

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CC-01092 COA**

WALTER GLEN JOHNSON

APPELLANT

v.

CITY OF JACKSON, MISSISSIPPI

APPELLEE

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

DATE OF JUDGMENT:	09/04/96
TRIAL JUDGE:	HON. JAMES E. GRAVES, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GLEN W. HALL RANDY A. CLARK
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: HUGH W. TEDDER, JR.
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	AFFIRMED COMMISSION'S ORDER
DISPOSITION:	AFFIRMED - 12/2/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	12/23/97

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

BRIDGES, C.J., FOR THE COURT:

Walter G. Johnson (Johnson) was injured on the job during his employment with the Jackson Police Department (employer) on March 4, 1991. Johnson filed his petition to controvert on March 18, 1994. The employer admitted the alleged injury and paid Johnson temporary disability benefits. While admitting to temporary total disability, the employer denied that Johnson was permanently disabled as a result of his injuries. The administrative law judge found that Johnson had suffered a compensable injury on March 4, 1991, which left him "10% anatomically disabled and 30% industrial disabled", amounting to a weekly loss of earning of \$164.50. Furthermore, the administrative law judge ordered Johnson permanent partial disability benefits in the amount of \$109.67 per week for 450 weeks. The Workers' Compensation Commission reversed the administrative law judge's order stating that there

was not sufficient evidence in awarding benefits for a 30% loss of wage earning capacity. Additionally, the Commission stated that amounts such as those paid by the City to fund fringe benefits in the form of life and health insurance for Johnson are not wages and should not be figured into the average weekly wage. The circuit court affirmed the decision of the Commission stating that Johnson's benefits should have been reduced and that substantial evidence existed to support such a reduction.

Aggrieved, Johnson appeals arguing that industrial loss of wage earning capacity was proven by substantial evidence, that the Commission and the circuit court erred in allowing the statutory minimum of \$25 per week as compensation, and that fringe benefits are part of the average weekly wage. We find that substantial evidence existed to support the previous findings by the Commission, and that their decision was not arbitrary or capricious. We therefore affirm the circuit court's decision.

FACTS

Johnson was a fifty-two-year-old patrolman for the City of Jackson when he suffered an injury on March 4, 1991. The accident occurred when Johnson injured his back while physically apprehending a suspect who was resisting arrest. While struggling with the suspect, Johnson felt an onset of back pain. Johnson immediately reported his accident to his supervisor and sought medical treatment the next day from Dr. George Truitt. Dr. Truitt treated Johnson conservatively for over two years and eventually referred Johnson to Dr. Lynn Stringer, a neurosurgeon.

Dr. Stringer initially saw Johnson on April 5, 1993, and diagnosed him as having a herniated disc at the L5-S1 disc level on the left and an incidental radial nerve palsy on the left side. Dr. Stringer performed back surgery on Johnson on April 8, 1993. Johnson reached maximum medical recovery from his surgery on December 15, 1993, and Dr. Stringer released him to return to work on light duty for an indefinite period of time. Dr. Stringer testified that Johnson is permanently restricted from lifting in excess of fifty pounds, but could lift up to this amount with proper back and leg support. Dr. Stringer testified that Johnson had a 10% permanent impairment rating because of anticipated future back problems, but that Johnson had fully recovered from the nerve palsy problem. He further testified that it was his opinion that Johnson could not return to his pre-injury patrolman duties.

Johnson returned to work with his employer in January 1994 and was assigned to the records department. He was paid his regular wages, and worked there until taking medical retirement in March 1994. He testified that he took medical retirement because his employer had a policy that stated that any employee who is unable to return to his normal duties within a year must take medical retirement. However, Johnson stated that his employer never told him he had to return to his regular duties or take medical retirement.

Prior to Johnson's accident, he also worked as a security guard at AMVETS Bingo Hall eleven hours per week at \$12 an hour. After recovering from surgery, Johnson returned to that employment and is still working there. Johnson testified that his job there is light duty and primarily consists of checking tickets and patrolling the parking lot. Johnson testified that after leaving the Jackson Police Department, he had applied for work as a salesman at All-Right Friendly Pawn Shop and Big 10 Tire Company, light assembly line office work with Groen Industries, a security officer position with Wackenhut, and as a general store helper at Animal Health Products, but was not hired.

Both parties agree that Johnson's regular pay before the accident was \$506.54 per week, and that his employer provided health and life insurance policies amounting to \$181.49 per month. The dispute is over whether the health and life insurance policies should be included in the calculation of Johnson's average weekly wage. The administrative law judge held that the \$181.49 per month the employer paid for the life and health insurance policies it purchases on behalf of Johnson constituted part of his wages. The administrative law judge stated that the \$181.49 premium cost amounted to a weekly cost of \$41.77. When added to Johnson's regular wages this totaled an average weekly wage of \$548.31. Furthermore, the administrative law judge stated that Johnson had a 30% permanent disability rating, which amounted to a weekly loss of earnings of \$164.50. The administrative law judge ordered Johnson permanent partial disability benefits in the amount of \$109.67 per week for the statutory maximum of 450 weeks. The City of Jackson filed a petition for review before the Commission. On September 27, 1995, the Commission reversed the judge's findings stating that the award of permanent partial disability was not supported by substantial evidence, and that the administrative law judge erred by including the costs to the City of life insurance and health insurance as a benefit of Johnson's employment in the average weekly wage. Johnson appealed to the Hinds County Circuit Court, and on September 4, 1996, the circuit court affirmed the Commission's decision. Johnson now appeals the circuit court's order.

ARGUMENT AND DISCUSSION OF LAW

I. WHETHER THE COMMISSION ERRED IN REDUCING JOHNSON'S BENEFITS TO THE STATUTORY MINIMUM.

II. WHETHER FRINGE BENEFITS SHOULD BE INCLUDED IN THE CALCULATION OF WAGES.

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 *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). As stated in *Delta CMI v. Speck*:

Under settled precedent, courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing evidence or otherwise evaluating evidence and determining facts;. . . "[W]hile appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the commission is that which is actually under review for all practical purposes."

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's

order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

***Delta CMI v. Speck*, 586 So. 2d 768, 772-73 (Miss. 1991)** (citations omitted). This Court will reverse only where a Commission order is clearly erroneous and contrary to the weight of the credible evidence. *Id.*; *see also Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 12 (Miss. 1994). We are not permitted to re-weigh the evidence to determine where, in our opinion, the preponderance of the evidence lies. *Lanterman v. Roadway Exp., Inc.*, 608 So. 2d 1340, 1345 (Miss. 1992). Moreover, "[t]his Court will overturn a Commission 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) (finding that where a 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).

Upon review of the record, we believe that substantial evidence existed in the Commission's decision to reduce the amount of benefits Johnson was awarded to the statutory minimum. We agree with the Commission that Johnson had incurred a minimum degree of occupational disability so as to be entitled to benefits under the Workers' Compensation Act . The Commission considered Johnson's obvious physical disability coupled with his unsuccessful efforts and intent to re-enter the work force after terminating his employment with the City. However, the Commission stated that it was "troubled with the fact that Johnson was able to return to work with the City with no loss of wage earning capacity, and of his own accord, opted to terminate this employment and seek retirement instead." The Commission properly ordered the employer to pay Johnson benefits for permanent partial disability at the rate of \$25 per week for 450 weeks, and held the employer liable for penalties and interest as provided by law. Since the award takes no consideration of Johnson's average weekly wage, the second issue on whether fringe benefits should be included in the calculation of wages has been rendered moot. The Commission is the ultimate finder of fact and has discretion to weigh all the evidence presented. The Commission exercised this discretion in its order based on what we believe to be substantial evidence, and the circuit court appropriately affirmed. This Court is also obligated to affirm.

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

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