

IN THE COURT OF APPEALS 06/04/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-00376 COA

AMERICAN COMMERCIAL CHINA AND LIBERTY MUTUAL INSURANCE COMPANY

APPELLANTS/CROSS-APPELLEES

v.

SUSAN NECAISE

APPELLEE/CROSS-APPELLANT

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. KOSTA VLAHOS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

BENJAMIN U. BOWDEN

ATTORNEY FOR APPELLEE:

JAMES K. WETZEL

NATURE OF THE CASE: CIVIL: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: BENEFITS DENIED TO NECAISE AS NOT CAUSALLY
RELATED TO HER INDUSTRIAL ACCIDENT

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

BRIDGES, P.J., FOR THE COURT:

Susan Necaise (Necaise) was injured while working for American Commercial China (American China). American China was insured under a workers' compensation policy by Liberty Mutual Insurance Company (Liberty Mutual). The Workers' Compensation Commission found that Necaise was not entitled to permanent partial disability, but was entitled to benefits for medical treatment relating to her lumbar spine injury. The commission further found that Necaise was not entitled to benefits for medical treatment relating to her cervical spine injury as that injury was not work related. All parties appealed this decision to the circuit court which affirmed the commission's findings concerning Necaise's work-related injury, but reversed the commission's findings that Necaise was not entitled to permanent partial disability benefits. All parties subsequently appealed that court's findings to our Court. We find that the lower court correctly reversed the commission's findings as to Necaise's permanent partial disability award. We also agree that Necaise is not entitled to compensation for her cervical spine injury and therefore affirm the decision of the lower court.

STATEMENT OF THE FACTS

On December 27, 1989, Susan Necaise was injured while employed with American Commercial China. Necaise was in the process of lifting setters while engaged in the procedure known as "saggar washing" when she felt a sharp pain in her back. After finishing two or three more setters, Necaise reported the injury to her supervisor. At the time of the injury, American China was insured under a policy of workers' compensation insurance issued by Liberty Mutual Insurance Company.

On January 2, 1990, Necaise saw Dr. Joseph Hull, a general physician, with Primary Care Associates on Highway 49 in Gulfport. She complained of pain in her lower back, which radiated into her hips and legs. Dr. Hull prescribed some muscle relaxers and inflammation medication. He also requested that she return for a checkup the following week. When she returned, Dr. Hull suggested that she not return to work for another three weeks and renewed her prescription medication. At this time, Necaise did not complain of any cervical problems. However, she started to suffer severe headaches which made her very sick. Dr. Hull diagnosed Necaise with a lumbosacral strain and ruled out a herniated disc.

Dr. Hull referred her to physical therapy, but the therapy increased her pain. At that time,

Necaise began seeing Dr. Richard Peden, another general physician in the same office as Dr. Hull. Dr. Peden referred Necaise to Dr. Steven Thomas, an orthopedic surgeon. Dr. Thomas recommended that Necaise continue her physical therapy and suggested that she enter a work-hardening program. Necaise began the program, but complained that the program increased her pain and made her condition worse. She continued to have headaches which made her see double and made her "sick to her stomach." Dr. Thomas ran some tests on Necaise and suggested that she lose weight to help alleviate some of the pain. Dr. Thomas then released Necaise to Dr. Hull.

At her next visit to Dr. Hull, Necaise asked that he refer her to a neurosurgeon. Dr. Hull did not think that she needed to see a neurosurgeon and referred her to Dr. Dudley Burwell, another orthopedic surgeon. Dr. Burwell gave Necaise a cortisone shot which helped her lower back, but Necaise continued to have headaches and neck pain. Dr. Burwell also suggested she receive physical therapy treatments. Necaise continued physical therapy, but maintains that the therapy only made her condition worse. She then stopped seeing Dr. Burwell for treatment "because he was providing the same treatment that Dr. Hull was providing and [she] didn't seem to be getting any better." Liberty

Mutual paid for this medical treatment and temporary total disability benefits to Necaïse.

Necaïse continued to seek treatment from Dr. Hull, who advised her to continue therapy "for a while longer." Necaïse continued physical therapy, but decided to contact an attorney. Her attorney got authorization from Liberty Mutual to consult Dr. Harry Danielson, a neurosurgeon. Dr. Danielson performed a myelogram and CT scan, which showed that Necaïse was suffering with a disc injury in her neck which was pinching a nerve and causing her headaches. Specifically, he found that Necaïse had herniated discs at C4-5, C5-6, and L4-5. Surgery was recommended.

On January 9, 1991, American China and Liberty Mutual filed their motion to controvert

asserting that Necaïse was not entitled to medical treatments or benefits under the Mississippi Workers' Compensation Act. On January 11, Dr. Danielson performed an anterior cervical discectomy at C5-6 and fusion. On January 14, Necaïse filed her petition to controvert with regard to the injury. Dr. Danielson subsequently performed two lumbar surgeries, a percutaneous nucleotome discectomy on July 26, 1991, and a micro discectomy and foraminotomy at L4-5 on February 7, 1992.

On April 21, 1992, Dr. Danielson released Necaïse from his neurosurgical care. She was diagnosed with a twenty-four percent medical disability and would not be able to do any heavy lifting, stooping, or squatting as required by her previous job. Dr. Danielson recommended that Necaïse find alternate employment which did not require her to lift, stoop, or squat.

Liberty Mutual refused to pay for her surgeries as not causally related to her industrial accident. Necaïse appealed to the Workers' Compensation Commission. The administrative judge found that Necaïse was entitled to temporary total disability benefits from December 27, 1989, through April 21, 1992, the date of maximum medical improvement. He also found that Necaïse was entitled to benefits for the medical treatment necessary for her lumbar spine injury. However, it was found that Necaïse was not entitled to benefits for medical treatment and services with regard to her cervical spine, nor was she entitled to permanent indemnity benefits.

All parties appealed to the full commission which upheld the administrative judge's order in its entirety. Subsequently, all parties appealed to the Harrison County Circuit Court. On March 15, 1995, that court upheld the commission's findings that Necaïse was only entitled to benefits for services with regard to her lumbar spine injury. However, the court also found that Necaïse was

entitled to permanent disability benefits and ordered the cause remanded for a determination of benefits.

On April 4, 1995, American China and Liberty Mutual filed their appeal to this Court arguing that Necaïse is not entitled to permanent disability. Necaïse then filed her notice of cross appeal to this Court maintaining that she is entitled to benefits from her cervical injury.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE WORKERS' COMPENSATION COMMISSION ERRED IN

FINDING THAT NECAISE'S CERVICAL INJURIES AND RELATED MEDICAL TREATMENT WERE NOT CASUALLY RELATED TO HER INDUSTRIAL ACCIDENT.

Our standard of review of the case sub judice has been expressed many times. Because the circuit court partially reversed the full commission's findings and order, we will again clarify our review. The Mississippi Workers' Compensation Commission is the finder of facts in a compensation case. *Cooper v. Marathon Freight Lines*, 635 So. 2d 855, 860 (Miss. 1994). The Mississippi Court of Appeals will employ a deferential standard to the commission's findings where they are supported by substantial evidence. *Id.* (citations omitted).

On appeal to the circuit court, the court must also defer to the commission's findings of fact. *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991). In no case can the circuit court substitute its judgment of the facts in place of the full commission's findings when the commission's findings are supported by substantial evidence in the record. *Presto Mfg. Co. v. Teat*, 241 So. 2d 661, 662 (Miss. 1970).

On review to the circuit court, it did not have to pass upon the question of whether Necaise's injuries were compensable. Instead, the question to be reviewed by the court was whether the record

substantiated the commission's finding that Necaise's cervical injury was not work related. The finder of fact, the commission, found that Necaise's cervical injury was not work related based on the evidence presented.

In determining that Necaise's cervical injury was not work related, the commission evaluated the testimony of three doctors. Dr. Hull, a general physician, treated Necaise immediately after her injury in January 1990. Dr. Hull testified that Necaise never complained about cervical problems during the six-month period that he treated her. Dr. Hull further testified that Necaise never complained about any symptoms that would have led him to believe that Necaise was suffering from cervical problems when he examined her. It was Dr. Hull's opinion that her cervical injury was not related to Necaise's lumbar spine injury. Dr. Thomas, an orthopedic surgeon, testified that he had treated Necaise for the injuries to her lower back in 1990. Dr. Thomas stated that Necaise never complained of cervical problems, nor did she complain of any symptoms that would have led him to believe that Necaise was suffering from cervical problems. He also testified that it was his opinion that Necaise was not suffering from any type of cervical problem at the time he was treating her. Dr. Burwell, another orthopedic surgeon who treated Necaise, also testified (by affidavit) that Necaise did not complain of any cervical problems, nor did she have any complaints which would have led him to believe Necaise was suffering from any type of cervical problem.

Finally, Dr. Danielson, Necaise's primary physician in this case, testified that he did not know whether Necaise complained to other physicians about her cervical problems. In his opinion, his treatment of Necaise for her cervical problems did not support a causal relationship to her work injury because Necaise had not complained to her previous physicians. He also stated that he was "caught in the middle of who's telling the truth."

It was the commission's finding that Necaïse's cervical injury was not work related. This finding is supported by the record and as such, we affirm the lower court's decision.

II. WHETHER NECAISE SHOULD BE AWARDED PERMANENT DISABILITY BENEFITS.

The commission found that Necaïse did not suffer any "occupational disability and/or loss of wage-earning capacity" as a result of her injury. The lower court reversed the commission and ruled that the commission's findings were not supported by substantial evidence and contrary to the workers' compensation law of Mississippi. We agree with the lower court.

The Mississippi Supreme Court has held:

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.

Jordan v. Hercules, Inc., 600 So. 2d 179, 183 (Miss. 1992).

Testimony showed that Necaïse was twenty-four to twenty-five percent permanently disabled and was restricted to "light duty" work. Further, it is uncontested that Necaïse could not return to her previous employment. No rebuttal evidence was offered by either Liberty Mutual or American China. However, there was much uncontested testimony that Necaïse attempted to seek employment, albeit unsuccessfully. She applied for more than thirty jobs. She sought employment through the state employment office. Necaïse also tried to find a job through the Mississippi Vocational Rehabilitation Department. The only job Necaïse found was a part-time job with the Hancock County School System as a substitute teacher. This job paid seventy-five percent less than what she was earning at American China. This is prima facie evidence that Necaïse was permanently disabled. Accordingly, we find that the commission erred in denying Necaïse permanent disability benefits and remand this issue to the commission for a determination of

allowable benefits.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED. THIS CAUSE IS REMANDED TO THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION FOR A DETERMINATION OF ALLOWABLE BENEFITS CONSISTENT WITH THIS OPINION. ALL COSTS ARE TAXED TO AMERICAN COMMERCIAL CHINA AND LIBERTY MUTUAL INSURANCE COMPANY.

FRAISER, C.J., BARBER, COLEMAN, DIAZ, KING, AND PAYNE, JJ., CONCUR.

SOUTHWICK, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, J. THOMAS, P.J., NOT PARTICIPATING.

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SOUTHWICK, J., concurring in part and dissenting in part:

I would uphold the commission's order in its entirety. Thus, I agree with the majority except for its finding that the *prima facie* case regarding total disability was un rebutted. I do so for two reasons. First, the presumption of disability emanating from *Jordan v. Hercules, Inc.*, 600 So. 2d 179, 183 (Miss. 1992), has no applicability to this case. Second, in the absence of the presumption's operation, the commission's decision is not contrary to substantial evidence of disability. Accordingly, I must respectfully dissent to a portion of the majority's decision.

The majority concludes that *Jordan* mandates an award of permanent disability benefits in this case. I cannot agree. The applicability of *Jordan*'s presumption of permanent total disability depends on the presence of substantial evidence that the employer has refused to rehire the claimant. Necaise had the burden to prove that American China refused to reemploy her. *Jordan*, 600 So. 2d at 183. Absent either a spurious offer or an outright refusal to rehire, the presumption of total disability is not triggered. *Id.* In this case, there is no evidence of a refusal to reincorporate Necaise into American China's work force.

While Necaise testified in a deposition that American China would not rehire her under medical restrictions placed on her by one of her physicians, that testimony was given prior to her maximum medical improvement, before her physical condition had stabilized and before permanent restrictions were set in place. *Jordan* looks only to whether a claimant has been refused reemployment after maximum medical improvement. The evidence developed by Necaise of the circumstances that followed her maximum medical improvement does not prove a refusal to rehire. A vocational rehabilitation specialist testified that he did not know American China's position on rehiring Necaise. Necaise testified that she did not submit an application for production work at American China because its employee leasing service did not believe she could do the work with her medical restrictions. However, Necaise conceded that she did not apply for non production work at American China. As a consequence, neither this Court nor the commission has before it evidence that American China refused to rehire Necaise. Without such evidence, I am unable to agree with the application of *Jordan*.

The sole question that remains is whether a decision that Necaise suffers no permanent loss of wage earning capacity because of her work injury is contrary to the substantial evidence. The inapplicability of the presumption does not foreclose an award of permanent disability benefits. On the contrary, a claimant may make out a *prima facie* case of disability without being limited to applying the *Jordan* presumption. *Lanterman v. Roadway Express, Inc.*, 608 So. 2d 1340, 1347 (Miss. 1992) (citations omitted) (holding that the claimant has the burden to show both medical impairment and a loss of wage earning capacity). After Necaise's evidence was presented, American China developed proof that Necaise had no permanent disability. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994) (citations omitted) (holding that once a claimant makes out a *prima facie* case of disability, the burden of proof shifts to the employer). In this case, the commission was presented with evidence on the issue of Necaise's permanent disability and decided, without finding that she made no efforts to find employment, that Necaise had no loss of wage earning capacity. The question for us must then be whether that decision is supported by the substantial evidence.

A determination of permanent disability does not look to one set of facts in isolation. Hence, the commission is not at liberty to determine whether Necaise suffered a loss of wage earning capacity based solely on Necaise's unsuccessful efforts to find work outside her former employment. Instead, the commission must examine the totality of the circumstances, weigh the evidence, and make its decision. *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869-70 (Miss. 1994). In this case, in addition to the evidence of Necaise's efforts to find work, the commission had before it the findings of the medical professionals concerning Necaise's physical limitations related to her work injury, testimony of a vocational rehabilitation specialist concerning jobs available to Necaise within her restrictions that offered the same or better wages, the specialist's opinion that Necaise had no loss of wage earning capacity, testimony that Necaise was successfully employed on occasion as a substitute teacher, testimony concerning Necaise's diverse educational and employment background, and testimony about the general availability of work where Necaise lived. The commission was entitled in its role as fact-finder, to weigh this evidence and decide whether Necaise had any permanent loss of wage earning capacity because of her work injury and, if so, to decide the quantitative nature of that disability. *Morris v. Lansdell's Frame Co.*, 547 So. 2d 782, 784-86 (Miss. 1989) (citations omitted). In light of the disputed evidence on this issue, the commission's decision that Necaise had no loss of wage earning capacity is not contrary to the substantial evidence. Accordingly, I would affirm the

commission's decision.

MCMILLIN, J., JOINS THIS SEPARATE WRITTEN OPINION.