (Miss. 1992) (citations omitted). "If the findings are supported by substantial evidence, then they are beyond the power of this Court to disturb." *Id.*

Statutory law espoused in section 71-3-51 of the Mississippi Code of 1972 addresses the matter of judicial review of the circuit court. Section 71-3-51 states:

The circuit court shall review all questions of law and fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the commission should have entered.

Additionally, in *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1246-47 (Miss. 1991), the Mississippi Supreme Court stated:

We have repeatedly read this statute to establish the Circuit Court's function as that of an intermediate court of appeals. More to the point, we have held repeatedly that the Circuit Courts must defer in their review to the findings of the Commission.

In a very real sense, all of this is nothing other than a workers' compensation variant on accepted limitations upon the scope of judicial review of administrative agency decisions, i.e., that the courts may interfere only where the agency action is seen arbitrary or capricious. Arbitrariness and caprice are in substantial part a function of the presence *vel non* of credible evidence supporting the agency decision. Where we find such evidence, we have no more authority to interfere with the decisions of the Commission than we do in a case of any other administrative body.

(citations omitted). As such, only where this Court finds the rulings of the commission are not supported by substantial evidence will we reverse the decision and findings of the commission.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT PERKINS SUFFERS FROM A PERMANENT PARTIAL DISABILITY?

Pursuant to Mississippi law, the claimant in a workers' compensation case has the burden to prove the elements of a claim by a preponderance of the evidence. *Bracey v. Packard Elec. Div., Gen. Motors Co.*, 476 So. 2d 28, 29 (Miss. 1985). These elements are:

(1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the death or claimed disability.

Hedge v. Leggett & Platt, Inc., 641 So. 2d 9, 13 (Miss. 1994) (citations omitted). *See also* Miss. Code Ann. §§ 71-3-3--71-3-7 (1972). On the other hand,

When the claimant, having reached maximum medical recovery, reports back to his employer for work, and the employer refuses to reinstate or rehire him, then it is prima facie that the claimant has met his burden of showing total disability. The burden then shifts to the employer to prove a partial disability or that the employee has suffered no loss of wage earning capacity.

McNeese v. Cooper Tire and Rubber Co., 627 So. 2d 321, 325 (Miss. 1993) (quoting *Jordan v. Hercules*, 600 So. 2d 179, 183 (Miss. 1992)). Moreover, "close questions of compensability should be resolved in favor of the worker, and . . . the act should be liberally construed to carry out its beneficent remedial purpose . . ." *McNeese*, 627 So. 2d at 326 (quoting *Stuart's Inc. v. Brown*, 543 So. 2d 649, 652 (Miss. 1989)). Perkins relies upon the testimony of Dr. Ellzey and Dr. Brown to show that she sustained a permanent partial disability entitling her to further compensation. Dr. Brown essentially testified that he would need to conduct further tests in order to make a diagnosis of the injuries sustained by Perkins. Though he stated that on the two occasions he examined Perkins she appeared to present a disabling medical condition, Dr. Brown could not present objective test results to support his initial opinion. Likewise, Dr. Ellzey could not produce objective test results to support his opinion that Perkins suffered a permanent disability.

In the case *sub judice*, it is arguable that Perkins was terminated prior to her attempt to return to work and that the burden of proof did not shift to the employer to prove that Perkins suffered no permanent wage earning capacity. Nevertheless, the evidence presented, or lack of it, substantially establishes that Perkins suffered no permanent disability as a result of her injury. Thus, this assignment of error has no merit.

III. WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF THE WORKERS' COMPENSATION COMMISSION THAT PERKINS REACHED MAXIMUM MEDICAL IMPROVEMENT ON MARCH 10, 1992?

Perkins relies upon the testimony of her personal physician, Dr. Howard Ellzey, to support her claim that she is entitled to workers' compensation benefits from the date of her injury through June 23, 1992. The administrative judge concluded that Dr. Ellzey's testimony was reliable in regard to the extent of Perkins' limitation of motion and the fact that Perkins complained of pain. However, the

judge ruled that Dr. Ellzey's testimony concerning Perkins' continued need for extended treatment by him was "inherently unreliable," and also found his opinion regarding Perkins' medical and functional impairment unreliable. The basis for this conclusion by the administrative judge was that Dr. Ellzey performed no more than a superficial examination of Perkins and made no objective findings as to her condition. In addition, he simply provided Perkins with physical therapy and injections for pain when she came to see him, all with limited results. The commission affirmed the ruling of the administrative judge but determined that Perkins reached maximum medical recovery on March 10, 1992, rather than June 23, 1992, the last day that Perkins saw Dr. Ellzey.

In further support of her claim that temporary total benefits should extend to June 23, 1992, as concluded by the administrative judge, Perkins also offers the testimony of Dr. Brown, the neurosurgeon, who saw Perkins on November 27, 1991, and March 10, 1992. Dr. Brown's opinion that Perkins was disabled on March 10, 1992, was not based upon any objective test results concerning the patient's condition, but was based solely upon his physical examination, and his review of Perkins' hospital records and Dr. Lowe's discharge summary from the Marshall County Hospital in September 1991. Dr. Brown concluded that to complete his diagnosis further objective tests would need to be performed.

In arriving at its decision that March 10, 1992, was the date of Perkins' maximum medical recovery, the commission had considerable and substantial evidence to support its conclusions. Dr. Ellzey's conclusions were essentially subjective in nature, based upon Perkins' complaints of pain. Furthermore, the physical therapy treatments prescribed by Dr. Ellzey were administered by unlicensed personnel. Moreover, the evidence revealed that Dr. Ellzey did not have admitting privileges at any nearby hospital and was not licensed to dispense any narcotic drug. Furthermore, the evidence disclosed that Dr. Ellzey had a felony conviction record in the State of Tennessee, where he had been convicted of illegally participating in a conspiracy to distribute controlled substances, and had been incarcerated in a federal prison. Dr. Ellzey's testimony was generally defensive and unpersuasive. Thus, as the ultimate finder of fact in this action, the commission's conclusion that Dr. Ellzey's testimony and conclusions were unreliable was supported by substantial evidence.

In regard to the testimony of Dr. Brown that Perkins remained disabled on March 10, 1992, the commission also had evidence before it that Perkins had sought to return to work on March 9, 1992, and declared herself able to work on that date to the employer's plant manager. In addition, she sought unemployment benefits at that time from State agencies and in her application for benefits stated that she was fully able to work full time, and perform her normal duties of employment. Finally, Perkins testified under oath that she was able to resume her normal duties on March 10, 1992, and was fully able to work. Moreover, Dr. Brown's conclusions were admittedly not based upon any objective findings, whereas Dr. Henard's opinion that Perkins was able to return to work in January 1992, was based upon objective diagnostic tests which showed that Perkins was not suffering from any physical impairment that would keep her from working.

The Mississippi Supreme Court has held that "[w]hether and when a claimant has reached maximum medical recovery are questions which are to be determined by the Commission based on testimony from both lay and medical witnesses." *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 168 (Miss. 1991) (citation omitted). So long as the commission's decision is not arbitrary and capricious and is supported by substantial evidence, the appellate court will not overturn a commission decision.

Walker Mfg. Co. v. Cantrell, 577 So. 2d 1243, 1246-47 (Miss. 1991). We find that the decision of the commission on this assignment of error was based upon substantial evidence and should be affirmed. The only objective medical findings in the case *sub judice* indicated that Perkins was able to resume her normal duties of employment by March 10, 1992. In addition, Perkins testified that she was able to resume full employment on that date.

IV. WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE RULING OF THE COMMISSION THAT DR. ELLZEY'S TREATMENT OF PERKINS WAS UNREASONABLE AND UNNECESSARY?

In the case *sub judice*, the administrative judge authorized the employer to refuse payment to Dr. Ellzey for medical services and supplies rendered to Perkins between October 4, 1991, and June 23, 1992, on the ground that the services provided were "unreasonable and unnecessary to the treatment of claimant's injuries . . ." However, the judge did offer Dr. Ellzey the opportunity to request the commission to receive evidence that his charges, or any portion of them, were reasonable and necessary to the treatment of Perkins' injuries. There is nothing in the record to indicate that Dr. Ellzey or Perkins made such a request.

Perkins cites *Ray v. Mississippi State Bd. of Health*, 598 So. 2d 760, 765 (Miss. 1992) in support of her position that Dr. Ellzey's treatment was reasonable and necessary. In *Ray*, the supreme court affirmed the ruling of the commission that injections for lower back pain were reasonable and necessary to alleviate pain caused by the patient's chronic back problem. *Ray*, 598 So.2d at 764. In the present action, there is no objective medical evidence that any such chronic problem existed, and Dr. Ellzey's conclusions in regard to Perkins' condition were correctly found to be unreliable. Moreover, neither Dr. Ellzey nor Perkins accepted the administrative judge's invitation to present further evidence to support Perkins' position that the charges of Dr. Ellzey were reasonable and necessary. Thus, we hold that the commission's decision to authorize the employer to refuse payment of Dr. Ellzey's charges for services and supplies was based on substantial evidence and should be affirmed. *Id.*

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

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, PAYNE,
AND SOUTHWICK, JJ., CONCUR. HINKEBEIN, J., NOT PARTICIPATING.**