

5/20/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 96-CC-00443 COA

GEORGE L. BALSLY

APPELLANT

v.

HULETT OUTDOOR CO., INC.

APPELLEE

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROBERT H. WALKER

COURT FROM WHICH APPEALED: HANCOCK COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KENNETH R. WATKINS

ATTORNEY FOR APPELLEE:

NONE

NATURE OF THE CASE: WORKERS COMPENSATION

TRIAL COURT DISPOSITION: AFFIRMED COMMISSION ORDER DENYING BENEFITS

MANDATE ISSUED: 6/10/97

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

PER CURIAM:

In this workers compensation case, George L. Balsly was injured within the course and scope of his employment on or about July 8, 1993. He claimed injury to his head, neck, arms and shoulders due to walking into a steel cat walk on a billboard.

At the hearing on September 7, 1994, the parties stipulated that Balsly did sustain an accidental injury and was temporarily and totally disabled until February 22, 1994. The administrative law judge ordered that benefits be paid for the period of disability and that the employer pay all reasonable and necessary medical expenses. On December 9, 1994, the administrative law judge denied Balsly's claim for permanent disability. Balsly then appealed to the Commission. On May 4, 1995, the Commission affirmed the order of the administrative judge. On March 22, 1996, the Hancock County Circuit Court affirmed the decision of the Commission.

Balsly testified that he could work about four hours a day or about twenty hours a week. His treating neurosurgeon, Dr. Danielson, assigned Balsly a nine percent anatomical impairment rating to the body as a whole. Dr. Danielson suggested no rapid head or neck movements while working, no stacking overhead, no prolonged extension of the neck or prolonged ladder climbing, but placed no other limitations on Balsly working.

After his release by Dr. Danielson, Balsly sought work with Grand Casino, President Casino, Treasure Bay Casino, Lady Luck Casino and Sack and Save grocery store. In June, 1994, he began working part-time as a painter for O K Signs. Balsly testified that he works at most twenty hours a week. Balsly testified that he attributes his lack of stamina to his diabetes. He testified that he developed diabetes as a result of his injury and surgery. Balsly did not present any medical evidence supporting a causal relationship between his diabetes and his work-related accident.

The employer introduced testimony from a private investigator and a surveillance video to show that Balsly was able to work longer hours than he contended.

The administrative law judge found that based on the entire evidence, "after his maximum medical recovery claimant failed to make reasonable, diligent efforts to resume employment and, thus, claimant is not entitled to an award of permanent partial disability benefits."

On appeal to this Court, Balsly states the issue as follows: The lower court erred in holding that the claimant/appellant failed to make reasonable and diligent efforts to resume employment and thus the claimant/appellant is not entitled to an award of permanent and partial disability or permanent total benefits and should be reversed.

The appellee did not file a brief. While there is the rule that the failure of the appellee to file a brief is tantamount to confession of error, the failure to file a brief alone does not automatically determine the outcome of the appeal. This rule comes into play only when the appellant makes out "an apparent case of error" then the Court does not have an obligation to "look to the record to find a way to avoid the force of the appellant's argument." *Dethlefs v. Beau Maison Development Corp.*, 458 So. 2d 714, 717 (Miss. 1984); *Westinghouse Credit Corporation v. Deposit Guaranty National Bank*, 304 So. 2d 636 (Miss. 1974).

In *Snow Lake Shores Property Owners v. Smith*, 610 So. 2d 357, 361 (Miss. 1992), the court reaffirmed the rule "that the failure of the appellee to file a brief is tantamount to a confession of error and will be accepted as such *unless we can say, after considering the record and brief of the appellant, that there was no error.*" *Id.*, quoting *Burt v. Duckworth*, 206 So. 2d 850, 853 (Miss. 1968)(emphasis added). See also *Queen v. Queen*, 551 So. 2d 197, 199 (Miss. 1989); *Sparkman v. Sparkman*, 441 So. 2d 1361, 1362 (Miss. 1983); *State v. Maples*, 402 So. 2d 350, 353 (Miss. 1981). In *Thompson v. Wells-Lamont Corp.*, 362 So. 2d 638, 641 (Miss. 1978), the Mississippi Supreme Court stated:

What constitutes a reasonable effort to obtain employment is a matter not of easy definition, and what might be a reasonable effort in one situation might not be in another. In determining whether one made a reasonable effort to obtain employment in the same or other occupation, several factors may be relevant, including: the economic and industrial aspects of the community and surrounding area, the claimant's general educational background, including work skills, and the particular nature of the disability for which compensation is sought. . . .

The rule which we now adopt is: The claimant has the burden of proof to make out a prima facie case for disability, after which the burden shifts to the employer to rebut or refute the claimant's evidence. . . .

Whether the claimant has made out a prima facie case is a question to be decided by the trier of facts on the evidence presented.

The Court is bound by the findings of the Commission where they are supported by substantial evidence, even though the evidence would convince the Court otherwise were this Court the fact finder. *Barnes v. Jones Lumber Co.*, 637 So. 2d 867, 869 (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." *Mitchell Buick, Pontiac & Equip. Co. v. Cash*, 592 So. 2d 978, 980 (Miss. 1991).

In this case the Commission had a basis for concluding both that any inability to return to full-time employment was unrelated to Balsly's injury and that he had not made reasonable efforts to obtain employment. Although Balsly testified that his occupation was as a commercial artist, his proof was that he primarily sought employment in areas where he had no experience--the casino industry and one grocery store. Balsly was able to find employment in his usual occupation, but limited himself to working no more than twenty hours a week and attributed this lack of stamina to diabetes, but failed to show by medical proof any connection with the work-related injury or that this limitation was not self imposed.

The finding of the Commission is supported by substantial evidence and not clearly erroneous. This Court affirms the Commission's decision.

**THE JUDGEMENT OF THE HANCOCK COUNTY CIRCUIT COURT IS AFFIRMED.
ALL COSTS ARE TAXED TO THE APPELLANT.**

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

