

IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00438 COA

OLA T. BECK

APPELLANT

v.

PACKARD ELECTRIC DIVISION, GENERAL MOTORS CORPORATION

APPELLEE

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

TRIAL JUDGE: HON. ROBERT L. GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROBERT G. GERMANY

ATTORNEY FOR APPELLEES: ANDREW D. SWEAT

NATURE OF THE CASE: WORKERS' COMPENSATION CLAIM

TRIAL COURT DISPOSITION: AFFIRMED COMMISSION'S ORDER

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

PAYNE, J., FOR THE COURT:

Ola T. Beck brought this workers' compensation claim against her employer, the Packard Electric Division of General Motors Corporation. The administrative judge determined, at the time of the hearing on the matter, that Packard had already paid Beck all temporary and permanent disability benefits that she was owed, and that no additional disability benefits should be paid. The full

commission affirmed the judge's order, and the circuit court affirmed the commission. Beck now appeals the circuit court's affirmance of the commission. We find that substantial evidence existed to support the previous findings, and that the commission's decision was not arbitrary or capricious. We therefore affirm the commission's decision and the circuit court's affirmance.

FACTS

Beck began working for Packard in 1973 and began having problems with her left knee in the course of her employment on August 13, 1990. Beck quit work on August 23, 1990, due to her knee injury. Packard's plant doctor referred Beck to an orthopedic surgeon, Dr. McWillie Robinson, who treated Beck and conducted an MRI test that revealed a possible torn medial meniscus, or cartilage. Dr. Robinson subsequently referred Beck to his partner, Dr. Kendall Blake, who performed an arthroscopic examination. This exam revealed no abnormality or tearing of the cartilage but did indicate arthritic damage or roughening, which Dr. Blake corrected the best he could. Dr. Blake treated Beck until he released her on January 3, 1991, for half-day work for one week, and then to resume full-time work with no restrictions. He noted that she had full movement, no limp, and no fluid within the joint. When Dr. Blake released Beck, he determined that she had reached maximum medical recovery and assigned to her a ten percent permanent partial impairment of the left lower extremity.

Beck did not return to work upon her release because Packard did not have a part-time position available. Packard continued to pay Beck temporary total disability benefits until she did return to full-time work in the shrink-wrap department on January 18, 1991. Packard paid Beck's medical expenses incurred as a result of her injury and also paid temporary total disability benefits from August 28, 1990, to January 18, 1991. Packard also paid her permanent partial disability benefits based on the ten percent permanent partial impairment rating following the date of maximum medical recovery.

Beck returned to Dr. Blake on March 22, 1991, and reported "pulling in her knee" and tenderness at the surgery site. Dr. Blake found nothing abnormal but reported a slight clicking noise in her left knee that he stated usually resolves itself over time. He also reported that no effusion existed (fluid accumulation in the knee joint), and that everything otherwise appeared completely normal. He maintained that she was still able to work full-time without restriction and advised her to lose weight and to exercise her quadriceps.

Beck filed a petition to controvert with the Mississippi Workers' Compensation Commission on April 12, 1991, requesting benefits for a one hundred percent loss of industrial use of her left lower extremity. Packard admitted that Beck had suffered a compensable injury but paid her medical expenses, temporary total disability benefits, and permanent partial disability benefits based on a ten percent permanent partial impairment rating. However, Packard denied that she was entitled to any benefits beyond the ten percent loss of use. Beck quit work under a long-term leave of absence in May 1991 due to chronic high blood pressure, hypertension, and a "near stroke."

Beck met with Dr. Blake again on August 12, 1992, with what she described as a sudden pain in her knee. He reported nothing more than a slightly warm effusion of her left knee and drained a small amount of fluid from her knee. On February 12, 1993, Beck filed for total and permanent disability benefits under Packard's pension plan, stating that she had become totally disabled on May 28, 1991,

due to a near stroke and blood pressure, nerve, and heart trouble. Dr. Blake saw Beck again on June 17, 1993, when she complained of knee pain. He found Beck to be "enormously overweight," no effusion, and no fluid or loss of muscle mass, and some mild degenerative joint disease in both knees. He noted Beck's "marked obesity" and recommended that she lose weight.

On September 1, 1993, a commission administrative judge held an evidentiary hearing. On October 8, 1993, the judge issued an order denying Beck's claim for additional permanent disability benefits. The order stated that Beck's industrial disability was no greater than her anatomical disability and, because the parties agreed that Beck had already been paid all temporary disability benefits and all permanent disability benefits based on a ten percent anatomical disability to her left leg, that no additional disability benefits were due. On October 26, Beck appealed to the full commission. On April 1, 1994, the commission affirmed the administrative judge without comment. On April 28, Beck filed an appeal with the circuit court. On March 16, 1995, the circuit court affirmed the commission's order. The court stated that ample evidence existed to support the finding of the commission as the finder of fact, that the commission clearly considered the evidence as a whole, and that the order was not arbitrary or capricious. Beck now appeals the circuit court's order.

ISSUES

I. DID THE CIRCUIT COURT AND THE COMMISSION ERR IN DETERMINING THAT BECK SUFFERED NO INDUSTRIAL LOSS OF USE OF HER LEFT LOWER EXTREMITY GREATER THAN THE TEN PERCENT ASSIGNED BY DR. BLAKE?

Beck argues that the administrative judge, commission, and circuit court failed to exercise their power and duty to evaluate other evidence, beyond only the physical or medical impairment rating assigned by Dr. Blake, in determining her industrial loss of use and loss of future wage earning capacity from the evidence as a whole. She contends that if other evidence had been considered, such as recurrent problems with her knee when she returned to work and Dr. Blake's testimony that she would have trouble walking, standing, sitting, and bending, then she would have been allowed more than the ten percent disability rating initially assigned to her by Dr. Blake.

II. WAS THE DETERMINATION OF THE DEGREE OF LOSS BY THE CIRCUIT COURT AND THE COMMISSION MANIFESTLY WRONG AND NOT SUPPORTED BY THE EVIDENCE?

Beck also contends that the evidence does not support the commission's or the circuit court's order limiting her industrial loss of use of her lower left extremity to ten percent disability. She believes that the decision was manifestly wrong when taking into account evidence of pain and swelling in her left knee upon her return to work, and Dr. Blake's testimony that these activities would aggravate her knee.

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).

ANALYSIS

The Mississippi Supreme Court has distinguished between medical disability and industrial disability in that "'medical' disability is the equivalent of a functional disability and relates to actual physical impairment. 'Industrial' disability is the functional or medical disability as it affects the claimant's ability to perform the duties of employment." *DeLaughter v. South Cent. Tractor Parts*, 642 So. 2d 375, 379 (Miss. 1994) (quoting *Robinson v. Packard Elec. Div.*, 523 So. 2d 329, 331 (Miss. 1988)). The court had also held that "predicating an award on medical or functional disability rather than upon a determination of the extent of loss of industrial use or impairment of claimant's wage earning capacity is error." *Id.* (quoting *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1125 (Miss. 1992)). This concept is consistent with the Court's definition of disability as the "incapacity to earn the wages which the employee was receiving at the time of the injury in the same or other employment." *Id.* (quoting *Jordan v. Hercules, Inc.*, 600 So. 2d 179, 183 (Miss. 1992)). To determine loss of wage earning capacity, the court must consider factors such as "the amount of training and education which the claimant has had, his inability to work, his failure to be hired elsewhere, the continuance of pain, and any other related circumstances." *Id.* (quoting *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 167 (Miss. 1991)). "[The] determination should be made only after considering the evidence as a whole." *Id.*

The court has also stated that "the [Workers' Compensation] Commission is not confined to medical testimony in determining the percentage of loss to be assigned to an injury." *McGowan v. Orleans Furniture Inc.*, 586 So. 2d 163, 167 (Miss. 1991). "Lay testimony may be considered to supplement medical testimony but 'the probative value of any witness' testimony is for the fact-finder to determine.'" *Id.* (citation omitted). Finally, the court has held that a workers' compensation claimant must sustain the burden of proving both a medical impairment *and* a loss of wage earning capacity as a result of that medical impairment. *Robinson v. Packard Elec. Div.*, 523 So. 2d 329, 331 (Miss. 1988) (citing Miss. Code Ann. §§ 71-3-3(I), 71-3-17(c)(25) (1972)).

In the present case, the record showed that Beck had earned a Bachelor of Arts degree and post-graduate credit toward a masters degree. She taught in the Jackson Public School system from 1971-

75 and began working at Packard in September 1973. Following her knee injury, Beck returned to work full-time on January 18, 1991. She stated that she continued to work with stiffness and pain in her knee. She worked until May, when she quit entirely and applied for permanent disability benefits through Packard's pension plan due to high blood pressure and hypertension. She stated that her heart and blood problems were unrelated to her knee injury, a fact that the medical deposition testimony confirmed. Dr. Blake testified by deposition that he could not find any medical reason for Beck's complaint of knee pain. The record shows that he drained her knee once of some fluid on August 12, 1992. Otherwise, none of the medical evidence showed anything unusual. The record also showed that, on two of the three visits to Dr. Blake after medical release, his observations and impressions were that Beck was overweight and markedly obese, and that he recommended that she should lose weight. Dr. Blake never advised or required Beck not to return to work after releasing her on January 3, 1991, but to return to part-time work for one week and then to full-time work thereafter. Dr. Blake testified that Beck's left knee problem stemmed in part from an arthritic condition that could easily occur in the other knee as well. He said that, had Beck not suffered any knee problem prior to her injury, the injury would at least be partly to blame for her left knee pain. Dr. Blake stated that normal activities such as walking up and down stairs, squatting, sitting for extended periods, standing, and walking might be more difficult, but that the difficulty related to those activities could not be definitively related to either her underlying pre-existing arthritis or to the knee injury itself. He said that his giving Beck a ten percent impairment rating from the injury was his best educated estimate of what portion of her future knee problems would be due to the injury alone. Additionally, Beck's supervisor testified at the hearing that Beck did complain to him of knee pain and other problems after she returned to work, but that she never told him that her knee hindered or prevented her from doing her job.

We believe that substantial evidence existed upon which the commission and circuit court awarded Beck no more than a ten percent anatomical disability. The administrative judge properly addressed the issue as a determination of the extent of Beck's disability or loss of wage earning capacity due to her injury. Beck failed to present evidence of her inability to pursue gainful employment (i.e. future wage earning capacity) due to her knee injury, as opposed to her blood pressure and hypertension problems. The judge considered evidence presented by both parties of Beck's education, work experience, and medical condition according to both medical depositions. We believe that the judge, the commission, and the circuit court properly determined that Beck suffered no more industrial disability or loss of wage earning ability than the medical impairment (anatomical disability) originally assigned by Dr. Blake. Beck did prove that she had a medical impairment, but she clearly failed to prove that she had a medical impairment (injured knee) greater than the ten percent assigned, *and* a loss greater than ten percent of wage earning capacity as a result of that medical impairment (injured knee). This factual question was properly determined by the commission based upon substantial, credible evidence.

The circuit court's opinion stated that ample evidence existed to support the commission's findings. The court stated that the commission, when determining Beck's degree of loss for future wage earning purposes, or industrial disability, properly considered her pre-industry and post-industry earnings, anatomical disability provided by Dr. Blake, education, work experience, and other factors connected to her wage earning ability such as her inability to work, failure to be hired elsewhere, continuance of pain from the injury, and lay testimony that accounts for these factors. The

administrative judge's and the court's opinions stated that the evidence as a whole supported the conclusion that Beck possessed a good education, credit hours toward a masters degree, work experience as a school teacher, and ability to earn her pre-injury wages before leaving Packard. Regarding the issue of Beck's future wage earning capacity, the record shows that the commission did consider Beck's own lay testimony of her recurring knee pain. Moreover, the commission considered as well evidence that Dr. Blake, on the three occasions that he saw Beck after her medical release, reported that he found nothing abnormal about her knee over a three-year period after the injury. The record also indicates that the commission considered Beck's supervisor's testimony that Beck had told him after she returned to work that her knee hurt, but that he also testified that she never stated to him that she could not do her job because of any knee pain. The commission and the court considered Beck's testimony that the reason she completely left Packard in May 1991, and remained off work to the date of the hearing, was not due to her knee injury but due to her heart, blood pressure, and hypertension problems.

We believe that the commission properly considered the whole of the evidence, and that it was correct in its findings. We further believe that its decision and order were supported by substantial evidence, and that neither was arbitrary or capricious. We believe that the commission did not simply predicate its award on Beck's ten percent medical disability rating, but based its decision on *all* existing evidence. The commission properly found that Beck suffered no loss beyond the ten percent impairment assigned by Dr. Blake. The commission's findings were also based on the absence of evidence showing that she suffered loss of wage earning capacity due to her injured knee. Regardless of whether the result might have been different were we the fact finder, we cannot say that the commission's decision was arbitrary or capricious. The commission properly exercised its discretion as fact finder and based its order upon what we believe to be substantial evidence.

CONCLUSION

We believe that the commission and the circuit court properly affirmed the administrative judge's determination of the amount of Beck's compensation. Substantial evidence existed upon which to base an amount not exceeding the amount awarded. We affirm the order of the commission in all respects for the reasons outlined herein.

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

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., NOT PARTICIPATING.