

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CC-01126 COA

*ALBERT DRUNGO APPELLANT*

v.

*BE&K CONSTRUCTION COMPANY AND ST. PAUL*

*FIRE AND MARINE 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. JOHN MONTGOMERY

COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: RICHARD GRINDSTAFF

ATTORNEY FOR APPELLEES: RONALD ROBERTS

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: CARPAL TUNNEL CLAIM DISALLOWED

MANDATE ISSUED: 7/22/97

BEFORE BRIDGES, C.J., COLEMAN, HINKEBEIN, AND SOUTHWICK, JJ.

HINKEBEIN, J., FOR THE COURT:

This is an appeal from a judgment in a workers' compensation case from the Lowndes County Circuit Court affirming the decision of the Mississippi Workers' Compensation Commission. The claimant, Albert Drungo, was employed by BE&K Construction Company as a laborer. The St. Paul Fire and Marine Insurance Company was BE&K's insurance carrier. On appeal, Drungo raises the following assignments of error:

I. The Mississippi Workers' Compensation Commission decision that there was not sufficient evidence in the record to relate the claimant's alleged carpal tunnel syndrome to the job-related injury

was against the overwhelming weight of the evidence and was not supported by substantial evidence, and the denial of compensation by the Commission for treatment rendered by physicians was erroneous.

II. The findings of the Mississippi Workers' Compensation Commission that the claimant does not suffer any permanent occupational disability and is not entitled to receive temporary total disability benefits through the end of 1990 is against the overwhelming weight of the evidence and is not supported by substantial evidence.

Finding no reversible error in the proceedings below, we affirm the decision of the trial court.

#### PROCEEDINGS BELOW

On March 21, 1991, Claimant Albert Drungo filed a petition to controvert with the Mississippi Workers' Compensation Commission. The petition alleges that on February 18, 1990 Drungo suffered a neck injury during an "on the job" accident. He also claims that, as a result of the accident, he now suffers from carpal tunnel syndrome, which is a compression of the median nerve on the wrist that typically stems from repetitive actions of the hand. A hearing was held concerning Drungo's claim, and on November 23, 1993, the administrative judge entered her order finding that the claimant had suffered a work-related neck strain and was entitled to receive temporary total disability benefits from February 18, 1990 through the end of the 1990 calendar year.

The administrative judge further ruled that there was not sufficient evidence to relate the claimant's alleged carpal tunnel syndrome or any other medical problem he was presently experiencing to an "on the job" injury. She further ruled that the evidence did not support a finding that the claimant suffered any permanent occupational disability. Finally, the administrative judge found that medical expenses incurred by the claimant as a result of the treatment rendered by Dr. John McFadden, other than those associated with cervical strain, were not reasonable and necessary and were not due to be paid by either the employer or carrier.

The ruling of the administrative judge was affirmed first on appeal to the full Commission and again by the Lowndes County Circuit Court. Following the ruling of the Circuit Court of Lowndes County, Mississippi, the claimant perfected this appeal.

#### FACTS

Drungo became employed by BE&K Construction Company on October 29, 1989. He submitted to a pre-employment physical examination and was hired by BE&K as a laborer. Drungo performed numerous heavy labor tasks during his employment with BE&K. While Drungo was carrying a five gallon bucket filled with grout, he states that he heard something pop in his neck and immediately notified his foreman.

Drungo was treated for this injury by Dr. Ronald Powell. He was released and told to return to work. Shortly thereafter, a dispute arose concerning a task that Drungo was assigned to perform. Drungo refused to undertake his assignment and resigned from his employment with BE&K.

In addition to the neck pain, Drungo also complains of a "knot" on his hip, numbness in his hand,

weakness in the left side of his body and difficulty walking, sitting down and bending over. Notwithstanding his testimony, a video tape taken of Drungo showed him bending and lifting without any apparent signs of pain.

Drungo testified that prior to his employment with BE&K, he had no physical problems other than the tuberculosis for which he had previously been drawing disability benefits. Contrary to his testimony, Drungo's medical records revealed that he was treated in 1987 for muscle spasms in his neck and again in 1988 for injuries to his right side. Since his employment with BE&K, Drungo has made no attempt to find other employment. Nevertheless, David Stewart, a vocational rehabilitation consultant, testified that there were numerous positions available for which Drungo was qualified. These jobs offered salaries ranging from \$225 to \$325 per week. Drungo's average weekly wage as of the date of his injury was \$221.53.

Several physicians who treated Drungo offered testimony as to the extent of his medical disabilities. Dr. John McFadden basically testified that Drungo could not work at all. Dr. Ronald Powell testified that he saw Drungo on March 22, 1990 and found that he suffered from tendinitis in the right wrist which should have cleared in one week and resulted in no permanent disability. Dr. Michael Dulligan testified that he found no clinical evidence of Drungo having carpal tunnel syndrome and stated that Drungo had a sprained muscle and that he should be able to return to work. Dr. Moses Jones, a board certified neurosurgeon, testified that he found no specific abnormality which would have limited the claimant's ability to be employed. He also stated that Drungo presented no symptoms suggestive of carpal tunnel syndrome. Dr. Haynes Harkey placed no restrictions on Drungo's ability to return to work except that very strenuous, heavy labor might be difficult.

## STANDARD OF REVIEW

The Commission is the ultimate fact finder, and deference must be given to its findings, despite the fact that the administrative law judge is in a better position to assess the credibility of a witness. *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124-25 (Miss. 1992). If there is substantial evidence supporting the Commission's ruling, the decision of the Commission must stand. *Id.* at 1125. On the other hand, the Commission's decision must be overturned where its findings of fact are unsupported, and its decision is arbitrary and capricious, *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991), or where the Commission has misapprehended the controlling legal principles, *Smith*, 607 So. 2d at 1120, 1123-24. If the decision of the Commission is based on substantial credible evidence the court lacks the power to disturb it, even though that evidence would not convince the court were it the fact finder. *Quitman Knitting Mill v. Smith*, 540 So. 2d 623 (Miss. 1989).

## ANALYSIS

I. The Mississippi Workers' Compensation Commission decision that there was not sufficient evidence in the record to relate the claimant's alleged carpal tunnel syndrome to the job-related injury was against the overwhelming weight of the evidence and was not supported by substantial evidence, and the denial of compensation by the Commission for treatment rendered by physicians was erroneous.

Drungo testified that he suffered a neck, hand, finger and arm injury as a result of his employment with BE&K. He also claims that because of his injury, he now suffers from carpal tunnel syndrome. In support of Drungo's claim that he suffers from carpal tunnel syndrome which is causally connected to his work at BE&K, Dr. Harkey testified that Drungo did have carpal tunnel syndrome and that this condition is generally work related. Dr. John McFadden stated that Drungo had probable carpal tunnel syndrome. However, he also stated that he really did not examine Drungo's wrist.

Dr. Powell, however, testified that Drungo suffered from tendinitis, not carpal tunnel syndrome. Dr. Dulligan testified that he could find no clinical evidence of carpal tunnel syndrome, and Dr. Jones testified that Drungo had no symptoms to suggest carpal tunnel syndrome.

It is not the function of this Court to pass on the weight of the evidence to determine merely where the preponderance lies. If there is no error of law and the decision of the Mississippi Workers' Compensation Commission is based on substantial evidence, that decision must be accepted on appeal. *Dewberry v. Carter*, 218 So. 2d 27, 30 (Miss. 1969).

In the case *sub judice*, three physicians testified that Drungo did not have carpal tunnel syndrome. Moreover, of the two doctors who testified in support of Drungo's claim, only one stated that there might be a causal connection between this condition and Drungo's work. Accordingly, the administrative law judge found that a portion of the physicians' fees were not compensable because the physician began treating Drungo over one year after the date of the injury he sustained while with BE&K. Given the testimony, she concluded that the injury should have been resolved by the time treatment began and that most of the fees were generated in the course of treating Drungo's ailments which were not related to the injury. We agree. Considering the record as a whole, we find that the Commission's decision was based on substantial, credible evidence. Therefore, this assignment of error is without merit.

II. The findings of the Mississippi Workers' Compensation Commission that the claimant does not suffer any permanent occupational disability and is not entitled to receive temporary total disability benefits through the end of 1990 is against the overwhelming weight of the evidence and is not supported by substantial evidence.

The decision of the Workers' Compensation administrative law judge held in pertinent part the following:

2. The claimant is entitled to receive temporary total disability benefits from February 18, 1990, through the end of the calendar year 1990, as a result of a muscle strain diagnosed in the cervical area.

3. The weight of evidence in this cause does not support a finding that the claimant has suffered or now suffers any permanent occupational disability benefits [sic] within the meaning of the Mississippi Workers' Compensation Act.

Although Drungo framed his second issue asserting as error the Commission's finding that Drungo was not entitled to receive benefits through the end of 1990, it seems clear from the record and the appellant's brief that the intent is to argue the Commission erred in finding that Drungo was not entitled to receive benefits after the end of the 1990 calendar year. We will address this issue

accordingly.

Drungo claims that he is prevented from carrying out the duties of his previous employment due to various medical problems he now has. He also asserts that these problems are a result of injuries which occurred while he was employed by BE&K. Dr. McFadden's testimony supported this claim. The extent of Dr. Harkey's testimony was that very strenuous, heavy labor possibly would be difficult. Contrary to this testimony was the testimony of other physicians who opined that Drungo does not suffer from any permanent injury. Dr. Powell testified that Drungo has no permanent problems or disability from his injury. Dr. Dulligan testified that there were no indications of a neurological problem and that the patient should be able to return to work without limitations. Dr. Jones's testimony was that the claimant had no limitations regarding the spine and had no spinal abnormalities.

As in the first issue presented, we conclude that the testimony of Doctors Powell, Dulligan and Jones is substantial, credible, evidence which supports the Commission's decision. Furthermore, the Commission's decision was made with the benefit of seeing a videotape of Drungo actively engaging in the type of physical activity he now claims he is unable to perform. The tape reflects that he was experiencing no apparent discomfort while in the course of this activity. Based on the record before us, we cannot say that the decision of the Commission was erroneous in any respect. Furthermore, we will not reconsider the weight of the evidence on appeal. For these reasons, we find that the circuit court did not err in affirming the Commission's decision.

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

**BRIDGES, C.J., McMILLIN AND THOMAS, P.J.J., COLEMAN, DIAZ, HERRING, KING,  
PAYNE, AND SOUTHWICK, JJ., CONCUR.**