

IN THE COURT OF APPEALS 10/29/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CC-00239 COA

GILBERT BAKER, JR.

APPELLANT

v.

**CITY OF HOLLANDALE - EMPLOYER; MISSISSIPPI MUNICIPAL WORKERS
COMPENSATION GROUP - CARRIER**

APPELLEES

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

TRIAL JUDGE: HON. HOWARD Q. DAVIS, JR.

COURT FROM WHICH APPEALED: WASHINGTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ALSEE MCDANIEL

ATTORNEY FOR APPELLEES:

ROBERT M. CARPENTER

NATURE OF THE CASE: ADMINISTRATIVE

TRIAL COURT DISPOSITION: AFFIRMED DECISION OF WORKERS' COMPENSATION
COMMISSION DENYING BENEFITS

BEFORE FRAISER, C.J., KING, AND PAYNE, JJ.

FRAISER, C.J., FOR THE COURT:

Appellant, Gilbert Baker (Baker), a former police officer with the City of Hollandale Police Department, was allegedly injured in a scuffle with a suspect while in the line of duty. Baker claims he sustained injuries to his head, neck, back, shoulders, arms, and vision. He filed a petition to controvert on October 15, 1991, alleging temporary total disability. The final judgment of Administrative Law Judge Higginbotham (ALJ) stated that medical evidence failed to establish any injury related to Baker's work. The Worker's Compensation Commission (commission) affirmed the order of the ALJ. Subsequently, Baker filed a motion to reconsider and supplement the record. His motion was denied, and Baker appealed the commission's decision to the Washington County Circuit Court. The circuit court affirmed the commission's decision. On appeal to this Court, Baker presents the following issues:

I. WHETHER THE COMMISSION COMMITTED ERROR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND TO SUPPLEMENT RECORD.

II. WHETHER THE COMMISSION'S ORDER AND DECISION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

These issues being meritless, we affirm.

FACTS

Baker alleged he was injured on the job while apprehending a suspect. He claims he hit his head on an air conditioning unit and sustained injuries to his eye, head, back, and arms. The alleged injury occurred on April 15, 1991; however, Baker did not seek medical attention until June 1991. Baker filed his petition to controvert in October 1991, alleging temporary total disability. Evidentiary hearings were held in January and March 1992. During that time, Baker went through two competent attorneys and ultimately chose to represent himself at the final hearing on April 3, 1992.

During the entire process leading up to the final hearing, the ALJ attempted to assist Baker in understanding the commission rules and procedures, despite Baker's sometimes garrulous and unpleasant disposition towards the ALJ and the commission. Baker, a veteran with full access to the Veteran's Hospital in Jackson, refused to take advantage of his free medical care because he insisted that he wanted his employer to pay for it.

In addition to Baker's sworn testimony, the following documents were received into evidence: 1) affidavit of Dr. John M. Estess; 2) sworn medical report of Dr. Edwin G. Egger; 3) sworn medical statement of Dr. J. Edward Hill; 4) affidavit of Dr. John W. McFadden; 5) sworn medical statement of Dr. Edwin G. Egger, dated May 8, 1992; and 6) sworn medical report of Dr. John C. Neill, dated April 14, 1992. Baker complains that the last two documents received into evidence after the April 2, 1992 hearing were admitted contrary to the authority of *Georgia-Pacific Corp. v. McLaurin*, 370 So.

2d 1359 (Miss. 1979). Also admitted into evidence were letters the ALJ sent to the parties on April 20 and May 1, 1992, illustrating the hearing procedures adopted at Baker's request. The following is an excerpt from the ALJ's evaluation of evidence and findings of fact:

The record consists of the claimant's sworn testimony of April 3, 1992, the aforementioned medical testimony by Affidavit, and other documents received on behalf of claimant on April 3, 1992. Claimant testified that he struck his head against an air conditioner on April 15, 1991. Claimant at first denied being struck in the eye, and then stated that he was poked in the eye by the finger of an assailant. Based upon a history that claimant "struck an air conditioner," Dr. McFadden, a pain specialist, testified that claimant suffered injuries to his neck, back, shoulder, arm, wrist and eye as a result of that incident. Not only does this appear to be inherently improbable, but Dr. McFadden's opinions are also contradicted by Dr. John Neill, a neurologist, who received a much more detailed history from claimant and even then found no physical abnormalities to account for claimant's myriad complaints.

Dr. Egger found that claimant suffered an impairment of vision in his left eye as a result of a macular hole in that eye. Dr. Egger stated that he could not find to a reasonable degree of medical probability that this condition resulted from claimant being struck on the side of the head on April 15, 1991. Dr. Egger did not note a history of claimant having been poked in the eye by his assailant's finger, and thus rendered no opinion on any relationship between such an event and claimant's macular hole.

The concern evidenced by Dr. Estess that claimant may have suffered an injury to the cervical spine is dispelled by the examination and findings of Dr. Neill. Dr. Hill's Affidavit testimony speaks only to whether claimant's complaints were being caused by degenerative arthritis. I do not find this evidence to be relevant in light of the Affidavit testimony of Dr. Neill. The evidence demonstrates that claimant's accident occurred on April 15, 1991. Claimant told Dr. Neill that he lost consciousness at that time. Claimant variously told physicians that his symptoms commenced on April 15, 1991; and that they developed "at some time" afterward. However, the record does not disclose that claimant sought any medical treatment until June 11, 1991.

I hereby find that the credible medical evidence fails to establish on the basis of reasonable medical probabilities that claimant suffered any injury as a result of his accident of April 15, 1991 for which medical or disability compensation benefits are due.

The ALJ's order was affirmed by the full commission on September 2, 1992. Baker filed a motion to reconsider and supplement the record that was denied by the commission on October 29, 1992. The Washington County Circuit Court affirmed the commission's decision affirming the ALJ's order denying benefits.

I. WHETHER THE COMMISSION COMMITTED ERROR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND TO SUPPLEMENT RECORD.

Baker contends that the commission erred in refusing to reopen his case. He had filed a motion to reconsider and supplement the record, but on appeal relies on case law pertaining to reopening a case as opposed to reconsidering a case. This Court is satisfied that Baker's motion to reconsider and supplement the record was an attempt to reopen his case, and we consider it accordingly. Baker is correct in stating that the commission may reopen a case when there is a change in conditions or because of a mistake in the determination of fact. *Georgia-Pacific Corp. v. Gregory*, 589 So. 2d 1250, 1254 (Miss. 1991); *see also* Miss. Code Ann. § 71-3-53 (1972). The decision whether or not to reopen a case is entirely at the discretion of the commission, and will not be reversed absent a clear abuse of discretion. *Smith v. Container Gen. Corp.*, 559 So. 2d 1019, 1023 (Miss. 1990). Baker claims that the commission should have allowed the case to be reopened in order for him to respond to the medical reports of Drs. Neill and Egger that were entered into evidence after the final hearing. Dr. Neill was appointed by the commission to perform an examination on Baker to determine what, if any, injuries Baker suffered as a result of his accident. The ALJ admitted Dr. Neill's report into evidence, as well as an additional report from Dr. Egger. In a letter to both parties, the ALJ explained the following:

This will confirm my April 17, 1992 telephone conversation with Mr. Baker wherein he requested that I issue my decision in his case immediately upon receiving the narrative report of Dr. John Neill, and that I consider, in addition to the report of Dr. Neill, the Affidavit reports of Dr. John M. Estess, Dr. John W. McFadden, Dr. Edwin G. Egger, and Dr. Edward Hill, all of which are presently in the Commission file. I understand Mr. Baker's request to be a waiver of his right to submit additional evidence prior to my decision, and a waiver of my prior decision requiring the passage of thirty days before receipt of sworn medical reports.

Pursuant to the foregoing, I propose to receive into evidence, at claimant's request: the report of Dr. John M. Estess, dated August 28, 1990, with attached Affidavit; the narrative report of Dr. John W. McFadden, dated March 18, 1992, with attached Affidavit; the notarized medical report of Dr. Edwin G. Egger, dated April 2, 1992; and the notarized medical report of Dr. J. Edward Hill, dated April 2, 1992. The report of Dr. John Neill, issued pursuant to referral by this Commission pursuant to Mississippi Code Annotated, Section 71-3-15 and Mississippi Code Annotated, Section 71-3-55, will be placed into evidence upon receipt. A copy of the report of Dr. John Neill will be furnished to the parties immediately upon its receipt by the Commission. After mailing of the report of Dr. Neill, the parties will have ten (10) days to file written objections, after which I will enter my decision based upon the above Affidavit evidence and such other competent evidence as may then be in the record.

This proposal is being made to accommodate the request of Mr. Baker. Since the

employer and carrier are due an equal right to be heard, I stress that either party may file written objections to the outlined procedure, which will be a substitute for the hearing procedure outlined in my Order of April 6, 1992, at any time between the date of this correspondence and the expiration of ten (10) days following the mailing by the Commission of the report of Dr. Neill.

The ALJ sent an additional letter to the parties, again reminding them that they had ten (10) days to file written objections:

As per my letter of April 20, 1992, and Administrative Judge Order dated April 6, 1992, I enclose herewith a copy of the sworn medical narrative of Dr. John C. Neill, neurological surgeon. In order to accommodate the insistence of Mr. Baker that the Commission immediately rule on his claim, as I also state in my letter of April 20, 1992, this document will be received into evidence, along with the sworn reports of Dr. Hill, Dr. Egger, Dr. McFadden and Dr. Estess, at the expiration of ten (10) days from the date of this letter. The parties have ten (10) days from the date of this letter to file written objections, sworn rebuttal Affidavits, and written arguments; absent objections by the parties during this period, I will prepare my decision at the end of that period.

Baker complains on appeal that these medical reports were submitted contrary to *Georgia-Pacific Corp. v. McLaurin*, 370 So. 2d 1359 (Miss. 1979). *McLaurin* requires notice and time to respond to medical reports before their admission into evidence. *Id.* at 1362-63. Baker cries foul, stating that he did not have notice or time to respond to the medical reports of Dr. Neill and Egger. To the contrary, the ALJ made every effort short of becoming an advocate for Baker to allow for objections and response. The ALJ admitted the reports into evidence at the request of Baker who wanted his claim resolved immediately. Baker cannot complain now of a situation created at his urging and without objection. Moreover, Baker did not allege a change in circumstances or a mistake in the determination of a material fact; therefore, he did not meet the statutory requirements for reopening a case. This issue is without merit.

II. WHETHER THE COMMISSION'S ORDER AND DECISION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Baker argues that because the commission refused to reopen his case, the record is incomplete and therefore the commission's decision is not supported by substantial evidence. However, the commission did not err in refusing to reopen the case, and the record is complete. We review the commission's decision under our familiar standard of review. Appellate review of compensation claims is a narrow one. It is well settled that "[t]he Commission is the ultimate fact-finder." *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990). "Accordingly, the Commission may accept or reject an administrative judge's findings." *Id.* In the case *sub judice*, the commission accepted and adopted the findings of the ALJ after thoroughly studying the record and

applicable law. Our standard of review is set forth in *Delta CMI v. Speck*:

Under settled precedent, courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing evidence or otherwise evaluating evidence and determining facts; . . . "[W]hile appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the commission is that which is actually under review for all practical purposes."

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

Delta CMI v. Speck, 586 So. 2d 768, 772-73 (Miss. 1991) (citations omitted). "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." *Mitchell Buick, Pontiac & Equip. Co. v. Cash*, 592 So. 2d 978, 980 (Miss. 1991) (citations omitted). In Baker's case, the ALJ sent Baker to a neurologist for a definitive examination because Baker could not supply sufficient evidence that he had suffered a compensable injury. Neither Dr. Neill nor Dr. Egger linked Baker's work-related accident to his claimed injuries. The other doctors' reports were either unreliable or inapplicable. The commission's decision denying Baker's compensation claim for worker's benefits is supported by substantial evidence.

THE DECISION OF THE WASHINGTON COUNTY CIRCUIT COURT AFFIRMING THE DECISION OF THE WORKERS' COMPENSATION COMMISSION DENYING BENEFITS IS AFFIRMED. COSTS ARE TAXED TO APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.