IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-WC-00817-COA

SAMUEL JAMES — APPELLANT

VS.

BOWATER NEWSPRINT

AND

TRAVELERS INSURANCE COMPANY — APPELLEES

On appeal from the Circuit Court of Grenada County, Mississippi

REPLY BRIEF OF APPELLEES

FRANKLIN WILLIAMS, MB#[redacted]
THE WILLIAMS FIRM, PC
1002 Van Buren Avenue
Oxford, MS 38655
662-236-4477

ORAL ARGUMENT IS NOT REQUESTED BY APPELLEES

IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-WC-00817-COA

SAMUEL JAMES — APPELLANT

VS.

BOWATER NEWSPRINT

AND

TRAVELERS INSURANCE COMPANY — APPELLEES

CERTIFICATE OF INTERESTED PARTIES

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

1. Samuel James, Claimant/Appellant;
2. Bowater Newsprint, Employer/Appellee;
3. Travelers Insurance Company, Carrier/Appellee;
4. J. Franklin Williams, attorney for Employer/Appellee;
5. Carlos E. Moore, attorney for Claimant/Appellant;

This the 20th day of December, 2007.

THE WILLIAMS FIRM, P.C.
1002 Van Buren Ave.
Oxford, MS 38655
(662) 236-4477

FRANKLIN WILLIAMS [redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SUMMARY OF THE ARGUMENT

The appellant, a worker's compensation claimant, did not file a petition to controvert until ten years after he claimed a work injury occurred. He admits this was not a latent injury, but argues the two-year statute of limitations did not expire because he continued to work and the underlying disease from which he suffered worsened. The undisputed facts are that claimant repeatedly alleged a specific 1994 incident, that the claim was denied by the employer/carrier, that he received no compensation benefits, that he was diagnosed with and treated for a chronic condition, and was repeatedly told the disease would worsen and ultimately require surgery. There is no exception to the limitations period. The Administrative Judge and the Full Commission found that the claim was filed untimely and the Circuit Court agreed. Under any interpretation of the facts and law, this claim is time-barred.

ARGUMENT

I. STATEMENT OF THE FACTS

Claimant asserts that an incident which happened on August 24, 1994, caused the subject work injury. Over the ensuing decade, claimant pointed to that incident as the event which he claims initiated his physical problems. During his years of treatment, he was repeatedly told that he had avascular necrosis, a progressive bone condition affecting his hips (hereinafter AVN). He was told it would worsen to the point he would need surgery. There has never been any dispute over those determinative facts.[1] RE, Deposition of Claimant, p. 24-26.

The year after the 1994 incident, Claimant had hip pain and sought treatment with Dr. Kevin Whalley. After diagnostic studies, Dr. Whalley told claimant that he had the degenerative bone condition AVN affecting both hips RE, p.27, 30 Exhibit B, Whalley records.

In June, 1996, an MRI and x-ray confirmed AVN of both femoral heads, more severe on the left. Claimant then saw Dr. Thomas Windham, a neurologist, who ruled out lumbar issues as a cause, affirmed the presence of AVN, and referred Claimant to Dr. Wayne Lamar, an orthopedist. (RE, pp 29-31)

Dr. Lamar's medical notes of March 27, 1998, state that "the main pain was in the left hip. The patient states that this started at the time of his fall." RE, p 32. On March 30, 1998, Dr. Lamar discussed the diagnosis and treatment of avascular necrosis with Claimant and placed him on continuing light duty work. At a visit on April 29, 1998, the doctor stated that Claimant "indicates he injured this when he slipped on some oil on his job."

Dr. Lamar advised Claimant that because of the avascular necrosis, a hip replacement was

---

[1]There is nothing in the record to show that the employer/carrier accepted the claim or paid medical benefits.

likely. The doctor stated in his notes that it was Claimant's "opinion that he injured his hips or aggravated his condition when he fell." *Id.*

In a letter dated May 5, 1998, Dr. Lamar wrote the following:

> I have seen Samuel D. James, employee, who tells me he injured his hips while on his job working for Newsprint South in 1995. He states he slipped in some oil and injured his lower back at that time and complained of pain in his left hip. . . . it is his opinion that he injured his hips or aggravated his condition when he fell. . . . The patient stated he had not had any pain in his hips prior to the fall.

RE. 34

A request for medical treatment was finally made to the carrier in 1999, five years after the work incident and over three years from the date of diagnosis. The employer/carrier investigated, obtained a recorded statement from the claimant, and thereafter filed a Notice of Controversion denying compensability. The claim was rejected as being untimely and unrelated to work. Still, claimant did nothing for another six years, until a Petition to Controvert was filed on June 8, 2005.

III STATEMENT OF THE LAW

As the Court is aware, the standard of review on an appeal of a Full Commission ruling is limited to whether the order was supported by substantial evidence, arbitrary or capricious, beyond the power of the lower authority to make, or violated some statutory or constitutional right. UCCR 5.03, citations omitted.

Pursuant to *MCA § 71-3-35(1)* a claim "shall be barred" if no application for benefits is

filed within two years after the date of injury if no compensation has been paid other than medical or burial expenses. The statute of limitations begins to run "from the date of the injury."

A. The Statute Runs From Time Injury is Apparent as Recently Confirmed in *Parchman*

The rule reiterated by this Court and the Supreme Court is that while the two-year statute of limitations begins to run from the date of injury and not necessarily the accident, that date is determined by when a compensable injury becomes apparent. Here, Claimant knew years before 2005 that he had and would continue to have a disability that, in his mind at least, was related to a work incident. Yet he says the limitations period should not run until he had surgery.

Claimant's argument is the same one made and rejected by this Court in *Parchman v. Amwood Products, Inc., 2007 WL 239509, Miss.App. Jan 30, 2007 (NO. 2006-WC-00075-COA), rehearing denied Nov 06, 2007 (citation pending).* In that case, the claimant sustained a burn injury in March 2000, which, surprisingly, became progressively worse. When the condition finally resulted in the loss of his job, Parchman filed a petition in July 2003.

Parchman argued the statute did not begin to run until he became aware that the injury was disabling, which he claimed was when it interfered with his wage-earning ability. This is what Claimant argues here. This Court disagreed with Parchman's theory, stating: "Although Parchman couches his argument in different terms, this point of error is simply an argument that Parchman's injury was a latent injury."

Parchman did not request that his medical bills be paid under worker's compensation, and neither did Claimant until at least 1999. This Court found that the statute began to run against Parchman at the latest, on the date that he initially sought compensable medical treatment. Both the administrative judge and the commission held that the statute started on the date of the accident, which was also the date of injury. Parchman, like James, was aware that benefits were

available but made no effort to obtain them until he filed his petition.

This Court explained that under *Sec. 71-3-35*, the statute runs from the date of the injury, citing to a prior holding that "[i]t 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. . . . ." *Jordan v. Pace Head Start, 52 So.2d 28, 30 (Miss.Ct.App.2002).* The Court found that the "injury" occurred, and the statute began to run, when Parchman received the burn, resulting in medical care. Therefore the limitations period expired in March 2002. *WL 239509, pp. 3-4* James, like Parchman, received no benefits of any kind within the two year period following his injury. Accordingly, the statute bars the petition to controvert.

Where an injury is progressive,"the time period for filing a claim does not begin to run until the claimant, judged by the standard of a reasonable person, recognizes the nature, seriousness, and probable compensable character of his injury." *Quaker Oats Co.*, 370 So.2d 1363, at 1366. Unlike Parchman, James was well aware from the beginning of the nature and future course of his condition. He was on continuing limited duty and he knew the AV would get worse, to the point he would require surgery.

It is clear that James' injury began on the day of the accident, when he received medical treatment. But even if we are forgiving and seek to extend the beginning date to some other time during the ten years, it still is barred. Again and again James was told what he had and what would happen, and yet he did nothing. Under the most generous of interpretations, the statute has expired.

B. The Claimant Had Medical Confirmation of a Compensable Injury Years Before Filing

While of course not authority for the Court, the Commission's discussion in a strikingly

similar case, *Haley v. Jeffcoat Fence Co., Inc., MWCC No. 01-03683-H-5463-A (MWCC 2004)*, is interesting for how it applied the prevailing law and distinguishes cases relied on by Claimant:

> "Mr. Haley argues that he should be allowed two years from October 30, 2000, which he claims is the first day he lost time from work as a result of his prior injury. Certainly, there are cases where the moment a person becomes disabled from work may mark the point of discovery that a compensable injury has been sustained, and hence, the point of beginning for the two year statute of limitations. Both *Quaker Oats* and *Bolivar County Gravel Co. v. Dial*, 634 So.2d 99 (Miss. 1994) are examples. But this is not the case presently, and neither of these precedents stand for the proposition that the two year statute of limitations does not begin to run until the claimant first becomes disabled from work. The key is determining 'the date of the injury' because this is when §§ 71-3-35 says that the two year period commences. In any given claim, this may be the date the claimant has to quit work altogether, or the date the claimant obtains 'medical confirmation of compensable injury,' as in *Georgia Pacific Corp. v. Taplin, 586 So.2d 823, 827 (Miss. 1991)*, or the date of the accident itself, depending on whether the injury is latent or progressive. See also *Jordan v. Pace Head Start, 852 So.2d 28 (Miss.Ct.App. 2002)*; *Speed Mechanical, Inc. v. Taylor, 317 So.2d 317 (Miss. 1977)*. In the present case, Haley's injury was neither latent nor unknown. Instead, he knew immediately that he hurt his left arm and shoulder on either October 9, 10 or 11, 2000."

This reasoning is applicable here. The injury was neither latent nor unknown. The evidence is

conclusive that claimant knew the medical proof showed the disease would worsen.[2]

In that regard, it is noteworthy that claimant admits that the "injury was not latent. . . ." Appellant's Brief, p. 6. He acknowledges that the only recognized exception to the statute of limitations is not applicable. Claimant discussed the nature of his disease repeatedly with his doctors. He received extensive treatment over a 12-year period. He was assigned light duty work and told he would need surgery. The carrier even denied the injury through a formal filing, but still he did nothing to preserve his claim

C. A Continuing or Worsening Injury Does Not Extend the Statute of Limitations.

Claimant argues that the statute did not run because his employment continued to exacerbate his condition. There is no support for this contention, particularly when Claimant knew of a specific incident, claimed an injury and received medial care and advice. As pointed out in *Parchman, Id.*, it is simply an end-run for a latent injury argument. Nowhere in his brief does Claimant even attempt to assert any proof in support of this position.

Futhermore, the cases he cites are not on point. The statute of limitations question was not even on appeal in *Jenkins v. Ogletree Farm Supply, 291 So. 2d 560, 562 (Miss. 1974)*. The facts in *Bolivar County Gravel Co. v. Dial, 634 So.2d 99 (Miss. 1994)* are so different as to only emphasize the untimeliness of this claim. The *Dial* claimant, suffering from lung disease, was simply unaware of the compensable nature of his injury until he was forced to leave work. There was also an issue arising from the difficulty of finding a date on which the injury occurred. Here,

---

[2]James' assertion that he ". . . was not aware of the origin of his injury . . ." and that "He was not informed of the severity or progression of his medical condition until surgery was ordered and later conducted in January 2004" is not only wrong, but misrepresents the facts.

Claimant has always said and testified that his injury started in 1994, and he has always known AV was disabling to some degree.

The medical facts are also significantly different. The *Dial* claimant had widely-spaced incidents were he would become briefly sick but then fully recover, and his physician testified that claimant would be ". . . . as good after he had recovered . . . as . . . before." Then he had a specific injurious incident from which he did not return. *Id, 103, 104.*

Here, James' physicians made it clear that AVN is a progressive disease which would require surgery. There was no period of recovery and re-injury. Unlike *Dial*, Claimant was always aware of both the severity and compensable nature of his condition. James never thought his treatment had ended or the disease cured at any time up to the point of a new injury, as did the *Dial* claimant.

On the other hand, a case that is on point is *Benoist Elevator Co., Inc. v. Mitchell, 485 So.2d 1068 (Miss. 1986).* Claimant suffered an injury in 1959, continued to have pain over the years when he worked, and finally sought help again in 1975. The Court dismissed the claim as untimely because claimant "knew his hand had been injured since 1959 and he had suffered with pain and stiffness throughout the years." *Id., 485 So.2d at 1069.* The fact the injury worsened did not extend the statute of limitations.

The test is awareness, both of the nature of the injury and its cause. Neither issue can be disputed here. There was an incident, a diagnosis of avascular necrosis, medical attention, even a denial of compensability. That the condition progressed in the intervening years, as he knew it would, does not extend the statute of limitations to some uncertain point in the future. Allowing a claimant to avoid the limitations period on grounds his condition worsened would eviscerate

the meaning and purpose of the law. Untold scenarios can be imagined whereby a claim would never reach a limitations point because there would be continuos allegation of aggravation. That is not the law.

CONCLUSION

This claim is absolutely barred by the two-year statute of limitations, *MCA § 71-3-35(1).* Claimant told his physicians that his hip pain began on August 24, 1994, after a work accident. He was diagnosed with a congenital condition, and repeatedly told the disease would require future medical care. In 1999, he finally reported a claim to the carrier, who denied it in part because the statue of limitations had run. Still, claimant failed to act for another six years.

Claimant's occupational disability did not begin in 2005. According to him, there was a definite and certain time of injury. Claimant has known the nature, seriousness, and probable compensable character of his injury or disease for over ten years. To find a claim such as this timely is to render the statute of limitations meaningless. The whole purpose of a limitations period is to have a date certain by which claimants must assert their rights. The unfortunate fact is that Claimant allowed the statutory period to expire without taking necessary action, and the rulings of the Full Commission and Circuit Court should be affirmed.

Respectfully submitted.

THE WILLIAMS FIRM, PC
1002 Van Buren Avenue
Oxford, Mississippi 38655
(662) 236-4477

BY: _____
FRANKLIN WILLIAMS M[redacted]

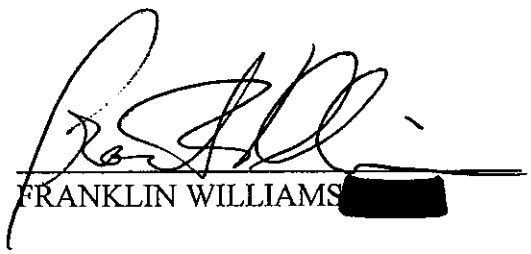
CERTIFICATE OF SERVICE

I, FRANKLIN WILLIAMS, attorney at law, Oxford, Mississippi, do hereby certify that I have this date mailed, by United States Mail, postage pre-paid, a true and correct copy of the above and foregoing Appellee's Brief to:

Mr. Carlos Moore
Moore Law Office
P.O. Box 1402
Grenada, MS 38901

Hon. Clarence E. Morgan, III
Circuit Court Judge
P.O. Box 721
Kosciusko, MS 39090-0721

This 20th day of December, 2007.



FRANKLIN WILLIAMS [redacted]