SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAUSE NO. 2007-[redacted]-00815

TIMMY PRENTICE — APPELLANT

VERSUS

SCHINDLER ELEVATOR COMPANY and
ZURICH AMERICAN INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or refusal:

1. Timmy Prentice, Appellant
2. Schindler Elevator Company, Appellee
3. Zurich American Insurance Company, Appellee
4. Honorable Prentiss M. Grant, Attorney for Appellant
5. Honorable Benjamin U. Bowden, Attorney for Appellees
6. Honorable W. Swan Yerger, Judge in the Circuit Court of Hinds County, Mississippi, First Judicial District
7. Honorable Mark Henry, Administrative Judge with the Mississippi Workers Compensation Commission

Certified this the 13th day of November, 2007.

SCHINDLER ELEVATOR COMPANY and ZURICH AMERICAN INSURANCE COMPANY, Appellees

VAUGHN, BOWDEN & WOOTEN, PA

BY: _____
Benjamin U. Bowden
Mississippi Bar No. [redacted]

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I. STATEMENT OF THE ISSUES

Claimant/Appellant (hereinafter "Claimant") sets out in his Statement of the Issues that the Circuit Court committed error when it reversed the Full Commission, thereby denying Claimant indemnity and medical benefits under the Mississippi Workers' Compensation Act. Claimant asserts that the Circuit Court committed reversible error in as much as the Decision of the Full Commission and the Administrative Judge of the Mississippi Workers' Compensation Commission was supported by substantial evidence and/or was not arbitrary or capricious. Employer/Carrier/Appellee (hereinafter "Employer/Carrier") disagree and assert that the Circuit Court was correct in reversing and rendering the Full Commission and the Administrative Judge in as much as the evidence clearly establishes that this claim should be barred by the applicable two (2) year statute of limitations. It is admitted by the Claimant that no indemnity benefits were paid within two (2) years from the date of the injury, nor was any such indemnity benefits requested by the Claimant. Claimant's only argument was to try to catch the Employer/Carrier with two (2) technicalities. First, Claimant argues that the Employer/Carrier knew of his continued medical treatment following his non-work-related termination from Employer/Carrier. Second, Claimant contends that Employer/Carrier's failure to file the Notice of Injury pursuant to Miss. Code Ann. § 73-3-67 operated to stay the two (2) year statute of limitations. A review of the evidence clearly establishes that Claimant was not entitled to indemnity benefits, Employer/Carrier are not estopped to raise the two (2) year statute of limitations based upon Claimant's assertions that no Notice of Injury was filed pursuant to Miss. Code Ann. § 73-3-67, and likewise, it is equally established by the evidence that the

two (2) year statute of limitations had run prior to Claimant filing his Petition to Controvert on July 18, 2002.

This case arises out of an injury which occurred on April 23, 1998 when the Claimant was working in the course and scope of his employment with Employer, Schindler Elevator Company, who was insured by Zurich American Insurance Company for workers' compensation purposes. The Claimant, although injured on April 23, 1998, did not file his Petition to Controvert until July 18, 2002, almost four (4) years after his accident. It is admitted by the Claimant that Employer/Carrier did not pay indemnity benefits within two (2) year of the date of the accident, nor did the Claimant request Employer/Carrier any such benefits during that two (2) year period. Claimant further admits that he did not miss the statutorily required number of days from work (five) until August 9, 2001, over three (3) years subsequent to his injury. Therefore, the Claimant admits that he never requested indemnity benefits be paid within two (2) years from the date of injury because, in fact, he was not entitled to benefits until after the two (2) years from the date of the injury of April 23, 1998. Hence, unless the Claimant was able to find a technical reason for the statute of limitations to have been tolled, all agree that his claim would be barred by the applicable two (2) year statute of limitations.

The Claimant attempted to defeat the two (2) year statute of limitations utilizing a technicality contained in the statute of the Mississippi Workers' Compensation Act requiring the Employer to file a First Report of Injury within ten (10) days after the Employer knows or reasonably should know that an injury has resulted or likely will result in permanent disability or serious head or facial disfigurement, even though the injury has not resulted in a loss of time and excess of the prescribed waiting period. That is, the Claimant argues that the Employer/Carrier knew or should have known that the Claimant's injury in question

would have resulted in permanent disability. This assertion is completely without basis in as much as it is admitted that the Claimant was terminated from his employment at Employer on May 28, 1998 for improper use of a company cell phone, a wholly non-work-related reason. (R.E. 1) That is, the Claimant was terminated from Employer approximately one (1) month after his injury. Thereafter, the Claimant found employment with subsequent employers. It was during the subsequent employment that the Claimant asserts that he continued to receive medical treatment, although he admits that he did not miss the requisite number of days from work until August 9, 2001. (R.E. 2) By this time, the Claimant had been terminated from his employment with Schindler Elevator Company for approximately three (3) years and three (3) months. Again, during this period of time, the Claimant worked for various other employers.1 It should be stressed that there is absolutely no medical evidence establishing that these visits with physicians and/or treatment was causally related to the work incident in question. It is incumbent upon the Claimant to establish the causal relationship of the medical treatment/visits. This must be done medical expert testimony. Cole v. Superior Coach Corp., 106 So.2d 71 (Miss. 1958). Therefore, the Claimant has yet to meet his burden on causal relationship. Be that as it may, the Claimant argues that since he had doctors' visits subsequent to his termination with Employer on May 28, 1998, that Employer should be held with the knowledge of said visits until, eventually, the Claimant missed the requisite five (5) days accumulative time which occurred, according to the Administrative Judge and Commission, on August 9, 2001. Even the Administrative Judge held that the statute of limitations ran on May 4, 2000 or no later than April 4, 2002. He based the first date on the date the Claimant was

1 It should be noted that it has not been established, in any way, that these doctor visits were, in any way, causally related to the Claimant's work-related injury on April 23, 1998.

returned to work by Dr. Robert Smith which was May 4, 1998, and the second date is based upon the date the Claimant returned to Dr. Estes, April 4, 2000. Therefore, even with the Administrative Judge giving the Claimant every benefit of the doubt, it is clear, and everyone agrees that the Claimant did not file his Petition to Controvert within the two (2) year statute of limitations.

Again, the only way the Claimant survives the two (2) year statute of limitations is to show that the statute was tolled due to the Employer/Carriers' inadvertent failure to file the Notice of First Report of Injury. However, upon review of that statute, Employer/Carrier are confident that the evidence clearly establishes that there was no requirement on the part of Employer/Carrier to file such notice. Employer/Carrier's argument will be clearly explained below.

II. STATEMENT OF THE CASE

A. Procedural History

Claimant filed his Petition to Controvert on or about July 18, 2002, alleging an injury of April 23, 1998. Thereafter, Employer/Carrier filed their Motion to Dismiss on or about August 7, 2002, alleging the defense of the two (2) year statute of limitations. A hearing was held before Judge Mark Henry, Administrative Judge with the Mississippi Workers' Compensation Commission, on June 27, 2005. Thereafter, Judge Henry issued his Order of Administrative Judge ruling in favor of the Claimant, stating that the two (2) year statute of limitations was tolled because the Employer/Carrier failed to file a Notice of First Report of Injury. Employer/Carrier timely appealed this ruling to the Full Commission which upheld Judge Henry's Order, without comment, on March 14, 2006. Employer/Carrier timely appealed the Full Commission's decision to the Circuit Court of Hinds County, Mississippi,

which reversed and rendered the Full Commission's Order in favor of the Employer/Carrier on January 16, 2007. From that ruling, Claimant appeals to this Honorable Court.

B. Statement of the Facts

As stated above, the Claimant alleges an injury of April 23, 1998. He did not file his Petition to Controvert until July 18, 2002. While the Claimant did seek some medical treatment for the injury in question, he did not qualify for indemnity benefits and received no such benefits within the two (2) year statue of limitations. It was only long after the statute of limitations ran that the Claimant alleges that he became entitled to indemnity benefits, and is attempting to hold Employer/Carrier liable for his alleged current disability and medical treatment he received for his injury. It is important to remember that most of the treatment which Claimant sought and seeks to hold Employer/Carrier liable for occurred years after the Claimant's termination from his employment with Employer. It occurred after a period of time in which the Claimant worked for subsequent employers. Claimant attempts to state that he returned to work for Employer for a period of time when he obtained employment from Tri-State/Schindler in Shreveport, Louisiana. However, this is not the same as Schindler Elevator Company, the company which employed Claimant at the time of the injury, and terminated (fired) him for a violation of company rules on May 28, 1998. Therefore, Employer/Carrier could not have known that Claimant was even engaged in medical treatment, work-related or not, following his termination on May 28, 1998. Therefore, since the Claimant was not entitled to indemnity benefits as of the time of his termination, and did not have any contact with Employer/Carrier following his termination regarding his medical treatment, it is clear that Employer/Carrier did not know or have any reason to know that the Claimant's injury would result, or likely would result, in permanent disability. Therefore, there was no requirement that the Employer/Carrier file

the Notice of Injury with the Commission, but only that they maintain a record of the injury in Employer's records. It is undisputed that the Employer did this.

III. LAW AND ARGUMENT

A. Standard of Review

It is has long been established that if a decision of the Mississippi Workers' Compensation Commission is based upon substantial evidence, the Circuit Court and the Supreme Court are bound by the findings of fact made by the Commission. However, it is equally clear that the legal effect of evidence and the conclusion by the Commission from the facts, as distinguished from its findings of evidentiary facts, is a question of law reviewable by the courts. Central Electric Power Association v. Hicks, 112 so.2d 230 (Miss. 1959); M. T. Reed Construction Company v. Garrett, 164 So.2d 476 (Miss. 1964). Furthermore, the Court in Central Electric Power Association, supra, held that the Commission's findings are to be reviewed on the whole record, not merely on the evidence tending to support said findings. Additionally, it has been held that the reviewing court shall examine the records and determine whether the policy and purposes of the workers' compensation law are being carried out in a particular case without over-emphasizing technicalities. Furthermore, the Court has held that an appellant court should reverse an Order of the Workers' Compensation Commission in cases where the reviewing finds that the Commission Order was based upon finding of fact which were contrary to the weight of the evidence, or upon an erroneous interpretation of the applicable provisions of the statute. Lucedale Veneer Company v. Rogers, 48 So.2d 148 (Miss, 1950).

B. The Circuit Court was correct in overturning the decisions of the Administrative Judge and Full Commission as this claim is barred by the two (2) year statute of limitations.

The Circuit Court was correct in reversing the Administrative Judge and Full Commission holding that the Claimant was barred to recover workers' compensation benefits due to the running of the two (2) year statute of limitations.

The only question in this matter, a question which was first raised by the Administrative Judge, is whether the statute was tolled due to Employer's failure to file its report in compliance with Mississippi Code Annotated § 73-3-67. That section provides as follows:

> (1) Within ten (10) days after the fatal termination of any injury, the employer, if self-insured, or its carrier, shall file a report thereof with the commission on a form approved by the commission for this purpose.
>
> In the event of an injury which shall cause loss of time in excess of the waiting period prescribed in Section 71-3-11, a report thereof shall be filed with the commission by the employer or carrier, on a form approved by the commission for this purpose, within ten (10) days after the prescribed waiting period has been satisfied.
>
> Within ten (10) days after the employer or carrier knows, or reasonably should know, that an injury has resulted, or likely will result, in permanent disability or serious head or facial disfigurement, but which does not cause a loss of time in excess of the prescribed waiting period, a report thereof shall be filed with the Commission on a form approved by the commission for this purpose.
>
> (2) Injuries not otherwise provided for in this section, and for which only medical benefits are due, are not required to be reported to the commission. Records of such injuries shall be maintained by the Employer, is self-insured, or its carrier, and shall contain the name and address of the employee, the date of the accident, the name and address of the employer, the nature of the injury, the number of days lost and the total medical expense. These records shall be made available to the commission upon request.

> If an injury provided for in this subsection subsequently causes a loss of time in excess of the prescribed waiting period, or causes permanent disability or serious head or facial disfigurement, it shall be reported within ten (10) days thereafter on the form approved for such claims.
>
> Any additional reports shall be sent to the commission in such time and in such manner as the commission may prescribe.

It is clear that the provision of the above section dealing with fatal termination in § 73-3-37(1) does not apply in this matter simply because the Claimant was not fatally injured. It is also clear that the provision in Paragraph 3 of Section (1) establishing that, within ten (10) days after the employer or carrier knows, or reasonably should know, that an injury has resulted, or likely will result, in permanent disability or serious head or facial disfigurement ... does not apply. This is especially true in as much as the Claimant was terminated from his employment with Schindler Elevator Company on May 28, 1998 for wholly non-work related reasons. Therefore, after May 28, 1998, this Employer had no knowledge whatsoever of the Claimant's physical condition or the status of his medical treatment. In fact, the Claimant testified at the hearing of this matter as follows:

Q. Did you stay in touch with Schindler of Jackson as to when you went to the doctor?

A. Which doctor?

Q. Did you let them know when you going to the doctor?

A. No.

(R.E. 3)

Claimant further testified:

Q. I guess to clarify in light of the Judge's remarks, just to clarify for his benefit, you, yourself, did not notify Schindler about the doctors' visits that you had after March 28, '98, the date of your termination?

A. No. I would notify the physician that it was a work-related injury.

Q. And you have no evidence or no knowledge of anyone else having contacted Schindler for those doctor visits or about those doctor visits?

A. No.

(R.E. 4)

Therefore, there is no way that the Employer or Carrier could have known, or reasonably should have known, that the injury would result or would likely result in permanent disability. The only provision which the Administrative Judge found to apply is the second paragraph of Section (1) which states, "In the event of an injury which shall cause loss of time in excess of the waiting period in Section 71-3-11, a report thereof shall be filed with the commission by the employer or carrier, on a form approved by the commission for this purpose, within ten (10) days after the prescribed waiting period has been satisfied. ..." The Administrative Judge held that the Employer knew or should have known that the injury would cause the Claimant to experience a loss of time in excess of the five (5) day waiting period, and therefore, the Employer was required to file a report. Employer/Carrier respectfully, but strongly, disagree with this finding. The evidence is clear in this case that the Claimant never missed more than five (5) days work between the date of injury and May 4, 1998, whether or not consecutive. The evidence establishes that following the Claimant's injury on April 23, 1998, he was off part of a day on April 24, 1998

for an MRI, and was off of work at the instance of Dr. Estes on Tuesday, April 28, 1998; Wednesday, April 29, 1998; Thursday, April 30, 1998; Friday, May 1, 1998; and a short time on May 4, 1998 when the Claimant was released by Dr. Smith to return to work. That is, the record clearly establishes that the Claimant only missed, at most, five (5) days of work between the date of the alleged injury and the date of termination, May 28, 1998. Thereafter, there is no evidence that the Claimant ever contacted anybody with Employer regarding any ongoing treatment or his medical status until after the two (2) year statute of limitations had run. In fact, as referenced above, the Claimant admits this point. Additionally, the Claimant admitted in his testimony at the Hearing on the Merits that he was terminated for completely non-work injury reasons approximately one (1) month following the injury. On this issue, the Claimant testified as follows:

Q. If the records reflect from Schindler and the union -- Local Union Number 16 -- are you a member of that?

A. Yes.

Q. -- that you were -- that they reflect you were terminated on May 28, 1998, you wouldn't have any reason to disagree with that?

A. No.

Q. Okay. And you were not terminated as a result of this work injury? It was unrelated to this work injury that you were terminated, would you concur with --

A. I would agree.

(R.E. 5)

He further testified:

Q. I guess to clarify in light of the judges remarks, just to clarify for his benefit, you yourself did not notify Schindler about the doctor's visits that you had after May 28, 1998, the date of your termination?

A. No. I would notify the physician that it was a work-related injury.

Q. And you have no evidence or no know knowledge of anybody else having contacted Schindler for these doctor visits or about those visits?

A. No.

(R.E. 6)

The Claimant further testified:

Q. Okay. And most of the doctors' visits that you had that you testified to were pretty much after -- if I'm understanding -- your termination from Schindler on May 29, 1998. Wouldn't that be correct? May 28, 1998 would have been approximately one month --

. . .

Q. About a month after -- yeah, about a mon- --- little over a month. Month and a couple of days or a few days after the injury? You only worked for them about another month or so?

A. Yes.

Q. And then most of your doctors' visits you testified to occurred after that?

A. Yes.

Q. And I believe on direct examination, you said that at that point you didn't contact Schindler about going to the doctor because you weren't working for them; you were working for Dover or Capital or somebody else; would that be correct?

A. Correct. I would tell the doctors that it was work-related.

Q. I understand, but I'm just trying to understand if you still called Schindler or if you just told Dover or Capital or whoever else you were working for about your appointment; would that be correct?

A. Yes.

(R.E. 7)

Therefore, since the Claimant had not missed the requisite number of days due to the alleged work-injury in question, before his termination on May 28, 1998, the statute of limitation ran on May 4, 2000. However, the Administrative Judge indicated that since the Claimant had eleven (11) visits to five (5) physicians between September, 1998 and April 4, 2000, those visits should also count to activate that provision of the above statute which requires employers or carriers to file injury reports when an employer knows that an injury resulted in the employee missing more than the requisite five (5) period. Again, however, the Claimant was last employed by the Employer on May 28, 1998. Employer/Carrier were not in a position thereafter to follow the Claimant from employment to employment to determine whether or not the Claimant met the five (5) day waiting period requirement. This is established by the Claimant's own testimony as referenced above. To hold employer/carriers to this task after injured employees leave their employment would unduly

burden employer/carriers in this state with the impossible task of forever keeping up with every injured employee who missed less than five (5) days work with a specific employer due to a work-related injury. Further, this places no responsibility on employees to keep former employers informed of their work-related status. Additionally, as set out above, there is no requisite medical evidence establishing that Claimant's condition for which he received treatment following his May 28, 1998 termination was due to the incident in question. The assertion that Employer may have erroneously paid for any such medical treatment does not operate as an admission that said treatment was work-related, nor does it have any affect on the running of the statute of limitations. For these reasons, Employer/Carrier assert that the facts herein place this matter under § 73-3-67(2) which states:

> (2) Injuries not otherwise provided for in this section, and for which only medical benefits are due, are not required to be reported to the commission. Records of such injuries shall be maintained by the Employer, is self-insured, or its carrier, and shall contain the name and address of the employee, the date of the accident, the name and address of the employer, the nature of the injury, the number of days lost and the total medical expense. These records shall be made available to the commission upon request.
>
> If an injury provided for in this subsection subsequently causes a loss of time in excess of the prescribed waiting period, or causes permanent disability or serious head or facial disfigurement, it shall be reported within ten (10) days thereafter on the form approved for such claims. ...

Employer complied with this provision as the Administrative Judge noted an Alabama Notice of Injury report was filled out by Employer and mentioned in its file. (R.E. 8)

IV. CONCLUSION

Hence, since the Claimant did not miss work in excess of more than the five (5) day waiting period before his termination on May 28, 1998, and since Employer was not contacted by the Claimant until after the running of the two (2) year statute of limitations on May 4, 2000, and no indemnity benefits were paid nor requested within that two (2) year statutory period, it is clear that the Circuit Court was correct in overruling the Commission Order, as the Claimant's claim should be barred pursuant to the two (2) year statute of limitations.

RESPECTFULLY SUBMITTED this the 13th day of November, 2007.

SCHINDLER ELEVATOR COMPANY, and ZURICH AMERICAN INSURANCE COMPANY, EMPLOYER/CARRIER/APPELLEE

VAUGHN, BOWDEN & WOOTEN, PA
Their Attorneys

BY: _____
BENJAMIN U. BOWDEN
Mississippi Bar No[redacted]

CERTIFICATE OF SERVICE

I, Benjamin U. Bowden, do hereby certify that I have this day mailed, through the United States Mail, postage prepaid, a true and correct copy of the above and foregoing to Prentiss M. Grant, Esquire, at his usual mailing address of Post Office Box 5459, Brandon, Mississippi 39047-5459.

THIS, the 13th day of November, 2007.

BENJAMIN U. BOWDEN

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