

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00519 COA

TIMOTHY J. MCKENZIE

APPELLANT

v.

MISSISSIPPI LAMINATORS AND THE TRAVELERS INSURANCE 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. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: CLARKE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN H. ANDERSON

ATTORNEYS FOR APPELLEES:

EUGENE M. HARLOW

ROMNEY H. ENTREKIN

NATURE OF THE CASE: WORKERS COMPENSATION

TRIAL COURT DISPOSITION: DENIED WORKERS COMPENSATION BENEFITS

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Appellant, Timothy McKenzie (McKenzie) appeals the Clarke County Circuit Court decision

affirming both the Workers' Compensation Commission and the administrative judge's decision to deny McKenzie additional Workers' Compensation benefits. McKenzie asserts the following issues in this appeal: (1) that the employer failed to prove that McKenzie was intoxicated at the time of the injury and (2) that the employer failed to prove that the intoxication (if any) was the proximate cause of the injury. We find that the Appellees have failed to prove that McKenzie's intoxication was the proximate cause of his injury. Therefore, we reverse the case and remand the cause for further proceedings.

FACTS

The claimant, McKenzie, filed a petition to controvert a workers' compensation claim on July 9, 1987. Therein, McKenzie claimed that he sustained an injury on June 2, 1987, while working on a construction job. Mississippi Laminators and Travelers Insurance Company, the employer and carrier, filed an answer on July 29, 1987, and later filed an amended answer alleging intoxication as an affirmative defense. McKenzie received benefits from June 3, 1987, though July 17, 1987, after which McKenzie filed an amended petition to controvert claiming that the payments were prematurely suspended.

McKenzie and two co-workers, Ronald and Donald Porter, were building a house when McKenzie was injured by a 2x4 that fell and hit him on the back. The Porters and McKenzie had been working together on the project for about one to two weeks prior to the day of the accident. Donald and Ronald Porter both testified in their depositions that McKenzie seemed confused and "spaced out" the day of the accident. McKenzie's job at the time of the accident was to tie a rope onto roof trusses and then Donald and Ronald would pull the trusses up to where they were working and anchor them into place. Donald Porter testified that he had warned McKenzie about walking under the roof trusses because things may fall from time to time. The accident happened when McKenzie walked under the roof truss, and a 2x4 slipped through the truss and struck him on the lower back. McKenzie was unconscious when they transported him to the hospital.

McKenzie was examined by several doctors following this injury. Dr. S. Mark Allen was the first to examine McKenzie on the day of the accident. Dr. Allen diagnosed McKenzie with a fractured rib, and referred him to Rush Foundation Hospital in Meridian for surgical evaluation. Among other routine tests, a urine test was administered to McKenzie before he was transferred to Meridian. The results revealed a cannabinoid level of greater than one thousand (1000) nanograms per milliliter. The usual level for detection is ten (10) nanograms per milliliter. However, Dr. Allen was not able to state conclusively whether McKenzie was intoxicated at the time he saw him at the hospital. Although it is admitted that McKenzie has been treated in an in-patient chemical dependency program, McKenzie denies drinking, smoking or being intoxicated on the day of the accident.

McKenzie subsequently visited three other doctors regarding his back. Each doctor had separate conclusions regarding McKenzie's range of motion of his back; none of which were consistent with another. Dr. Frank Jones, a general practitioner, stated that McKenzie had a ten percent (10%) permanent partial disability to his body as a whole, while Dr. Rolando Abangan, a neurosurgeon stated that he did not have any permanent impairment. Dr. Abangan felt that McKenzie could have performed light duties as of July 17, 1987, and that he probably could have resumed his regular duties by August 17, 1987. Dr. Cleave Johnson had yet another opinion. Dr. Johnson first stated that

McKenzie had a fifty percent (50%) normal range motion on his first visit, but on a subsequent examination, showed normal range motion.

A hearing was held, and the administrative judge entered an order on April 1, 1992. The administrative judge found that McKenzie was intoxicated at the time of the accident, and thus, his claim was barred by section 71-3-7 of the Mississippi Code. McKenzie appealed to the full commission and then to the circuit court where the administrative judge's findings were affirmed.

DISCUSSION

The 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*, 641 So. 2d 1176, 1180 (Miss. 1994) (citations omitted). If the commission's findings are supported by substantial evidence, all appellate courts are bound by the commissions' findings, even if the evidence would persuade this Court to find otherwise if it were the fact finder. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence. *Vance*, 641 So. 2d at 1180. Applying the standard stated above, we consider the issues raised by McKenzie.

INTOXICATION

Our workers' compensation statute states in relevant part, "No compensation shall be payable if the intoxication of the employee was the proximate cause of the injury. . .". Miss. Code Ann. § 71-3-7 (Supp. 1995). Although the statute does not define intoxication, (i.e. whether intoxication solely means under the influence of alcoholic beverages, or if it encompasses other narcotic substances as well), *Mississippi Workmens' Compensation Law* cites cases from other jurisdictions which conclude that intoxication is a condition produced by use of some stimulant in which the employee's faculties and judgment are impaired to the extent that he becomes a danger to himself. Vardaman S. Dunn, *Mississippi Workmens' Compensation* § 155 (3rd ed. 1990). However, as to whether McKenzie was actually intoxicated at the time of the accident, we look to the evidence presented. Both Donald and Ronald Porter testified that McKenzie seemed confused and dazed on the day of the accident. Donald Porter testified that McKenzie seemed to be having problems performing simple repetitive tasks that morning. Both of the Porters also testified that up to the date of the accident, McKenzie seemed to be a bright worker. Aside from the Porters' testimony, a urine analysis on the day of the accident showed McKenzie's cannabinoid level at higher than one thousand (1000) nanograms per milliliter when the usual detection level of cannabinoid is at ten (10) nanograms per milliliter. According to Dr. Allen, this was a very high level of cannabinoids. Based on the evidence in the record, we defer to the decision of the commission regarding McKenzie's intoxication as its finding is supported by substantial evidence.

PROXIMATE CAUSE

The intoxication defense raised by the employer and carrier requires them to prove (1) that the claimant was intoxicated and (2) that the intoxication was the proximate cause of the injury. *Reading & Bates, Inc. v. Whittington*, 208 So. 2d 437, 440 (Miss. 1968) (citations omitted). McKenzie argues that even if he was intoxicated at the time of the accident, the employer and carrier have failed to

prove that his intoxication was the proximate cause of his injury. We agree.

McKenzie was injured when a wooden plank fell from the roof where his co-workers were working, and struck him on the back while he was working below them. The employer and carrier maintain that McKenzie had been warned to not to walk under anybody who was working above ground. They contend that had McKenzie not been intoxicated, he would not have been standing where the plank fell on him. We think that this is contrary to the overwhelming weight of the evidence. At the time of the accident, McKenzie's job was to tie a rope onto the roof trusses, and Donald and Ronald Porter, who were working above him, pulled the trusses up and anchored them into place. The accident happened when a 2x4 from one of the trusses they had just pulled up fell and hit McKenzie on the back. Regardless of McKenzie's intoxication, his duties at the time required him to be where he was. The Mississippi Supreme Court held in *Smith Bros. v. Dependents of Cleveland* that the evidence was insufficient to prove that the claimant's intoxication was the proximate cause of his death. *Smith Bros. v. Dependents of Cleveland*, 126 So. 2d 519, 521 (Miss. 1961). In *Smith Bros.*, the decedent, Cleveland, was told to go home for the day after his supervisor discovered that he was intoxicated. The employer argued that Cleveland, while intoxicated, was trying to unload the logs of a truck contrary to orders. The court found that this contention was not supported by the evidence, and that based on the evidence, Cleveland was probably walking along the side of the truck loaded with logs when a few unsecured logs rolled off the truck and killed him. Finding that his intoxication was not the proximate cause of his injury, the court remanded the case back to the Commission to determine the benefits owed. The present case is similar to *Smith Bros.* in that the accident that injured the claimant was not proximately caused by the claimant's intoxication. McKenzie's intoxication did not cause the 2x4 to fall from the truss up above, just as Cleveland's intoxication did not cause the unsecured logs to fall off of the truck in *Smith Bros.*

CONCLUSION

Based on the record, the evidence does not support the fact that McKenzie's intoxication was the proximate cause of his injury. The employer and carrier argue that McKenzie was paid benefits through July 17, 1987, when Dr. Abangan stated that he was able to perform light duties, and therefore, he should not be entitled to additional benefits. The administrative judge denied McKenzie additional benefits, found that the claim was statutorily barred, and dismissed the case with prejudice. Because we find that McKenzie's intoxication was not the proximate cause of the injury, we reverse the decision of the commission which affirmed the administrative judge's order to dismiss this cause. Accordingly, we remand the cause back to the commission to determine what benefits are to be paid. **THE JUDGMENT OF THE CLARKE COUNTY CIRCUIT COURT IS REVERSED AND THE CAUSE IS REMANDED FOR A DETERMINATION OF BENEFITS TO BE PAID. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEE.**

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

McMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY

SOUTHWICK, J.

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McMILLIN, J., DISSENTING:

I respectfully disagree with the majority's conclusion that the commission was manifestly in error in determining that McKenzie's intoxication was the proximate cause of his injuries. For that reason I must dissent.

The majority opinion suggests that "[r]egardless of McKenzie's intoxication, his duties at the time required him to be where he was." McKenzie's general duties on the day in question consisted of working on the ground assisting two carpenters working above him in raising roof trusses up for installation. However, there is no proof that these duties required McKenzie to be directly under the carpenters. In fact, the exact physical proximity of McKenzie to the carpenters when performing these duties is not explored fully in the record. It appears to me that this is the case because it is undisputed that McKenzie was not going about these assigned duties at the time of his injury. In his answers to interrogatories, he described the circumstances of his injury as follows: "I walked under the roof to go get a drink of water and a piece of lumber fell from the roof, and landed on me." During his testimony at the hearing, he testified that, ". . . and it was kind of hot, and I went in to get some water. As I walked through the door of the place, something fell in my back bone."

Both carpenters testified that McKenzie had been repeatedly warned about walking directly under the area where they were working, but that, at the time of his injury, he was exactly where he had been

warned not to be. They testified that the piece of lumber that hit McKenzie was being used to support the trusses while they were being installed, and that it simply slipped and fell. One carpenter testified that the warnings were issued to McKenzie because there was always the possibility of something falling, or of a worker dropping a tool, or some similar event. In my opinion, the commission was entitled to draw the reasonable inference that McKenzie's state of intoxication resulted in his disregard for the well-known, but easily avoidable, dangers inherent in his activity and that this impairment-induced inattention was the proximate cause of his injury within the meaning of Section 71-3-7.

I believe the denial of benefits should be affirmed.

SOUTHWICK, J., JOINS THIS DISSENT.