

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 1998-WC-01174-COA**

**MARTHA NECAISE**

**APPELLANT**

**v.**

**MAGNOLIA PERSONAL CARE**

**APPELLEE**

DATE OF JUDGMENT: 06/22/1998  
TRIAL JUDGE: HON. R. I. PRICHARD III  
COURT FROM WHICH APPEALED: PEARL RIVER COUNTY CIRCUIT COURT  
FOR APPELLANT: JAMES KENNETH WETZEL  
MARIANO JAVIER BARVIE  
FOR APPELLEE: DONALD PAUL MOORE  
BRANDI C. SCHWARTZ  
NATURE OF THE CASE: CIVIL - WORKERS' COMPENSATION  
TRIAL COURT DISPOSITION: AFFIRMED ORDER OF THE WORKERS'  
COMPENSATION COMMISSION  
DISPOSITION: AFFIRMED: 9/14/1999  
MOTION FOR REHEARING FILED: 10/13/99; denied 6/27/2000  
CERTIORARI FILED: 7/11/2000; denied 10/5/2000  
MANDATE ISSUED: 10/26/2000

BEFORE SOUTHWICK, P.J., BRIDGES, AND IRVING, JJ.

BRIDGES, J., FOR THE COURT:

¶1. On April 23, 1998, the Pearl River County Circuit Court affirmed an order by the Workers' Compensation Commission which found that Martha Necaïse failed to show she had suffered a compensable injury while working for Magnolia Personal Care (Magonolia). The circuit court had previously remanded the case back to the Commission for failure of either the administrative law judge or the Commission to state and/or adopt any findings of fact. The Commission then reiterated its affirmation of the administrative law judge and stated "[i]t is our opinion now as it was then that the Claimant in this case failed to put forth sufficient credible evidence to support her claim." Necaïse appeals the circuit court's affirmation of this order, asserting that Commission's second order" failed to follow the circuit court's order

to make specific finding of fact and conclusions of law upon which the claimant's case was decided."

### **FACTS AND PROCEDURAL HISTORY**

¶2. This cause arose from Necaise's claim that on Friday, April 29, 1994, a resident of Magnolia kicked her between the shoulder blades thereby injuring her neck. Necaise was the only witness to the accident as the resident did not testify. On that Friday, Necaise told Jim Allinson, her supervisor and the owner of Magnolia, of the incident but said she was not significantly injured. She testified that on the following Monday she fell and hit her knees on the shower floor as she was adjusting a shower head at Magnolia. Again she reported the incident to Allison, and he suggested she see Dr. Donald Berry. On May 5, 1994, Berry examined Necaise's knees and back but found nothing wrong. Additionally, in early May of 1994, Necaise testified that Allison refused to assign her to any more shifts at Magnolia even though she told him that physically she was able to return to work.

¶3. With Allison's approval, Necaise sought treatment from Dr. Thomas Purser on May 20, 1994. Dr. Purser did not testify, but it appears from his office records that were introduced as an exhibit that Necaise was treated by him through July of 1994. Necaise then sought treatment from at least two other physicians, M.F. Longnecker, M.D. and Ahmad Hiadar, M.D., who prescribed medication to relieve pain. A major controversy at the hearing level as well as subsequent reviews at the Commission, the circuit court, and the Court of Appeals is whether these medications were truly necessary for any underlying injury, and if such injury existed whether it occurred in the scope of Necaise's employment at Magnolia.

¶4. However, from the record it appears there can be no doubt that Necaise suffered some injury because on August 18, 1995, Dr. Harry Danielson removed two disks from the area of her neck, levels C4-5 and C5-6. Dr. Danielson testified by deposition that while he had not released Necaise from his care, he estimated she suffered a fourteen percent permanent partial disability. There is no contention that this surgery was unnecessary.

¶5. Magnolia's contention at the hearing and throughout appellate review is that the injury leading to the surgery did not occur through her employment at Magnolia. Magnolia also asserted that Dr. Danielson's, and perhaps Dr's. Longnecker's and Hiadar's, treatments were unauthorized.

¶6. At the administrative hearing, Necaise's testimony was less than clear. Necaise testified that she had never had a serious neck injury prior to the accident. During cross-examination Magnolia sought to impeach this assertion through evidence showing that Necaise had settled a previous workers' compensation claim approximately one year before the Magnolia accident. Records of that previous claim were introduced as an exhibit, and they indicate the injury was a back and ankle strain, yet a pain diagram that Necaise drew while obtaining treatment for this injury shows she had pain in the back of her neck. Necaise also had suffered a back injury in an automobile accident prior to her Magnolia employment. Additionally, Necaise reported to Dr. Hiadar that she fell in her kitchen causing pain in her shoulder area.

¶7. Despite these possible non-work related causes on Necaise's neck injury, no one testified that anything other than the Magnolia accident was, in fact, the cause of the injury necessitating surgery. Rather, Necaise stated it was the cause of the pain that ultimately led to the surgery. Additionally, Dr. Danielson testified:

based upon the reliability and the accuracy of the history given [by Necaise] that -- there was a significant contribution and aggravation to anything that may have gone on before that was

asymptomatic, secondary to that vehicular accident. But everything seems to point to a probable causal relationship between her herniations and this injury where she was kicked and then hit the window sill and jarred her neck.

However, upon cross-examination Dr. Danielson stated he had not been informed of the previous workers' compensation claim with Jitney Jungle.

¶8. The hearing officer authored a sixteen page order, fifteen of which were a summary of evidence introduced at the hearing. She concluded this order with three paragraphs headed under "decision":

Upon evaluation of all testimony, lay and medical, and based upon a preponderance of the evidence supported by applicable law, I hereby render the following findings of fact:

The claimant has failed to sustain her burden of proof that she suffered a work-related injury on or about the date alleged in the Petition to Controvert. Conflict reigns among the lay testimony as presented This determination is made based on all evidence as submitted as well as an observation of the demeanor of the claimant on the occasion of this hearing and with special consideration of the facts and controlling law.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the claimant's claim for workers' compensation benefits be, and the same is, hereby denied.

Without hearing oral arguments, the Commission affirmed the case with one paragraph:

Having heard arguments offered on behalf of the parties and having thoroughly studied the record and applicable law, the Commission affirms the 'Order of Administrative Judge.'

¶9. The trial court remanded the action to the Commission to "place in the record specific findings of fact or conclusions of law" and in doing so stated:

Ordinarily the Court could assume that the Commission simply adopted the findings of fact and conclusions of law of the administrative law judge. Here, however, that option is also unsatisfactory. The Administrative Law Judge, after setting forth a thorough and detailed summary of the evidence and testimony presented, found simply and generically that the claimant "failed to sustain her burden of proof . . . based on all the evidence as submitted as well as an observation of the demeanor of the claimant ... and with special consideration from the facts and controlling law." This "finding of fact" leaves the Court with no means to determine the specific basis upon which the ALJ's decision was made. Short of re-weighing the facts of the case, which this Court may not do, there is no basis in the record at this point from which to decide the appeal.

¶10. The Commission again affirmed, without offering specific findings of fact. The trial court finally affirmed, stating:

At their core, then, the ALJ's findings say no more than "I looked at the evidence, heard the testimony, watched the witnesses, and considered the law. Based on all this, Ms. Necaie loses." These are the findings that the Commission originally affirmed. Nowhere in this short paragraph is there any indication of whether any of the witnesses were credible and, if so, which ones. There is not

one whit of explanation to guide this Court in *why* Ms. Necaise "failed to sustain her burden of proof." Rather, the Court was apparently expected to "rubber-stamp" the ALJ's (not even the Commission's) finding based on the unembellished assertion that the Plaintiff had "failed to sustain her burden of proof." This is simply not enough. Accordingly, the case was remanded for further elucidation.

In its second "Full commission Order," the Commission graciously notes that "it is our opinion now as it was then that the Claimant in this case failed to put forth sufficient credible evidence to support her claim. *Neither the Judge nor the Commission found the Claimant's evidence believable. . .*" (emphasis added). This statement at least gives the Court a peg on which to hang its hat in reaching a decision. The Commission's decision at least now says, "We looked at the evidence, heard the testimony, watched the witnesses, and *we did not believe them*, and we considered the law. Based on all this, Ms. Necaise loses."

### ANALYSIS

¶11. Necaise asserts that the circuit court erred in affirming the Commission's second order because this order, like the first order, failed to make specific findings of fact and state conclusions of law.

¶12. The Commission, rather than the administrative judge, is the finder of fact in workers' compensation cases. *Railway Express Agency v. Hollingsworth*, 221 Miss. 688, 695, 74 So. 2d 754, 756 (1954); *Malley v. Over the Top*, 229 Miss. 347, 353, 90 So. 2d 678, 680 (1956). Therefore, the question in this case is whether the factual finding that the Commission made in its second order was sufficient for the circuit court to affirm the decision for the employer Magnolia. That finding was simply that Necaise failed to put forth "credible" evidence. The supreme court has found that under the Mississippi Rules of Civil Procedure a trial court "generally should" make specific findings of fact. *Tricon Metals and Services v. Topp*, 516 So. 2d 236, 238 (Miss. 1987).<sup>(u)</sup> However, workers' compensation proceedings are not strictly subject to the Mississippi Rules of Civil Procedure. Miss. Code Ann. § 71-3-55 (Rev. 1995). Moreover, where a trial court has failed to make specific findings of fact, upon appellate review a court should "assume" findings of fact consistent with the inferences that could be drawn from the record in order to reach a result that will affirm the trial court's decision. *Tricon Metals and Services*, 516 So. 2d at 238-39. *See also Pace v. Owens*, 511 So. 2d 489, 492 (Miss. 1987); 46 AM. JUR. 2D *Judgments* § 95 (1994).

¶13. Viewing this case from Necaise's viewpoint, there is a question as to why she did not prevail upon the record submitted to the Commission. Where a claimant testifies as to pain resulting from an employment related accident, and medical evidence corroborates a causal connection between the accident and a medical diagnosis, a claim is ordinarily compensable. *See Dunn*, MISSISSIPPI WORKMAN'S COMPENSATION § 281 (3rd ed. 1990). In this case, the only witness to the accident was Necaise. Her testimony that she was injured when a resident of Magnolia kicked her was not contradicted. Further, no one contradicted Dr. Danielson's testimony that surgery was necessary. As such, Necaise put forth evidence sufficient to prevail.

¶14. Nevertheless, something in the record must have led the Commission to conclude that the injury for which Dr. Danielson performed an operation was not related to the injury Necaise suffered while working at Magnolia. Upon cross-examination, Dr. Danielson stated that Necaise had not fully informed him of her past injury at Jitney Jungle. Additionally, Necaise was still taking pain medications related to a past injury approximately ten days before the Magnolia injury, and Dr. Danielson stated he was unaware of this fact until the day of his testimony. As such, the Commission may have found that the Magnolia injury was a

continuation of the Jitney Jungle injury.

¶15. Conversely, the Commission could have found the injury which required Dr. Danielson to perform surgery occurred after the Magnolia accident. Dr. Berry examined Necaïse after the Magnolia accident, but before Danielson began treating Necaïse, and found no injury to her neck. Additionally, Necaïse told both Drs. Hiadar and Danielson that she had fallen in her home several times after the Magnolia accident. As such, the Commission could have found Necaïse injured her neck in a way unrelated to the Magnolia accident.

¶16. Where substantial evidence supports the Commission's decision, an appellate court will affirm the decision. *Shelby v. Peavy Electronics Corp.*, 724 So. 2d 504, 506 (Miss. 1998). In this case, the Commission's decision is supported. However, when the Commission or a trial court fails to specifically state what factual findings led to a particular result, not only are the parties left with an uncertainty as to what actually determined issues of importance to them but also an appellate court is forced to delve into the record to try to ascertain how the facts were weighed against the evidence. This practice invites a re-weighing of the evidence, which should be discouraged. *See e.g. Tricon Metals and Services*, 516 So. 2d at 239. Therefore, it would have been helpful if the Commission plainly set forth findings of fact supporting its decision. Nevertheless, because substantial evidence supported a finding that Necaïse's injury was not causally related to the surgery performed by Dr. Danielson, the Circuit Court did not err in affirming the Commission's second order. There is no error.

**¶17. THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**KING, P.J., DIAZ, IRVING, LEE, MOORE, AND THOMAS, JJ., CONCUR.**

**SOUTHWICK, P.J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY McMILLIN, C.J. AND PAYNE, J.**

SOUTHWICK, P.J., CONCURRING

¶18. Both the trial judge and this Court's majority find the Commission's opinion to be unsatisfying. My disagreement with both the circuit court and the majority is that I find the decision to be clear enough for proper appellate review. I would not have remanded to the Commission as did the circuit court, nor would I indicate the dissatisfaction with the Commission that the majority does here. In other words, I concur without the criticism of the agency.

¶19. The first opinion was by the administrative judge. Her view was clear if somewhat indirect, namely, that the claimant's testimony was incredible. There is substantial evidence in the record regarding a history

of compensation claims, some of which were not disclosed to subsequent doctors during the course of making new claims. The majority refers to those factual defects. The administrative judge stated that the decision was "based on all the evidence as submitted as well as an observation of the demeanor of the claimant"; this statement followed the administrative judge's finding that the claimant failed to sustain her burden to prove a work-related injury.

¶20. In my view this was a firm if polite finding that the claimant was not believable. It was the claimant whose testimony and reports to her doctors indicated the work-related nature of her injuries. The administrative judge did not accept that evidence. I find that a ruling based on credibility of witnesses is completely proper and indeed absolutely necessary in many cases. No one here disputes the administrative judge's authority to make such a ruling. Miss. Code Ann. §§ 71-3-47 & 71-3-93 (Rev. 1995) (general authority to conduct hearings and make decisions).

¶21. When the claimant then sought full-Commission review of this fact-finding based on the credibility of a witness, the Commission merely adopted the previous findings. This seems to be the source of the trial court and the majority's concern. May the Commission decide that a claimant is not credible without itself listening to the claimant? An appellate court traditionally defers in that fashion to a trial court, using such adages as the trial judge who "smells the smoke of the battle" is in a better position to determine credibility than an appellate court. *Gavin v. State*, 473 So.2d 952, 955 (Miss.1985). But the relationship between the administrative judges and the Commission is not quite the same. Nonetheless, I find it similar enough as will be explained.

¶22. By statute the administrative judge "shall have the authority of a commissioner." Miss. Code Ann. § 71-3-93. There are of course three commissioners and no one commissioner makes final decisions on compensation. Miss. Code Ann. §§ 71-3-47 & 71-3-85. What is evident, though, is the administrative judge's decision regarding compensation is final unless an appeal is taken. Miss. Code Ann. § 71-3-47. Once that appeal occurs, the Commission itself becomes the fact-finder and does not need to defer to findings made by the administrative judge. Even if that hearing officer's decision is supported by substantial evidence, the supreme court has held that the full Commission's contrary decision will be affirmed so long as it also is supported by substantial evidence. *United Funeral Homes, Inc. v. Culliver*, 240 Miss. 878, 882, 128 So.2d 579, 580 (1961). We are dealing here with the reverse. Is the Commission precluded from relying on a fact-finding by the administrative judge if part of the fact-finding, i.e., the credibility of a witness, is not based totally on matters reducible to the black and white of a printed transcript in the record?

¶23. I acknowledge that the Commission could conduct a hearing, seek evidence from further investigation, and otherwise largely perform the function already managed by the administrative judge. Miss. Code Ann. § 71-3-47. Though much of the reason for the administrative judge's credibility choice does appear in the record, such as the previous and not always disclosed compensation claims, presumably part of the reason for the initial decision was that the claimant herself did not come across as believable at least when compared to other witnesses. In my view, giving deference to the administrative judge on a matter such as the relative credibility of witnesses is within the discretion of the Commission in performing its review function. To some extent most cases have some component of credibility, whether of competing medical professionals or of the employer and the worker. I do not think that all the witnesses relevant to comparing credibility must be recalled by the Commission. An objectively reasonable determination by the administrative judge may be affirmed without the Commission itself hearing the same witnesses.

¶24. For these reasons I would affirm the Commission. The fact-finding that was performed was adequate and there is no need to imply the findings to support the Commission.

**MCMILLIN, C.J. AND PAYNE, J., JOIN THIS SEPARATE OPINION.**

1. *But see Morreale v. Morreale*, 646 So. 2d 1264, 1270 (Miss. 1994)(stating that not every failure to make specific findings of fact mandates reversal).