

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES P. BAKER

CLAIMANT/APPELLANT

v.

NO. 2007-WC-00305

IGA SUPER VALU FOOD STORE AND
MISSISSIPPI INSURANCE GUARANTY
ASSOCIATION

EMPLOYER AND CARRIER/APPELLEES

Brief

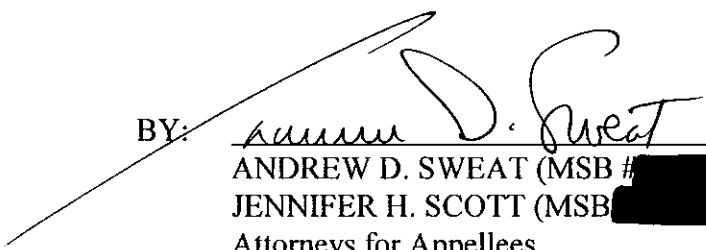
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons may have an interest in the outcome of this case. These representations are made so that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. The Honorable Frank G. Vollor, Circuit Court Judge for Warren County, Mississippi
2. IGA Super Value Food Store, Employer/Appellee
3. Mississippi Insurance Guaranty Association, Guaranty Association/Appellee
4. Mr. Andrew D. Sweat and Ms. Jennifer H. Scott of Wise Carter Child & Caraway, attorneys for Appellees
5. Mr. Charles P. Baker, Appellant
6. Mr. David Sessums of Varner Parker & Sessums, attorney for Appellant
7. The Honorable Tammy Harthcock, Administrative Judge for Mississippi Workers' Compensation Commission
8. Mr. Liles B. Williams, Commissioner/Chairman for Mississippi Workers' Compensation Commission
9. Mr. Barney J. Schoby, former Commissioner for Mississippi Workers' Compensation Commission

This the 6th day of August, 2007.

BY:


ANDREW D. SWEAT (MSB # [REDACTED])

JENNIFER H. SCOTT (MSB # [REDACTED])

Attorneys for Appellees

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STATEMENT OF THE ISSUES

1. Did the Commission correctly determine that Mississippi Code Annotated § 71-3-35 barred Claimant's claim for any benefits after January 9, 2004?
2. Did substantial evidence support the Commission's decision that Mississippi Code Annotated § 71-3-35 barred Claimant's claim for benefits after January 9, 2004 and that no equitable basis existed for tolling that statute of limitations?

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

On March 25, 2004, Claimant Charles Baker filed a Petition to Controvert alleging that he sustained a back injury on January 9, 2002 during the course and scope of his employment with IGA Super Valu Food Store ("Employer") in Vicksburg, Mississippi. Employer and Mississippi Insurance Guaranty Association ("Guaranty Association") timely filed an Answer asserting that the statute of limitations barred Claimant's claim for benefits.

Following discovery in this matter, Administrative Judge Tammy Harthcock conducted a hearing at the Mississippi Workers' Compensation Commission building in Jackson, Mississippi on January 19, 2006. The parties stipulated that Claimant sustained a work accident on January 9, 2002 in which he injured his lower back and that Employer and Guaranty Association had paid only medical benefits and wages for working to Claimant. The threshold issue before Judge Harthcock was whether the two year limitations period in Mississippi Code Annotated § 71-3-35 applied to the claim or whether the payment of medical benefits had tolled that limitations period.

On February 7, 2006, Judge Harthcock issued an order in which she determined that the two year limitations period precluded any claim for disability benefits and medical treatment after January 9, 2004. Claimant appealed that decision to the Full Commission. On June 14, 2006, the Full Commission affirmed Judge Harthcock's decision. Claimant thereafter appealed the Commission's determination to the Circuit Court of Warren County, Mississippi. After reviewing the record and briefs, Circuit Court Judge Frank G. Vollor issued an Order on February 13, 2007 affirming the Commission's decision. Claimant then timely appealed to this Court.

B. Statement of Relevant Facts

On January 9, 2002, Claimant was working as a Meat Department Manager for Employer. (Vol. III at 8¹) On that date, Claimant turned as he was lifting a box of beef, and, upon doing so, he experienced a sharp pain in his lower back. (*Id.* at 9) Claimant then reported the injury to the assistant store manager on that same day. (*Id.*) Claimant initially sought and received medical treatment for this injury the very next day, on January 10, 2002. (*Id.*) The doctor prescribed muscle relaxers and pain medication, and he referred Claimant to physical therapy. (*Id.* at 9, 16) Claimant received continuous and regular medical treatment for his back injury from the date of injury until January 2004; the Employer and Guaranty Association paid for that treatment pursuant to workers' compensation law. (*Id.* at 9-10) Claimant did not miss any work as a result of the injury. (*Id.* at 10) Instead, he continued to work and to receive his regular wages. (*Id.*)

No physician has ever provided Claimant with any written documentation regarding physical restrictions resulting from his January 9, 2002 injury. (*Id.* at 20) Claimant contended at the hearing that, at all times since his injury, he has only been able to lift thirty to forty pounds without experiencing pain. (*Id.* at 11) This lifting restriction is a self-imposed limitation, however, as Claimant admitted that no doctor had ever provided written notice of any physical restrictions as a result of the back injury. (*Id.* at 19-21) Neither could Claimant recall having provided Employer with medical documentation regarding any physical restrictions resulting from the back injury. (*Id.* at 21) Claimant also testified that, post-injury, he was able to work as many hours as were required and that, to his knowledge, his job performance continued to be satisfactory. (*Id.* at 19) Other than his self-imposed lifting restriction, Claimant admitted that his

¹Citations are made to the relevant volume and page number of the Record. Citations to the trial exhibits, which are also part of the Record, are made to the relevant exhibit number (e.g. "Ex. 1") and page number where appropriate.

post-injury physical capabilities were the same as his pre-injury capabilities. (*Id.* at 15)

As these facts illustrate, at all times from the date of his injury, Claimant continued to perform satisfactorily in his pre-injury position as Meat Department Manager for Employer. (*Id.* at 19) Moreover, Claimant admitted that he had never been denied a promotion or wage increase as a result of his injury or any alleged physical limitations after that injury. (*Id.*) Neither had he experienced any post-injury wage decrease. (*Id.*) Claimant's salary had, in contrast, increased since his injury. (*Id.* at 15-16) Because he continued to perform satisfactorily in his pre-injury job, Claimant received no workers' compensation benefits other than payment of medical treatment: Claimant specifically acknowledged, and the parties stipulated, that the Employer and Guaranty Association paid no temporary disability benefits. (*Id.* at 3-4, 19) Claimant instead continued to receive his regular wages (including regular wage increases) in exchange for his satisfactory job performance.² Claimant did not file any claim for benefits with the Commission until March 25, 2004, when he filed a Petition to Controvert.

SUMMARY OF THE ARGUMENT

Claimant incurred a work-related injury on January 9, 2002. The Employer and Guaranty Association accepted compensability but paid no workers' compensation benefits other than medical benefits. After his injury, Claimant continued to work in his pre-injury position as meat department manager. Claimant did not miss any work because of the injury, and he never

²As part of Claimant's job as Meat Department Manager, he occasionally operates a bandsaw. (Vol. III at 22) Sometime during 2005, in the course of this litigation, Employer discovered that Claimant had been daily taking four 30 milligram doses of Morphine since approximately February 2002. (*Id.* at 13-14, 16) Upon discovering this information, Employer presented a memorandum to Claimant, requesting him to provide a doctor's certification that he was competent to operate the bandsaw while taking these daily doses of Morphine. (*Id.* at 12; Ex. 9) When this memorandum was presented to Claimant in March 2005, he refused to sign it. (*Id.* at 22-24) At the time of the hearing, Claimant also had not obtained any release from his physician regarding his ability to continue operating the bandsaw. (*Id.* at 22) Even so, Claimant admitted that he continued to operated the bandsaw "from time to time." (*Id.* at 22)

presented Employer with any medical documentation indicating that he had any post-injury physical restrictions. Claimant did not file a Petition to Controvert with the Mississippi Workers' Compensation Commission during this period or otherwise make a claim for benefits with the Commission. Because Employer and Guaranty Association paid only compensation for medical treatment, the two year statute of limitations in Mississippi Code Annotated § 71-3-35 applied to Claimant's situation, and it would operate to protect Employer and Guaranty Association from any claims for benefits made after January 9, 2004.

The Employer and Guaranty Association continued to pay reasonable and necessary medical expenses related to Claimant's injury until the statute of limitations in this action expired in January 2004. In March 2004, Claimant filed a Petition to Controvert relating to the January 2002 injury. As readily evident from this timeline, Claimant filed his Petition to Controvert too late—well over two months after the limitations period had ended. Claimant has presented no evidence showing any equitable basis for tolling the limitations period. As such, the two year statute of limitations bars Claimant's March 25, 2004 claim for benefits. This Court should affirm the decision of the Full Commission on this issue, as the Commission's decision involved no error of law and is supported by substantial evidence.

ARGUMENT

A. Mississippi Code Annotated § 71-3-35 Bars Claimant's Claim for Benefits.

Mississippi Code Annotated § 71-3-35(1) provides as follows:

Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefit filed with the Commission within two years from the date of injury or death, the right to compensation therefore shall be barred.

This statute establishes a two year limitations period for filing a Petition to Controvert in cases

where the employer and carrier pay no compensation benefits other than benefits for medical treatment or burial expense. When a claimant does not file a Petition to Controvert within this two year period, the statute extinguishes his subsequent right to compensation and the employer and carrier's obligation to provide the same.

1. The Limitations Period Commenced January 9, 2002 and Bars Any Claim for Benefits After January 9, 2004.

Mississippi Code Annotated § 71-3-35(1) clearly and unambiguously sets the date of injury as the date on which the limitations period commences, stating that a claimant must receive payment of disability benefits or make an application for benefits “within two years from *the date of injury* or death” or else his “right to compensation therefor shall be barred.” (emphasis added) The statute defines “injury” as an “accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner.” Miss. Code Ann. § 71-3-3(b). Significantly, the statute does not define injury in terms of any disability that may result from the injury except in cases involving exposure to ionizing radiation.³ Instead, Workers' Compensation Law separately defines “disability” as “incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or other employment.” Miss. Code Ann. § 71-3-3(i) (emphasis added).⁴

³Mississippi Code Annotated § 71-3-3(b) provides that, “[i]n radiation cases only, the date of disablement shall be treated as the date of the accident.

⁴Claimant seems to premise many of the arguments in his Brief on the notion that “injury” and “disability” are synonymous terms. As Sections 71-3-3(b) and 71-3-3(i) indicate, Claimant's premise is erroneous. Not only does the statute define these two terms separately, but the *individual* definition of each term also emphasizes this separateness. For example, the statute provides that a *disability* results from an *injury*. Miss. Code Ann. § 71-3-3(i). Based on that definition alone, Claimant's attempts to make “disability” synonymous with “injury” are illogical, as the definition unquestionably considers an “injury” to be a concept distinct and separate from a “disability.” In equating these two concepts, Claimant also ignores the common

In applying Mississippi Code Annotated § 73-3-35(i), courts have recognized the distinction between these terms. As one court explained, “It is clear that this two year statute runs from the time of injury and applies in instances where there has been no payment of disability income benefits or nonburial death benefits.” *Jordan v. Pace Head Start*, 852 So. 2d 28, 30 (Miss. Ct. App. 2002). Recently, the Court of Appeals rejected a claimant's argument that the limitations period did not commence “until he became aware that the injury was disabling, meaning that it impacted his wage-earning ability, as defined by Mississippi Code Annotated § 71-3-3(i).” *Parchman v. Amwood Products, Inc.*, 2007 WL 239509, at *3 (Miss. Ct. App. Jan. 30, 2007). The court decisively stated that “[t]he statute . . . does not state the commencement of the statute of limitations in those terms.” *Id.* Emphasizing the statutory phrase “within two years from the date of the injury,” the Court held that the statute commenced on the date of claimant's accident and that it had expired unless an equitable basis existed for tolling it. *Id.* See also, *Pepsi Cola Bottling Co. of Tupelo, Inc. v. Long*, 362 So. 2d 182, 185 (Miss. 1978)(noting that “[o]rdinarily the time of injury coincides with the accident”).

The case at bar involves facts similar to those at issue in *Parchman*. Claimant sustained a work-related injury that resulted in no lost time from work and no incapacity causing a disability. Claimant's injury occurred on January 9, 2002, when he had a work-related accident which caused him to feel a sharp pain in his low back. Pursuant to Mississippi Code Annotated § 71-3-

situation in which a worker sustains a compensable *injury* for which the employer and carrier provide medical treatment and from which the worker fully recovers without missing any work, and then returns to his pre-injury job without restrictions. In such cases, the worker experiences no incapacity as a result of the injury, thereby sustaining no *disability* under Workers' Compensation Law. As this hypothetical illustrates, an employer and carrier often pay medical benefits to an employee as compensation for a work-related *injury* even though that worker sustains no *disability* entitling him to any additional compensation benefits. If “injury” and “disability” were synonymous terms as Claimant contends, every work-related injury would obligate an employer and carrier to pay both medical and disability benefits to the worker.

35(1), the limitations period for filing a claim for benefits commenced on that date as Claimant immediately recognized that he had hurt his back and that such injury was related to a work task.⁵ Provided the Employer and Guaranty Association had paid only medical benefits to Claimant and he had made no application for benefits, the statute would operate to bar any claim for workers' compensation benefits after January 9, 2004. Claimant admittedly received no disability compensation after his injury and missed no time from work because of the injury or any resulting physical restrictions. In fact, Claimant continued to perform his pre-injury job satisfactorily after the January 9, 2004 injury. Neither did Claimant file with the Commission any claim for benefits before March 25, 2004, when he filed a Petition to Controvert. The statute of limitations barred that claim, however, as Claimant filed it more than two years after the date of injury—i.e., *after* the limitations period had expired. This Court should, therefore, affirm the Commission's decision that Claimant's Petition to Controvert was not timely.

2. ***Claimant Did Not Sustain a Latent or Progressive Injury That Warrants Tolling the Commencement of the Limitations Period.***

Claimant contends that the limitations period in this case has not yet commenced because his “accident has not disabled him from employment [and] he has not yet suffered a compensable injury (i.e. a 'disability') within the meaning of the act.” (Claimant's Brief at 10) The *Parchman* court rejection this precise argument in a case involving similar facts. Claimant, however, ignores the *Parchman* holding and attempts to support this contention by relying on cases applying Mississippi Code Annotated § 71-3-35(1) to latent or progressive injuries. Because Claimant's injury is neither a latent nor a progressive injury, his reliance on these cases is

⁵The facts and authorities showing that Claimant did not incur a latent or progressive injury are fully discussed in Section A2 of this Brief.

misplaced⁶, and the *Parchman* holding controls.

A latent injury is “an injury that a reasonably prudent [person] would not be aware of at the moment it was sustained.” *Parchman v. Amwood Prods., Inc.*, 2007 WL 239509, at *4 (citing *Quaker Oats Co. v. Miller*, 370 So. 2d 1363, 1366 (Miss. 1979)). To determine when the statute of limitations commences, courts apply a discovery rule to cases involving latent injuries: “a latent injury does not cause the statute to begin to run until the disabling nature of the injury manifests itself.” *Quaker Oats Co.*, 370 So. 2d at 1365. A similar discovery rule applies to cases involving progressive injuries, where a worker in fact “knew at the time of the accident that he had sustained an injury arising out of the course and scope of his employment.” *Parchman*, 2007 WL 239509, at *4. For such progressive injuries, the limitations period begins when “the claimant, judged by the standard of a reasonable person, recognizes the nature, seriousness, and probable compensable character of his injury.” *Parchman*, 2007 WL 239509, at *5 (quoting *Quaker Oats Co.*, 370 So. 2d at 1366)).

Claimant did not incur a latent injury because he undeniably knew he had sustained a work-related injury to his back on January 9, 2002. Claimant felt a sharp pain in his back as he was turning and lifting a box of beef. Claimant reported his injury to the assistant manager on the same day. These facts establish that Claimant was aware of his injury on the day of the accident and that he recognized on that day the connection between his back injury and his work activity. He cannot, therefore, credibly argue that he sustained a latent injury for which the discovery rule would toll the limitation period's commencement. Neither can Claimant credibly

⁶Specifically, the analyses in the following cases are not relevant to the case at bar because they involve latent or progressive injuries: *Tabor Motor Co. v. Garrard*, 233 So. 2d 811 (Miss. 1970); *Struthers Wells-Gulfport, Inc. v. Bradford*, 304 So. 2d 645 (Miss. 1974); and *Pepsi Cola Bottling Co. of Tupelo, Inc. v. Long*, 362 So. 2d 182, 185 (Miss. 1978).

argue that his injury was a progressive injury as he felt sharp pain immediately and reported the injury to a manager. Those actions suggest Claimant on that day recognized the nature, seriousness, and probable compensable nature of the injury.⁷

The Commission correctly determined that Claimant did not incur any latent or progressive injury and that the limitations period therefore commenced on January 9, 2002, the date of his accident and injury. As a result, this Court should affirm the Commission's decision that Claimant's March 25, 2004 Petition to Controvert was not timely.

B. No Facts Otherwise Warrant Tolling the Limitations Period.

Claimant's Brief includes several other attempts to justify tolling the limitations period so as to make his March 2006 Petition to Controvert timely filed. As to each of these attempts, Claimant has either failed to establish that the proffered doctrine applies to these facts or that its application would, in fact, warrant tolling the statute of limitations. Each of Claimant's theories is addressed below.

1. Claimant Has Not Established the Elements Required for Equitable Estoppel.

Courts have tolled the two year statute of limitations "where the employer misrepresents the nature and existent of its coverage and the employee relies on such statement." *Holbrook v. Albright Mobile Homes, Inc.*, 703 So. 2d 842, 844 (Miss. 1997). *See also, Casey v. Deeson Cash Grocery*, 246 So. 2d 534, 535 (Miss. 1971) (no equitable estoppel where claimant "was aware of her rights before the expiration of the limitation period" and did not rely on employer's alleged

⁷Even assuming that Claimant's injury could be considered a progressive injury and applying the discovery rule to the limitations period, the time for filing a claim began no later than January 10, 2002. A reasonable person in Claimant's position would have recognized the nature, seriousness, and probable compensable character of the injury no later than the date on which Claimant began undergoing treatment for his back injury (including a course of physical therapy, muscle relaxers, and pain medication) and on which he also immediately recognized his self imposed lifting restrictions. Accordingly, Claimant still filed his March 2006 Petition to Controvert after the two year limitations period had ended.

misrepresentation regarding coverage). Courts have also indicated that the claimant's reliance must be justified in light of the alleged misrepresentation. *McCrary v. City of Biloxi*, 757 So. 2d 978, 982 (Miss. 2000) (noting facts that “justified [claimant's] reliance”). Before applying equitable estoppel to bar an employee from asserting a statute of limitations defense, courts require a showing of “inequitable behavior” by the employer. *Id.* at 981. (“we do not agree that equitable estoppel should be applied so liberally as to allow a claimant to assert estoppel where no inequitable behavior is present”). Specifically, the party claiming estoppel must prove by a preponderance of the evidence the following elements:

Conduct and acts, language and silence, amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation or silence, or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence.

Id. at 980-81. Claimant has wholly failed to show any inequitable behavior by the Employer or Guaranty Association, and he has not established all of the doctrine's required elements.

To begin, Claimant presents no evidence or argument to show that Employer or Guaranty Association engaged in any “inequitable behavior.” Claimant merely alleges that Employer and Guaranty Association neither “hinted, intimated, [n]or in any way lead him to believe they were going to cut off his medical benefits after January 9, 2004.” (Claimant's Brief at 8) The facts, however, show that Employer and Guaranty Association accepted Claimant's injury as compensable and paid for reasonable and necessary medical treatment and expenses related to that injury in accordance with their statutory obligations. This behavior stands in stark contrast to the inequitable behavior at issue in the cases on which Claimant relies.

For example, in *Holbrook v. Albright Mobile Holmes, Inc.*, the court properly denied the employer's motion for summary judgment where fact issues existed regarding whether the

employer had misled the decedent's family into believing the employer had no workers' compensation insurance and whether the family had relied on any such statements. *Holbrook*, 703 So. 2d 842, 845 (Miss. 1997) The court acknowledged that, if true, such misleading statements and reliance would justify tolling the limitations period. *Id.* at 844. A later court distinguished cases such as *Holbrook* in which “the employer had affirmatively advised the employee that Mississippi Workers' Compensation benefits were not available” from a case in which the employee “was aware that benefits were available but made no effort to obtain benefits” until after the limitations period had ended. *Parchman*, 2007 WL 239509, at *3. The court held *Holbrook* inapplicable to a case in the latter category.

As in *Parchman*, the case at bar involves no affirmative misrepresentations by the Employer and Carrier regarding the availability of benefits beyond the statutory requirements. Claimant claims only that he “reasonably relied on the Employer and Guaranty Association to continue to pay his medical benefits.” (Claimant's Brief at 10) Claimant does not proffer any basis for his alleged reasonable reliance, however. He does not allege that Employer and Guaranty Association made any statement or took any actions to make him believe they would continue to pay medical benefits after the statute of limitations extinguished their obligation to do so. The only possible basis for Claimant's belief that his medical benefits would continue is the fact that Employer and Guaranty Association had been providing such benefits as required by statute. It was not reasonable for Claimant to rely on Employer and Guaranty Association's compliance with their statutory obligation as a basis for believing that they would continue to provide benefits after that obligation had ended. Because Claimant proved neither inequitable conduct nor justifiable reliance, equitable estoppel is not warranted. Substantial evidence supports the Commissions' decision to bar Claimant's Petition to Controvert as untimely, and no

error of law underlies this decision. Accordingly, the Court should affirm that decision.

2. *Voluntary Payment of Medical Expenses Does Not Toll the Limitations Period Established by Mississippi Code Annotated § 71-3-35.*

Claimant also proposes that Employer and Guaranty Association's voluntary payment of medical expenses tolls the applicable statute of limitations, either "in toto" or "at a minimum . . . as [the statute] relates to medical benefits." (Claimant's Brief at 11) Claimant's proposal ignores the express language of the statute, which clearly *excludes* medical benefits from the compensation payments that will toll the two year limitations period. The statute only operates to bar claims where a claimant makes no application for benefits and receives "no payment of compensation (*other than medical treatment or burial expense*)." Miss. Code Ann. § 71-3-35(1) (emphasis added). *See also, Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317, 320 (Miss. 1977) (noting that, "in special instances where medical only is paid, the legislature has provided that two years from the date of the injury is a sufficient period of time in which to either file a claim for compensation, or be barred therefrom").

Claimant apparently relies on *Graeber Brothers, Inc. v. Taylor*, 115 So. 2d 735 (Miss. 1959) to support his theory that payment of medical benefits tolls the limitations period despite contrary statutory language. The *Graeber* court, however, addressed an issue relating to the one year statute of limitations currently codified in Mississippi Code Annotated § 71-3-53.⁸ *Graeber*,

⁸The *Graeber* court cited § 6998-27 of the Revised Code of 1942, which is the same as Mississippi Code Annotated § 71-3-53 and which provides, in part, as follows:

Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

115 So. 2d at 737. That court did not analyze or interpret the two year statute of limitations codified in Mississippi Code Annotated § 71-3-35(1). The *Graeber* court instead analyzed the meaning of “compensation” as used in the one year statute of limitations at issue in that case.⁹ The case is not, therefore, relevant to the issue before this Court.

In short, the plain language of the statute directly refutes Claimant's notion that payment of medical benefits tolls the two-year limitations period. Moreover, Claimant cannot give credence to this notion by relying on a case that addresses an entirely different issue. Accordingly, a correct application of law and substantial evidence support the Commission's decision to bar Claimant's claim as untimely, and the Court should affirm that decision.

3. *Claimant Has Established Neither That He Received Wages in Lieu of Compensation Benefits nor That Any Such Payments, Even If Received, Would Toll the Limitations Period*

Claimant has not shown that Employer paid him wages in lieu of compensation benefits. Such a showing would require Claimant to establish that Employer *intended* the wages it paid him to be a substitute for compensation benefits owed rather than payment for wages earned. *See Lanterman v. Roadway Express, Inc.*, 608 So. 2d 1340, 1348-49 (Miss. 1992); *City of Kosciusko v. Graham*, 419 So. 2d 1005, 1009 (Miss. 1982); *George S. Taylor Constr. Co. v. Harlow*, 269 So. 2d 337, 338 (Miss. 1972). Claimant cannot reasonably infer such an intent from the circumstances surrounding the Employer's payment of his post-injury wages.

⁹In its analysis, the court noted that the two year statute of limitations specifically excluded “medical treatment” from its use of the term “compensation.” The court reasoned that by expressly excluding medical treatment, Mississippi Code Annotated § 71-3-35(1) (formerly § 6998-18(a)) “clearly indicate[d] that the legislature considered medical treatment as a payment of compensation.” *Graeber*, 115 So. 2d at 737. In other words, had the legislature not intended “compensation” to include “medical treatment,” its express exclusion of medical treatment in Mississippi Code Annotated § 71-3-35(1) would have been unnecessary. From this exclusion, the court further reasoned that “compensation” in Mississippi Code Annotated § 71-3-53 included medical benefits within its meaning. *Id.* at 740.

The facts establish that Claimant continued *to earn* his salary after his injury. Claimant never missed any time from work as a result of his injury. Claimant also admitted that no doctor imposed any physical restriction on him post-injury. In addition, he never provided Employer with any notice documenting any physical restrictions. Claimant instead continued to work in his pre-injury position, working the hours required by Employer and performing his job satisfactorily. Rather than suggesting Employer intended Claimant's wages to be a substitute for workers' compensation benefits during this period, these facts indicate just the opposite: that Employer intended to continue to pay Claimant his regular, pre-injury salary in exchange for his continuing to perform his job satisfactorily post-injury.¹⁰

Even if Claimant had shown that Employer intended his post-injury wages to be in lieu of compensation benefits, he presented no authority to support his contention that such payment could toll the limitations period. The *Parchman* court, in fact, questioned whether the wages-in-lieu-of-compensation principle could serve to toll the statute, noting that courts had previously only applied the principle to allow an employer “to credit those wages paid against an award of workers' compensation benefits.” *Parchman*, 2007 WL 239509, at *4. The *Parchman* court did not decide the issue, however, finding instead that the claimant had not even shown he received

¹⁰Claimant contends that his “uncontradicted and un rebutted testimony is that he performs lighter or lower rated work and yet receives the same or higher pay.” (Claimant's Brief at 13) This contention is misleading, however, as it attempts to draw from Claimant's testimony too broad a conclusion. Claimant clearly admitted that lifting over forty pounds was the only job task he could not continue to perform after his injury. (Vol. III at 14-15) Claimant presented no evidence to show that lifting over forty pounds was of such importance to his position that his self-imposed lifting restriction would disqualify him from the job. In fact, Claimant's testimony indicates just the opposite. He acknowledged that his employer continued to be satisfied with his post-injury job performance and that he continued to be able to work all the hours required of him post-injury. (*Id.* at 19) Thus, Claimant's uncontradicted and un rebutted testimony is that he continued to work as a Meat Department Manager post-injury, needing only to avoid lifting over forty pounds, and that his Employer did not consider the lifting restriction to compromise his job performance. Nothing about these circumstances suggests that Employer paid Claimant higher wages for lower rated work.

such payments. *Id.* Because the Commission's decision on this issue correctly applies the law and is supported by substantial evidence, this Court should affirm that decision.

CONCLUSION

Employer and Carrier paid only medical expenses as a result of Claimant's January 9, 2002 injury. Because no equitable basis exists for tolling the limitation period established in Mississippi Code Annotated § 71-3-35(1), the two year period for filing a claim based on that injury ended on January 9, 2004. Accordingly, Claimant's March 25, 2004 Petition to Controvert was not timely. Because the Commission correctly applied the relevant law to the substantial evidence before it, this Court should affirm its decision that Mississippi Code Annotated § 71-3-35(1) bars Claimant's claim for benefits after January 9, 2004.

Dated this the 6th day of August, 2007.

Respectfully submitted,

**IGA Super Valu Food Store and Mississippi
Insurance Guaranty Association, Employer and
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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this day caused to be served via hand-delivery, a true and correct copy of the above and foregoing to the following:

Ms. Betty Sephton, Clerk
Mississippi Supreme Court
450 High Street
Jackson, Mississippi 39205

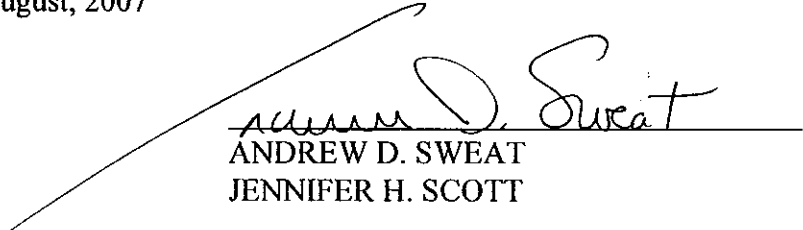
and via **United States Mail**, postage prepaid, to the following:

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Warren County Circuit Clerk
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Dated this the 6th day of August, 2007



ANDREW D. SWEAT
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