IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMMY PRENTICE — APPELLANT

VS. — **NO. 2007-WC-00815**

SCHINDLER ELEVATOR COMPANY AND
ZURICH AMERICAN INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PERSONS

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Timmy Prentice, Appellant

2. Prentiss M. Grant, Esquire
   Attorney for Appellant

3. Schindler Elevator Company and
   Zurich American Insurance Company, Appellees

4. Benjamin U. Bowden, Esquire
   VAUGHN,, BOWDEN & WOOTEN, PA
   Attorneys for Appellee

5. Honorable W. Swan Yerger
   Trial Judge, First Judicial District
   Hinds County Circuit Court

6. Honorable Mark Henrey
   Administrative Judge
   Mississippi Workers' Compensation Commission

SO CERTIFIED this the 10th day of Sept, 2007.

PRENTISS M. GRANT
ATTORNEY FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF THE ISSUE

The Appellant shows unto the Court that the issue to be presented herein is the following:

1. The Circuit Court committed reversible error in reversing and rendering the decision of the Full Commission of the Mississippi Workers' Compensation Commission and the Administrative Judge as same was supported by substantial evidence and/or was not arbitrary or capricious. The Employer and Carrier had notice of the continuing medical treatment received by the Claimant, lead the Claimant to believe his treatment was being handled by their workers' compensation insurance, and failed to file the required First Report of Injury with the Mississippi Workers' Compensation Commission. The Administrative Judge and the Full Commission were correct in ruling the Employer and Carrier are estopped from asserting in this claim the Statute of Limitations defense found in Miss Code Ann. § 71-3-35(1) (Rev. 2000).

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VS. — **NO. 2007-WC-00815**

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ZURICH AMERICAN INSURANCE COMPANY — APPELLEES

STATEMENT OF THE CASE

Appellant, Timmy Prentice, hereinafter "Claimant", perfected an appeal to this Court from an Order of the Hinds County Circuit Court reversing and rendering the decision of the Full Commission of the Mississippi Workers' Compensation Commission. The decision of the lower court was against the current law as it pertains to the Employer and Carrier being estopped from asserting the Statute of Limitations as a defense when said Employer and Carrier have failed to file a First Report of Injury with the Mississippi Workers' Compensation Commission as required by Miss. Code Ann. §71-3-67. The primary question is whether Schindler Elevator Company and Zurich American Insurance Company, hereinafter "Employer and Carrier", knew, or should have known, at the time of the injury or shortly thereafter, that the injury would cause the Claimant to experience "loss of time in excess of the [five day] waiting period prescribed in Miss. Code Ann. § 71-3-11," which would require the Employer and Carrier to file the First Report of Injury.

On April 23, 1998, the date of the accident, Claimant was employed by Schindler Elevator Company. That day at the worksite a crane lifted a portable restroom, of the type commonly referred to as a "porta-john" or similar name, about ten or fifteen feet into the air. Unbeknownst to the crane operator, the portable restroom was occupied at the time by the Claimant. As the restroom was suspended above the sixth floor, the Claimant stepped out and fell to the construction floor.

The Claimant reported the injury to his supervisor, Doug McIntire, who gave Claimant a "State of Alabama Employer's First Report of Injury or Occupational Disease" form and the fax number of the Employer's office in Alabama. The Claimant completed the form and faxed it to that number.

Following the accident the Claimant missed several days of work and sought treatment by several doctors. A MRI and other tests were conducted and the Claimant testified without contradiction that he was not paid for the time he missed from work while receiving medical care.

The Claimant agrees the Employer and Carrier paid no indemnity benefits relative to this claim to the present but have paid some medical benefits. Claimant continued to receive medical attention due to his injuries from the date of his accident until on or about August 9, 2001, at which time he was declared permanently and totally disabled. The Claimant did not

make a claim for medical benefits during the statutory period because the employer led him to believe same would being handled until the statutory period had past.

The Administrative Judge in his Order of September 23, 2005, held the statute of limitations had run against the Claimant but that the Employer and Carrier was estopped from raising said argument due to its failure to comply with Mississippi Code Annotated §73-3-67, as interpreted by the Supreme Court in its rulings in Martin v. L.A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964), Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997), and McCrary v. City of Biloxi, 757 So. 2d 978,981 (Miss 2000). Said ruling was correctly affirmed by the Full Commission on March 14, 2006.

STATEMENT OF THE FACTS

On April 23, 1998, the date of the accident, Claimant was employed by Schindler Elevator Company. That day at the worksite a crane lifted a portable restroom, of the type commonly referred to as a "porta-john" or similar name, about ten or fifteen feet into the air. Unbeknownst to the crane operator, the portable restroom was occupied at the time by the Claimant. As the restroom was suspended above the sixth floor, the Claimant stepped out and fell to the construction floor.

The Claimant reported the injury to his supervisor, Doug McIntire, who gave Claimant a "State of Alabama Employer's First Report of Injury or Occupational Disease" form and the fax number of the Employer's office in Alabama. The Claimant completed the form and faxed it to that number. (R.E. 5)

Following the accident the Claimant missed several days of work and sought treatment by several doctors. A MRI and other tests were conducted and the Claimant testified without contradiction that he was not paid for the time he missed from work while receiving medical care.

The Claimant agrees the Employer/Carrier paid no indemnity benefits relative to this claim to the present but have paid some medical benefits. Claimant continued to receive medical attention due to his injuries from the date of his accident until

on or about August 9, 2001, at which time he was declared permanently and totally disabled. The Claimant did not make a claim for medical benefits during the statutory period because the employer led him to believe same would being handled until the statutory period had past.

The Employer/Carrier position is that Martin v. L.A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964), Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997), and McCrary v. City of Biloxi, 757 So. 2d 978,981 (Miss 2000), should not apply against them because they allegedly did not have notice the Claimant was still receiving medical treatment following his termination from employment with Schindler Elevator Company on May 28, 1998, for wholly non-work related reasons. In support of their contention the Employer and Carrier set out a portion of the Claimant's testimony at the hearing 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.

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. 6)

There are three flaws in the Employer/Carrier's argument which support the Claimant's contention the Full Commission's decision was based upon substantial evidence.

First: As the above testimony states, the Claimant notified the physicians his injuries were work related. Those medicals were forwarded to the Employer and Carrier for payment. The evidence shows the few medicals paid by the carrier include services incurred by the Claimant and payments made by the Employer/Carrier beyond the last date of the Claimant's employment. Therefore, the Employer and Carrier had notice of continuing medical treatment and, in fact, paid for same. The Affidavit of Rob Golus, provided by the Employer and Carrier, with supporting documents, shows medical treatment received by the Claimant from Jackson Radiology Associates and Dr. Robert E. Estess in 1999 and paid for by the Employer and Carrier. (R.E. 7) The Employer and Carrier can not now argue they had no way of

knowing the Claimant was receiving treatment for which the Employer and Carrier was paying.

Second: The Claimant further testified that he went back to work for Schindler Elevator after his initial discharge in 1998. The company he worked for was Schindler Elevator in Shreveport, Louisiana, which according to the Claimant's testimony had the same parent company as Schindler Elevator in Jackson, Mississippi. Schindler Elevator in Shreveport, Louisiana, also corresponded with Dr. Holder about the medication she had the Claimant taking and the need to remove him from said medication. The testimony of the claimant was as follows:

Q. The - you had stated to the judge's questions that until August 9th of 2001 when the doctor took you off work, that you worked?

A. Yes.

Q. And I think - can you tell some of the companies that you worked for during that time?

A. I worked for Schindler Elevator. They terminated me. From there I went to, I believe it was Capitol Elevator. Then I went back to work at Schindler Elevator in Shreveport, Louisiana.

Q. Okay. Is that the same company, to your knowledge?

A. Same mother company, yes.

(R.E. 8)

Claimant further testified:

Q. Strike that. Mr. Prentice, let me ask you this question: Your medical records reveal, I want to say, a letter from Schindler Elevator and a letter replied from Dr. Holder about your medication.

A. Yes. Oh, yes. You refreshed my memory. I was on a cocktail mixture of medications to break the pain cycle in my brain. And Mr. Alexander over there, I had notified him that I had this disease, and he said that - he give me a drug test. And I showed up positive, which I had prescriptions for each one of these drugs. And he said I could no longer work while I was on these drugs, so basically I weaned off of them and went bact into -- it was pure hell. (R.E. 9)

The Employer and Carrier can not say it did not have notice of the Claimant receiving medical treatment since they objected to the treatment in the form of prescriptions the Claimant was receiving.

Third: The Claimant testimony reveals that he did stay in touch with Schindler Elevator of Jackson following his termination. In fact, the Claimant testified that he called Doug McIntyre at the Jackson office when his bills were not being paid and Mr. McIntyre gave the Claimant the Carrier's direct telephone number. The testimony was as follows:

Q. Okay. When you testified earlier that you had trouble - when you started getting the medical bills -

A. Yes.

Q. - you had to call and - I'm sorry - - Doug - - what was his name?

A. I called Doug McIntyre.

Q. Okay. Was that after you were terminated from Schindler in Jackson?

A. I believe so.

Q. And he gave you Mabel's number?

A. Correct.

(R.E. 10)

Again, proof the Employer and Carrier had notice of the Claimant's continuing medical treatment.

SUMMARY OF THE ARGUMENT

This Court has stated the following with regards to the standard of review in agency decision: "In reviewing the decision of a chancery or circuit court regarding an agency action, this Court applies the same standard employed by the lower court." Mississippi Sierra Club v. Mississippi Dep't of Envtl. Quality, 819 So.2d 515, 519 (Miss. 2002). This Court will not disturb an agency's ruling unless the decision of the administrative agency "(1) was unsupported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the administrative agency to make; or (4) violated some statutory or constitution right of the complaining party." Id.

In specific regards to workers' compensation decisions, this Court has ruled "The findings and orders of the Mississippi Workers' Compensation Commission are binding on all appellate courts so long as the decisions are supported by substantial evidence." Vance v. Twin River Homes, Inc., 641 So.2d 1176, 1180 (Miss.1994); Fought v. Stuart C. Irby Co., 523 So.2d 314, 317 (Miss.1998); Champion Cable Const. Co., v. Monts, 511 So.2d 924, 927 (Miss.1987); Penrod Drilling Co., v. Etheridge, 487 So.2d 1330, 1332 (Miss.1986); Georgia-Pacific Corp. v. Veal, 484 So.2d 1025, 1027 (Miss.1986); Evans v. Marko Planning, Inc., 447 So.2d 130, 132 (Miss.1984). Also this Court has stated, "Great

deference is given to the finding of the Commission when supported by substantial evidence. Harper v. North Miss. Med. Ctr., 601 So.2d 395, 395 (Miss.1992).

In the case sub judice, the decision of the Full Commission is support by substantial evidence. The Employer and Carrier knew, or should have known, the Claimant miss the requisite number of days to require the Employer and Carrier to file the First Report of Injury. Although for a time the Claimant was not in the employ of the Employer, he contacted the Employer about his medical benefits on several occasions and was lead to believe his benefits were being utilized, the Carrier paid for medical treatment after the Claimants initial termination of employment with the Employer, the Claimant missed work when he was re-employed by the Employer to receive treatment for the same injuries and the Employer complained to Claimant's medical providers concerning the prescription medication the Claimant was taking.

It is clear from the certificate filed by Jo Ann McDonald, Secretary for the Mississippi Workers' Compensation Commission that as of October 19, 2001, no report was on file with the Commission. (R.E. 11) The Employer and Carrier do not deny they failed to filed the required report. Given the substantial evidence which supports the Full Commission's decision that Martin v. L.A. Contracting Co., 249 Miss. 441, 162 So.2d 870

(1964), Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997), and McCrary v. City of Biloxi, 757 So. 2d 978,981 (Miss 2000), apply and the Employer and Carrier are estopped from asserting the Statute of Limitations defense, this Court should reverse the decision of the circuit court and re-instated the decision of the Full Commission.

APPELLANT'S ARGUMENT

THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN REVERSING AND RENDERING THE DECISION OF THE FULL COMMISSION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND THE ADMINISTRATIVE JUDGE AS SAME WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR WAS NOT ARBITRARY OR CARPICIOUS

On April 23, 1998, the date of the accident, Claimant was employed by Schindler Elevator Company. That day at the worksite a crane lifted a portable restroom, of the type commonly referred to as a "porta-john" or similar name, about ten or fifteen feet into the air. Unbeknownst to the crane operator, the portable restroom was occupied at the time by the Claimant. As the restroom was suspended above the sixth floor, the Claimant stepped out and fell to the construction floor.

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The Claimant filed his Petition to Controvert and the Employer and Carrier filed an Answer. The Employer and Carrier then filed a Motion to Dismiss alleging the Claimant was barred from filing a claim pursuant to the two year Statute of Limitations period having run.

The Administrative Judge in his Order of September 23, 2005, held the statute of limitations had run against the Claimant but that the Employer/Carrier was estopped from raising said argument due to its failure to comply with Mississippi Code Annotated §73-3-67, as interpreted by the Supreme Court in its rulings in Martin v. L.A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964), Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997), and McCrary v. City of Biloxi, 757 So. 2d 978,981 (Miss 2000). Said ruling was correctly affirmed by the Full Commission on March 14, 2006.

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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. 6)

There are three flaws in the Employer's and Carrier's argument and all evidence the Full Commission's decision was based upon substantial evidence and was not arbitrary or capricious.

First: As the above testimony states, the Claimant notified the physicians his injuries were work related. Those medicals were forwarded to the Employer and Carrier for payment. The evidence shows the few medicals paid by the Carrier include services incurred by the Claimant and payments made by the Employer and Carrier beyond the last date of the Claimant's employment. Therefore, the Employer and Carrier had notice of continuing medical treatment and, in fact, paid for same. The Affidavit of Rob Golus, provided by the Employer and Carrier, with supporting documents show medical treatment received by the claimant from Jackson Radiology Associates and Dr. Robert E. Estess in 1999 and paid for by the Employer and Carrier. (R.E. 7)

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A. Correct.

(R.E. 10)

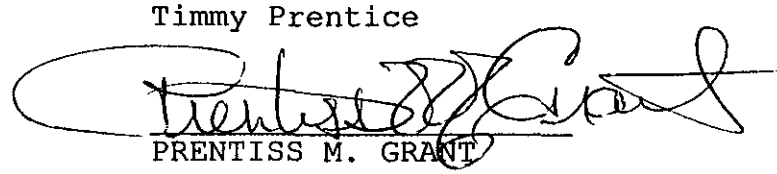
Again, proof the Employer and Carrier had notice of the Claimant's continuing medical treatment.

In addition, it is clear from the certificate filed by Jo Ann McDonald, Secretary for the Mississippi Workers' Compensation Commission that as of October 19, 2001, no report was on file with the Commission. (R.E. 11) The Employer and Carrier do not deny they failed to filed the required report. The only position taken in these proceedings by the Employer and Carrier is that they did not know or could not have known the Claimant was receiving treatment after the date of his initial termination. This position is refuted by the evidence before the Court.

CONCLUSION

Given the substantial evidence which supports the Full Commission's decision that Martin v. L.A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964), Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997), and McCrary v. City of Biloxi, 757 So. 2d 978,981 (Miss 2000), apply and the Employer and Carrier are estopped from asserting the Statute of Limitations defense, this Court should reverse the decision of the circuit court and re-instated the decision of the Full Commission.

Respectfully submitted,
Timmy Prentice



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CERTIFICATE OF SERVICE

I, Prentiss M. Grant, attorney for Appellant, Timmy Prentice, do hereby certify that I have this day mailed by United States Mail, first class, postage prepaid, a true and correct copy of the above and foregoing Brief for Appellant to the below listed individuals:

Honorable W. Swan Yerger
Circuit Court Judge
Post Office Box 327
Jackson, MS 39205

Benjamin U. Bowden, Esquire
VAUGHN, BOWDEN & WOOTEN, PA
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Honorable Barbara Dunn
Circuit Clerk
Post Office Box 327
Jackson, MS 39205

This the 10th day of September, 2007.

PRENTISS M. GRANT