

IN THE COURT OF APPEALS 04/23/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00925 COA

JUDY LYNN DEMENT

APPELLANT

v.

**SOUTH MISSISSIPPI HOME HEALTH AGENCY AND COMMERCIAL UNION
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. RICHARD W. MCKENZIE

COURT FROM WHICH APPEALED: FORREST COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

LARRY O. NORRIS

ATTORNEY FOR APPELLEES:

WALTER J. EADES

NATURE OF THE CASE: CIVIL: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: BENEFITS DENIED

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

BRIDGES, P.J., FOR THE COURT:

Judy Lynn Dement (Dement) was assisting a patient while working for South Mississippi Home Health as a nurse's aide when she noticed a pain in her back. She sought treatment at a local hospital

and later went to see an orthopedic surgeon, Dr. Gary Giles. Dr. Giles determined that Dement had strained her lower back. Dement returned to work after having been off for three days and continued working approximately a year and a half. During this period, Dement continued performing the same job and job duties she performed on the date of her injury. She continued to work without any apparent problems and sought no medical treatment during this time. However, she alleges that she worked in constant pain.

On August 13, 1991, almost one year and five months after the injury, Dement saw Dr. Giles again with complaints of pain in her neck and back. Dr. Giles performed an EMG which showed an S1 radiculopathy, as well as a tarsal tunnel syndrome. Dement was then admitted to the hospital, and a myelogram and post-myelogram CT scan were performed. These tests did not show any abnormalities in her lower back, but did show that Dement had a spinal tumor in the junction of her lower thoracic area and lumbar spine. At that point, Dr. Giles referred Dement to Dr. Michael Lowry, a neurosurgeon.

On October 21, 1991, Dr. Lowry performed surgery to drain the tumor and biopsy the spinal cord to see if there was a malignancy present. The tumor was benign, and Dr. Lowry continued to follow Dement's progress postoperatively, ultimately releasing her to return to work as a home health care nurse on December 15, 1992. Dement never attempted to return to work with Home Health. However, she worked with three different employers for very short periods of time, quitting each job after only a few days. Other than contacting the unemployment office, she has not sought any gainful employment.

On November 8, 1991, Dement filed her petition to controvert with the Mississippi Workers' Compensation Commission alleging that she received a compensable injury while employed by Home Health. The administrative judge determined that Dement did suffer a compensable lumbar strain on March 5, 1990, but that a spinal tumor for which she sought treatment approximately a year and a half later was unrelated to that injury. He further found that the evidence failed to establish that Dement suffered any permanent disability as a result of the injury and therefore denied her claim for permanent disability benefits. He did, however, order Home Health and its workers' compensation insurer, Commercial Union Insurance Company (Commercial Union) to provide medical services and supplies as required by section 71-3-15 of the Mississippi Code.

Dement appealed this decision to the full commission which affirmed the administrative judge's decision. She then appealed to the Circuit Court of Forrest County. That court affirmed the commission's decision, finding "that the decision rendered by the Mississippi Workers' Compensation Commission contains no error of law or fact." Aggrieved, Dement now appeals to this Court.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE LOWER COURT ERRED IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT DEMENT'S INJURY AND RELATED MEDICAL TREATMENT WAS NOT CASUALLY RELATED TO HER COMPENSABLE ACCIDENT.

In litigated workers' compensation claims, the claimant bears the burden of proving the occurrence of a compensable injury and that the injury caused the alleged disability. *Penrod Drilling Co. v. Etheridge*, 487 So. 2d 1330, 1332 (Miss. 1986). 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 credible 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). Therefore, the circuit court is limited in its review and must defer to the findings of the commission unless the commission commits prejudicial error. Miss. Code Ann. § 71-3-51 (1972). Furthermore, this Court will reverse the commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence. *McGowan v. Orleans Furniture, Inc.*, 586 So. 2d 163, 165 (Miss. 1991). When conflicting evidence is presented we will not make a determination of the preponderance of the evidence, "the assumption being that the Commission, as the trier of fact, has previously determined which evidence is credible, has weight, and which is not." *Metal Trims Indus., Inc. v. Stovall*, 562 So. 2d 1293, 1297 (Miss. 1990).

On review to the circuit court, it did not have to pass upon the question of whether Dement's condition was compensable. Instead, the question to be reviewed by the court was whether the record substantiated the commission's finding that Dement's condition was not work related. The finder of fact, the commission, found that Dement's condition was not work related based on the evidence presented.

In determining that Dement's injury was not work related, the commission evaluated the testimony of Dr. Giles, Dr. Lowry, and Dement. Dr. Giles testified that the tumor was not causally related to the injury of March 5, 1990. He further testified that the symptoms which Dement reported on August 1991 were not related to the injury, but were caused instead by the tumor found in her spine. All of the diagnostic tests performed upon Dement showed no evidence of any nerve root involvement or herniated discs. Except for the tumor, no other abnormalities were shown on the tests. Additionally, Dr. Giles explained how Dement's S1 radiculopathy shown on an EMG would have been caused by the cyst. Dr. Lowry's testimony does not contradict Dr. Giles' testimony in this regard.

Dr. Lowry testified that he performed surgery on October 21, 1991, which confirmed the presence of a tumor, and although Dement continued to complain of back pain, no specific cause of her pain was ever seen in any of the diagnostic studies which had been performed. He further stated that he did not know what was causing her back pain and leg pain, and could not deny that it was related to the tumor. In fact, Dr. Lowry agreed with Dr. Giles that "it could be connected to the cyst. The root does go into the cord near the cyst."

Dement's ability to continue to work without medical attention for nearly a year and a half before returning to Dr. Giles with symptoms associated with the tumor corroborates the medical testimony that her ability to work was not impaired by the injury. It was the commission's finding that Dement's

condition was not work related. This finding is supported by the record and is not erroneous or contrary to the overwhelming weight of the evidence. Therefore, we affirm the lower court's decision.

THE JUDGMENT OF THE FORREST COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO DEMENT.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.