IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MISSISSIPPI STATE UNIVERSITY
AND MISSISSIPPI INSTITUTIONS
OF HIGHER LEARNING,
SELF-INSURED — APPELLANTS

VERSUS — Case No. 2008-WC-00340-COA

BRUCE PANUSKA — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY, MISSISSIPPI
AND FROM THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION

BRIEF OF THE APPELLEE

Oral Argument Not Requested

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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 representations are made in order that the members of this Commission may evaluate possible disqualification or recusal.

1. Bruce Panuska, claimant/appellee;
2. Carla Panuska, wife of claimant;
3. Mississippi State University, employer/appellant;
4. Mississippi Institutions of Higher Learning, Self-Insured Mississippi, carrier/appellant;
5. Patricia A. Killgore, Esq., attorney for the claimant; and
6. Joseph Wilkins, III, Esq., Wilkins, Stephens & Tipton, P.A.; attorney for the employer and carrier/appellant;
7. The Honorable James Homer Best and The Honorable Mark Henry, Administrative Judges, Mississippi Worker's Compensation Commission; and
8. The Honorable James T. Kitchens, Jr., Circuit Court Judge.

This the 6th day of August, 2008.

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3. Whether the doctrines of Collateral Estoppel and/or Res Judicata bar re-litigation of the statute of limitations issue because the Administrative Judge's Order of May 9, 2003, denying the employer's motion to dismiss, became final when the Employer and Carrier did not appeal the Full Commission's Order of October 21, 2003, which affirmed the Administrative Judge's Order of May 2003.

II.

STATEMENT OF THE CASE

A.

PROCEDURAL BACKGROUND

Prior to this appeal, this case was reviewed by two Administrative Judges on four separate occasions. Administrative Judge Mark Henry reviewed the issue of the statute of limitations on two occasions.(R.E. 4, R. Vol. 3, p. 146; R. Vol. 3, p. 176). Administrative Judge Homer Best reviewed the issue of the statute of limitations on two separate occasions (R.E. 7; R. Vol. 6, p. 529; R. Vol. 6, p.550).

Prior to this appeal, this case was also reviewed by the Full Commission on three occasions. (affirming Judge Henry's Motion Order R.E. 6; R. Vol. 5, p. 376; affirming Judge Best's Motion Order R. Vol. 6, p. 540; affirming Judge Best's Order on the merits R.E. 8; R. Vol. 6, p. 565). It was again reviewed by the Circuit Court of Oktibbeha County, Mississippi. (R.E. 10; R. Vol. 1, p. 15). Upon each review, the Administrative Judges, Commissioners and the Circuit Court Judge have consistently held that the statute of limitations did not begin to run in this case until September 6, 2000 when the claimant's injury was first diagnosed.

The Petition to Controvert was filed on February 7, 2002. (R. Vol. 3, p. 1). Prior to completing discovery, the Employer/Carrier filed a motion to Dismiss (R. Vol. 3, p. 44) arguing that the two-year statute of limitations began running on March 27, 1999, the date of the claimant's accident. The Administrative Judge, The Honorable Mark Henry, issued an Order (R.E. 4; R. Vol. 3, p. 146) denying the Employer/Carrier's Motion to Dismiss on the basis that the statute of limitations did not begin to run with regard to the ear injury until September 6, 2000 when Dr. Fetterman first diagnosed Mr. Panuska with a traumatic inner ear injury (i.e. labyrinthine concussion). (R.E. 4, p. 149 & 150; R. Vol. 3, p. 149 & 150) The Administrative Judge ruled that the statute of limitations had run with regard to the brain injury (cerebral contusion) because it was discovered soon after the blow to the head. (R.E. 4, p. 149; R. Vol. 3, p. 149). Mr. Panuska bases his claim, not on the brain injury (cerebral contusion), but on the ear injury (the labyrinthine concussion). It is the ear injury that is the subject of this appeal.

On May 21, 2003 the Employer/Carrier filed a Motion to Reconsider, (R. Vol. 4, p. 151) which was denied by Order of the Administrative Judge on July 11, 2003. (R. Vol. 4, p. 176). The Employer/Carrier then filed an Appeal to the Full Commission. (R. Vol. 4, p. 177).

On October 21, 2003, after hearing oral arguments (R. Vol. 5, p. 375), the Full Commission affirmed the Order of the Administrative Judge dated May 9, 2003. (R.E. 6; R. Vol. 5, p. 376).

After the Order was affirmed by the Full Commission, the parties obtained the medical testimony from the various physicians and the vocational rehabilitation specialist and readied this case for final hearing.

Upon completion of discovery and prior to the final hearing on the merits, the Employer and Carrier filed another motion (this time entitled "Motion to Reopen" although the case had never been closed) (R. Vol. 5, p. 377) again addressing the statute of limitations issue. The claimant filed his objection and response to this latest motion. (R. Vol. 6, p. 502). Due to the rotation of Judges at the Commission, by the time this case was ready to be tried, it had been re-assigned to Administrative Judge Homer Best. The statute of limitations question was decided once again in the favor of the claimant when Judge Best denied the employer and carrier's Motion to Reopen on January 23, 2006. (R. Vol. 6, p. 529) stating that "this Administrative Judge will not entertain, accept or hear any further argument or evidence on the issue of the two year statute of limitations unless so instructed by the Full Commission." (R. Vol. 6, p. 534 & 535). Judge Best's Motion Order was appealed to the Full Commission. (R. Vol. 6, p. 536). This Appeal was dismissed by the

Commission by Order dated February 21, 2006. (R. Vol. 6, p. 540). The employer and carrier asked for clarification of its Order and the Full Commission entered its Order on February 28, 2006, stating, "The [Administrative] Judge noted how the Employer/Carrier has been given numerous opportunities to marshal evidence and argue its statute of limitations defense. Any further attempts to litigate this issue should be addressed to the Judge at the time of the hearing." (R. Vol. 6, p. 545).

After conducting a final hearing on the merits on April 3, 2006, Administrative Judge Homer Best found that "the claimant is incapable of performing or holding any full time employment due to the precarious nature of his seriously disruptive symptoms." (R.E. 7; R. Vol. 6, p.560 & 56l). The Order of the Administrative Judge was entered on August 1, 2006, wherein it was directed that the Employer and Carrier pay to the Claimant:

1. Permanent and total disability benefits in the amount of $322.90 per week for a period of not more than 450 weeks, beginning May 3, 2002. To each such installment not timely paid there was added the 10% penalty, together with interest at the legal rate.
2. Such medical services and supplies as may have been and may yet be reasonably necessary to the treatment of the claimant's labyrinthine concussion and his recovery therefrom, consistent with the foregoing decision and with the rules and fee schedule of the Commission.

To date, no benefits have been paid to the claimant.

The Order of the Administrative Judge was affirmed by the Full Commission on February 13, 2007. An appeal to the Circuit Court followed. Oral argument was had before The Honorable James Kitchens, Circuit Court Judge, Oktibbeha County, Mississippi on October 9, 2007. The oral argument was transcribed and is part of the record on this appeal. (R. Vol. 2, p. 1 - 36). The Circuit Court, "having read the record in detail" affirmed the Order of the Full Commission. (R.E. 10, R. Vol. 1, p. 15).

II.

STATEMENT OF THE FACTS

On March 27, 1999, the claimant, Bruce Panuska Ph.D., worked as an Associate Professor in the Department of Geosciences at Mississippi State University. He had been an instructor at the college level since 1984. (R. Vol. 7, p 7 & 8). His professional duties included teaching college classes and, in the summer, traveling to remote locations for geological studies for research programs. (R. Vol. 7, p. 14 - 17). He has not been able to work since May 2, 2002 (R. Vol. 7, p. 3) due to the injury he sustained while in the course and scope of his employment at MSU. At the time of the final hearing in April, 2006, Mr. Panuska was 54 years old (R. Vol. 7, p. 6).

In the Spring of 1999, the claimant's department at MSU was preparing to vacate Hilbun Hall, the building in which the department was housed, for renovation purposes. On March 27, 1999, the Geoscience Department was required to remove all stored rock samples from the building. A very large rock weighing approximately 100 to 200 pounds was loaded onto a hand cart and taken to the dumpster for

disposal. One of the workmen from the MSU Physical Plant helped Mr. Panuska lift the rock and throw it into the dumpster. The rock was too heavy to throw very far and it landed on top of a large wooden crate. The rock was precariously balanced and in danger of rolling out of the dumpster so Mr. Panuska leaned over the wooden crate and pushed the rock over the edge of the crate. The rock apparently landed on a long 2 x 4 situated on an unseen fulcrum. The 2 x 4 board sprang towards Mr. Panuska, striking him in the forehead, just above the hairline. (R. Exh. Vol. 2, Gen. Exh. 6, p. 5 -7).

There was very little blood. Mr. Panuska wanted to be checked by a physician and drove himself to the Emergency Room at the Oktibbeha County Hospital and the treating physician told him to take it easy for the rest of the weekend. (R. Exh. Vol. 2, Gen. Exh. 6, p. 7).

Medical Treatment

After the accident, Mr. Panuska experienced some dizziness and reported this to his family physician, Dr. Everett McKibben who diagnosed a hemorrhagic concussion (R. Exh. Vol. 2, Gen. Exh. 6, p. 79) or brain injury.

Dr. Jimmy Miller, a neurosurgeon in Tupelo first examined the claimant on April 5, 1999. (R.E. 14, p. 5; R. Exh. Vol. 1, Gen. Exh. 1, p. 5) Dr. Miller did a lot of basic observational tests such as hand eye coordination, reflex tests, gripping tests and nothing in those tests suggested a serious problem. Dr. Miller ordered an MRI of the head (R. Vol. 4, p. 282) which showed no intracranial mass or mass effect and a CT of the head which indicated a cerebral contusion – a brain injury – and a possible aneurysm. (R. Vo. 4, p. 275; R. Exh. Vol. 1, Gen. Exh. 1,

p. 9, l. 29, p. 10 l. 1-5). However, an MRA (Magnetic Resonance Angiography) of the neck was ordered which ruled out the aneurysm (R. Vol. 4, p. 268; R. Exh. Vol. 1, Gen. Exh. 1, p.11). Dr. Miller explained to Mr. Panuska that he had a cerebral contusion (R. Vol. 4, p. 272) – that in addition to getting a brain hemorrhagic concussion, Mr. Panuska's brain was bruised a little bit. (R. Exh. Vol. 1, Gen. Exh. 1, p. 7, l. 24-27) (R. Exh. Vol. 2, Gen. Exh. 6, p. 19& 20). He told Mr. Panuska that there was small blob of blood on the brain and that the brain would heal itself and it would just take time. (R. Exh. Vol. 2, Gen Exh. 6, p. 19 & 20).

Dr. Miller prescribed Dilantin because he was concerned about convulsions that may occur because of the small blob of blood on the brain. Dr. Miller later ordered that the Dilantin be discontinued because he thought that the Dilantin was what may have been causing the "strange feelings" that Mr. Panuska began experiencing (R. Exh. Vol. 1, Gen. Exh. 1, p. 8, l. 14-22, p. 24; R. Vol. 4, p. 274 & 275). When he did not get better when the Dilantin was discontinued, Dr. Miller put him back on the Dilantin. (R. Vol. 4, p. 268).

For the remainder of 1999, Panuska was monitored by Dr. Miller by what Dr. Miller had diagnosed as a brain injury. During this time, Dr. Miller was reporting to Mr. Panuska that he was well on the road to recovery. (R. Exh. Vol. 2, Gen. Exh. 6, p. 35). Dr. Miller still thought Mr. Panuska had a cerebral contusion (a brain injury) that was resolving. (R. Exh. Vol. 1, Gen. Exh. 1, p. 11 l. 10 & 11, p. 13, l. 28, p. 14, l. 1 & 2).

In January 2000, Mr. Panuska reported to Dr. Miller that rapid eye movement or change in direction caused him to experience nausea and dizziness. (R. Exh. Vol. 1, Gen. Exh. 1, p. 14, l. 25 -29, p. 15, l. 1-8). Dr. Miller felt that Mr. Panuska needed to see a neurologist rather than a neurosurgeon and referred him to Dr. Graff and Dr. Doorehbos's clinic (R. Vol. 4, p. 268) and Mr. Panuska was seen by their partner, Dr. Donna Harrington on February 10, 2000. (R. Exh. Vol. 1, Gen. Exh. 2, p. 4) Dr. Harrington was of the opinion that the Dilantin was increasing the symptoms of the disequilibrium and recommended that he taper off the Dilantin. (R. Vol. 4, p. 293 & 294; R. Exh. Vol. 1, Gen. Exh. 2, p. 5, l. 12-15).

Mr. Panuska went back to Dr. Harrington in May 2000 and reported that he had started having trouble when he rode on elevators, when he flew in airplanes and when he stared at certain patterns. (R. Exh. Vol. 1, Gen. Exh. 2, p. 6, l. 14-21). She decided to try Antivert and when that did not help she tried him on Diamox, which also did not relieve Mr. Panuska's symptoms. In August 2000, Dr. Harrington told Mr. Panuska that he may have an inner ear injury but that she could not treat him for that type of injury as it was outside her expertise. She referred him to the Shea Ear Clinic. (R. Exh. Vol. 1, Gen. Exh. 2, p. 9, l. 10-18)

Mr. Panuska was first seen by Dr. Fetterman, an Otologist/Neuro-otologist[1], at the Shea Ear Clinic on September 6, 2000 and many tests were conducted. (R.E. 15, p. 7; R. Exh. Vol. 1, Gen. Exh. 3, p. 7) (R. Exh. Vol. 2, Gen. Exh. 6, p. 77-79). Dr. Fetterman uncovered a separate injury that was sustained in conjunction with the brain contusion (diagnosed by Dr. Miller) and the brain hemorrhagic concussion

[1]This specialty treats ear, hearing and balance disorders

(diagnosed by Dr. Miller and Dr. McKibben) and the separate injury was that Mr. Panuska had a labyrinth concussion (traumatic injury to the inner ear) and that this was the cause of his symptoms. In Dr. Fetterman's opinion, the labyrinth concussion was related to his injury of March 27, 1999 (R. Vol. 5, p. 311, 364 & 365).

Dr. Fetterman is no longer with the Shea Ear Clinic and maintains an office in Germantown, Tennessee where Mr. Panuska continued to be treated by Dr. Fetterman. On September 6, 2000, Mr. Panuska was advised by Dr. Fetterman (R. Vol. 5, p. 365) for the first time that he had an inner ear injury. For several months, Mr. Panuska underwent the physical therapy/balance exercises recommended by Dr. Fetterman at the Oktibbeha County Hospital. However, when the therapy was not working, it was discontinued by the therapist, Glenda Tranum.

None of the physicians from whom the claimant sought treatment knew prior to September 6, 2000 that the claimant had an inner ear injury.

Dr. Miller, the neurosurgeon, testified that he was not familiar with and did not know all the symptoms of a labyrinthine concussion (R.E. 14, p. 18; R. Exh. Vol. 1, Gen. Exh. 1, p. 18 & 19, p. 23, l. 11-20) and that he could not have known from his evaluation and treatment of the claimant whether the claimant had a vestibular deficit, a symptom of the labyrinthine concussion. (R. Exh. Vol. 1, Gen. Exh. 1, p. 25, l. 24-28). He had no expertise in diagnosing a labyrinthine concussion and did not pretend to have any such expertise. He testified that as far as the labyrinthine concussion, he would defer to Dr. Fetterman's opinions. (R. Exh. Vol. 1, Gen. Exh. 1, p. 23, l. 21-26).

Dr. Harrington, the neurologist, also testified that she would defer to Dr. Fetterman as to any opinions with regard to the labyrinthine concussion (R. Exh. Vol.1, Gen. Exh. 2, p. 16, l. 13-19) and that Mr. Panuska was not diagnosed with the labyrinthine concussion until Dr. Fetterman saw him. (R. Exh. Vol. 1, Gen. Exh. 2, p. 18, l. 11-14). She further confirmed that Mr. Panuska did not obtain an answer to the question of what was causing his symptoms until he saw Dr. Fetterman. (R. Exh. Vol. 1, Gen. Exh. 2, p. 18, l. 11-14) With the benefit of hindsight, she testified, she could now say that the labyrinthine concussion had its onset when the head trauma occurred in March 1999. (R. Exh. Vol. 1, Gen. Exh. 2, p. 13).

Dr. Fetterman, the ear doctor, was able to determine the cause of Mr. Panuska's symptoms because his specialty, Otology/neuro-otology, allowed him the expertise and knowledge to diagnose the injury. (R. E. 15, p. 15; R.Exh. Vol. 1,Gen Exh. 3, p. 15). In his opinion, the claimant's symptoms were not caused by the brain concussion/contusion. (R.E. 15, p. 37 & 38; R. Exh. Vol. 1, Gen Exh. 3, p. 37 & 38).

According to Dr. Fetterman, a labyrinthine concussion is a rare condition and most doctors outside his specialty would probably not be familiar with this condition. (R.E. 15, p. 37; R.E. Exh. Vol. 1, Gen. Exh. 3, p. 37). In Dr. Fetterman's opinion, it was not unusual for Drs. Miller and Harrington to be without the medical expertise to diagnose the condition. (R. Exh. Vol. 1, Gen. Exh. 3, p. 37). If they, as his treating physicians, did not know the cause of his

condition until Dr. Fetterman's diagnosis, it would be unreasonable to conclude that Mr. Panuska should have known the cause of his condition.

Symptoms

Because of the traumatic injury to his inner ear, Mr. Panuska experiences dizziness and nausea which are triggered by everyday stimuli. (R. Vol. 7, p. 25-30). The stimuli brings on dizziness and nausea "spells", disequilibrium, and a mental fog which usually lasts for the rest of the day. (R. Vol. 7, p. 33). Therefore, if the symptoms are triggered in the early morning, Mr. Panuska can often be symptomatic for the rest of the day. Mr. Panuska has noticed that after he gets a good night's sleep, he is much better but then something may trigger his symptoms the very next day and he is forced back to bed rest. (R. Vol. 7, p. 34)

Classroom settings routinely bring on symptoms. (R. Vol. 7, p. 27). For example, Mr. Panuska can not move his head rapidly enough to look at his class and write on the board effectively. There will always be some students wearing patterned clothing which can trigger symptoms (R. Vol. 7, p. 30 & 31) and Mr. Panuska may not be able to avoid looking at them. In the crowded classrooms, it is very difficult for students not to bump slide projectors, which Mr. Panuska used in nearly every class. (R. Vol. 7, p. 25-34). This unexpected motion of the image usually triggers mild to mid-level episodes. When an episode begins, Mr. Panuska's thought processes and word choice slow down dramatically. As a result, claimant's teaching evaluations decreased precipitously. (R. Vol. 7, p. 34 & 35)(R. Exh. Vol. 2, Gen. Exh. 7).

Without exception, departmental meetings made Mr. Panuska ill. Usually, after such a meeting, he would have to stagger back to his office, rest for an hour and then drive home, unable to work for the rest of the day. The problem in the meetings is that the room is over crowded, tables jostle, Mr. Panuska's gaze has to change rapidly to follow discussions and despite the knowledge that it exacerbates his situation, people continue to wear clothing with patterns that trigger problems. (R. Vol. 7, p. 25-30).

Computers became more and more essential in Mr. Panuska's work. However, he could not attend computer training sessions as he can not tolerate looking at the computer screen. He can only work computers when he has complete control. Moreover, many Internet sites have "dancing icons" which trigger negative responses. Others at work would sometimes use the Internet for him but the poor results made this of dubious value. (R. Vol. 7, p. 26).

Mr. Panuska can not attend seminars and thesis defenses without becoming ill. PowerPoint presentations have become the standard. The fades, dissolves and animations invariably trigger episodes. Moreover, laser pointers cause problems. (R. Vol. 7, p. 26).

The same problems made attendance at professional conferences difficult. Mr. Panuska would routinely get sick. During the last conference that Mr. Panuska co-convened, he had to look away from the screen for at least one-third of the talks, to avoid symptomatic response. (R. Vol. 7, p. 26).

In non-work settings, Mr. Panuska must be under a constant vigilance for potential symptomatic triggers. These include: flashing lights in grocery stores

bringing attention to specials, cell phone towers with flashing lights on top of them, post office trucks with brilliant blinding strobe lights on the back of them (R. Vol. 7, p. 25) , being bumped by students or others while walking down school corridors, (R. Vol. 7, p. 25) fine patterned clothing worn by others (R. Vol. 7, p. 26), fine checkered patterns in washrooms, and mirror placement in washrooms. Signing credit card slips can trigger symptoms if someone jars the surface he is writing on. He can not sign digital credit card signature recorders; the time lag between his hand movement and appearance of letters is a trigger. (R. Vol. 7, p. 25).

When claimant has visited restaurants, he must look for special seating where symptomatic triggers are minimized. Establishments with too many mirrors are not acceptable; if he can't leave quickly enough, he will become symptomatic. Certain patterned floors and certain furniture designs can set off his symptoms.

Mr. Panuska has great difficulty driving. (R. Vol. 7, p. 45). The pavement and lines traveling at him, rather than under him can make him ill.

Mr. Panuska can not ride escalators due to the lined step patterns and jerky motion. He can not tolerate the power reclining chair in the dentist's office. Riding in elevators requires considerable concentration and if he lets his guard down or becomes distracted, he can experience mild symptoms.

Prior to this injury, Mr. Panuska had exercised on a regular basis by hiking, going to the gym or swimming laps in a pool. (R. Vol. 7, p. 47). Maintaining personal fitness and health is now difficult and is becoming

increasingly impossible. All workout facilities have excessive numbers of mirrors. Mr. Panuska used to do lap swimming but that is no longer feasible. (R. Vol. 7, p. 47).

The claimant's symptoms were documented as objective findings by the physical therapist, Glenda Tranum. (R. Exh. Vol. 2, Gen. Exh. 4, p. 17-19) .

Dr. Fetterman relates the cause of these symptoms to the labyrinthine concussion. (R. Exh. Vol. 1, Gen. Exh. 3, p. 10-12).

Mr. Panuska never knows when these symptom flares are going to occur. (R. Vol. 7, p. 46). He continued to try to work until May 2, 2002, when his symptoms triggered by every day stimuli became quite frequent and intolerable. In Dr. Fetterman's opinion, Mr. Panuska is permanently and totally disabled -- his condition will prevent him from performing his usual employment as a college professor and the disability is related to his head injury of March 1999. (R. Vol. 5, p. 311).

Testimony of Donald E. Woodall
Vocational Rehabilitation Consultant

Mr. Woodall, the vocational rehabilitation consultant, testified that, due to these symptoms caused by the labyrinthine concussion, Mr. Panuska can not return to work as an Associate Professor and that there are no other jobs in the national economy in which he can reasonably be competitive. (R. Exh. Vol. 2, Gen. Exh. 5, p. 16). His detailed report is attached to his deposition. (R. Exh. Vol. 2, Gen. Exh. 5, depo. exhibit 3).

III.

SUMMARY OF THE CLAIMANT'S ARGUMENT

(1) The statute of limitations has not expired because the claimant's ear injury was not discovered until September 6, 2000, and, therefore, the statute of limitations did not begin to run until that date. The Petition to Controvert was filed on February 7, 2002, within the limitations period.

(2) If the Court of Appeals reverses the decisions of the Full Commission and the Circuit Court and rules that the Petition to Controvert should have been filed within two years of March 27, 1999, then the Employer and Carrier should have filed the B-3, First Report of Injury as required by statute and they are estopped to plead the statute of limitations as a defense. If the Court of Appeals affirms the Full Commission and finds that the injury was not discovered until September 6, 2000, and therefore the Petition to Controvert was filed within the statutory period, then it is irrelevant whether a B-31, First Report of Injury was filed with regard to the estoppel issue. It is the claimant's position that the B-3, First Report of Injury with regard to the ear injury could not have been filed until the injury was known on September 6, 2000.

(3) Collateral Estoppel and/or Res Judicata bar re-litigation of the statute of limitations issue. The Administrative Judge's Order of May 2003, ruling that the statute of limitations has not expired, became final when the Employer and Carrier did not appeal the Full Commission's Order of October 21, 2003, which affirmed the Administrative Judge's Order of May 2003.

IV.

ARGUMENT

A.

THE COMMISSION AND CIRCUIT COURT DECISIONS THAT THE STATUTE OF LIMITATIONS HAS NOT EXPIRED BECAUSE THE INJURY WAS NOT DISCOVERED UNTIL SEPTEMBER 6, 2000 IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED

When the Worker's Compensation Commission's findings of fact and order are supported by substantial evidence, all appellate courts are bound thereby. *Champion Cable Const. Co., Inc. 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);and *Evans v. Marko Planning, Inc.* 447 So. 130, 132 (Miss. 1984). An Appellate Court can reverse the Commission's Order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence. *Myles v. Rockwell International*, 445 So. 2d 528, 536 (Miss. 1983). The Commission decision that the statute of limitations has not expired because the injury was not discovered until September 6, 2000 is supported by substantial evidence and should be affirmed.

The claimant sought medical treatment immediately after the accident and was diagnosed with a brain injury (a brain concussion and a brain contusion) by his family physician, a neurosurgeon and a neurologist. He was told by his doctors that his injury would resolve and that it just took time. He noticed that he would get dizzy and become disoriented and continued to seek medical treatment. The

doctors kept telling him that his symptoms would resolve. As the symptoms increased, he continued to seek medical treatment until his medical condition (a labyrinthine concussion -- a traumatic injury to the inner ear) that was causing his symptoms was finally diagnosed on September 6, 2000 by an ear specialist. The brain injury or brain concussion/contusion (previously diagnosed by Dr. Miller and Dr. Harrington) was not causing the symptoms. (R. Exh. Vol. 1, Gen. Exh. 3, p. 37 & 38). An inner ear injury, about which no one knew until September 6, 2000, was causing the symptoms. The Petition to Controvert was filed on February 7, 2002 which is within two years of the date that the injury became apparent.

The claimant, Mr. Panuska, could not have known of the compensable nature of his injuries because, although he continued to seek treatment, even his physicians remained unaware of the compensable nature of his injuries until September 6, 2000. The statute of limitations begins to run when the claimant is or reasonably should be aware of having a compensable injury, but the statute is deemed not to have begun running if the claimant's reasonably diligent efforts to obtain treatment yield no medical confirmation of compensable injury. see *Georgia Pacific Corp. v. Taplin,* 586 So. 2d 823 (Miss. 1991). The statute of limitations in this case, therefore, did not begin to run until September 6, 2000 and since the petition to controvert was filed within two years of this date, the Administrative Judge's Order was properly affirmed by the Full Commission and the Circuit Court.

When this injury occurred, Mr. Panuska was told by Dr. Miller that he had a contusion, a brain injury, and that his symptoms would resolve. (R. Exh. Vol 2, Gen. Exh. 6, p. 73 & 74). This is confirmed by Dr. Miller's note of May 3, 1999 (R.

Vol. 4, p. 268) explaining that Mr. Panuska had been under his care for a hemorrhagic concussion and that effects of his condition are likely to last at least through the month of June.

When Mr. Panuska's symptoms did not resolve in a few months, Dr. Miller told him that some people take longer than others to recover from a brain contusion. (R. Exh. Vol. 2, Gen. Exh. 6, p. 74). Dr. Miller thought that the Dilantin may have been causing Mr. Panuska's symptoms as evidenced by Dr. Miller's note of May 3, 1999 stating that "He is better from hit on the head, but having strange feelings from Dilantin." (R. Vol. 4, p. 275). When Mr. Panuska's symptoms had still not resolved, Dr. Miller told Mr. Panuska "that can't happen" (R. Exh. Vol. 2, Gen. Exh. 6, p. 74).

In January, 2000, still not having found the source of the problem, Dr. Miller ordered an EEG (R. Vol. 4, p. 268) and referred Mr. Panuska to Dr. Harrington, a neurologist, thinking that she could find the problem. Mr. Panuska first saw Dr. Harrington on February 10, 2000 and Dr. Harrington attempted to find the source of Mr. Panuska's problem for several months throughout the year 2000, but could not. She finally suggested to Mr. Panuska that it may be an inner ear injury that was causing his problems and on August 23, 2000, Dr. Harrington referred Mr. Panuska to the Shea ear clinic. Mr. Panuska was not diagnosed with the traumatic inner ear injury until September 6, 2000 and it was Dr. Fetterman who first diagnosed his injury and, in his opinion, the injury is permanent and debilitating.

Dr. Fetterman uncovered a separate injury that was sustained in conjunction with the brain contusion (diagnosed by Dr. Miller) and the brain (hemorrhagic)

concussion (diagnosed by Dr. Miller and Dr. McKibben) and that was that Mr. Panuska had a labyrinth concussion (traumatic injury to the inner ear).

In the May 3, 1999, office note, Dr. Miller noted that the CT scan indicated that the cerebral contusion had resolved (R. Vol. 4, p. 275). The separate inner ear injury was not diagnosed until September 6, 2000. Prior to the discovery of the separate inner ear injury , Mr. Panuska had no reason to know that he had any injury other than the brain concussion/brain contusion which he had been told by a medical doctor would subside. Mr. Panuska just thought he was taking a little bit longer than other people to get better but that at some point he would get better and he based this on what his doctors had told him. (R. Exh. Vol. 2, Gen. Exh. 6, p. 46).

Mr. Panuska testified as follows at his deposition:

Q. But the way it was explained to you by Dr. Federman (sic), the hemorrhagic concussion is that different from –

A. Oh, yes, that is a completely different form.

Q. --- from what Dr. Federman has diagnosed?

A. Yes. My concussion problem is apparently gone, but I have a traumatic damage to the inner ear sustained during that blow, so, yes, it gave me the regular concussion but it also damaged the inner ear at the same time.

Q. And the concussion that Dr. Federman has diagnosed is –

A. Well, that's called a traumatic, I think he calls it a traumatic labyrinthine concussion, l-a-b-y-r-l-n-t-h-l-n-e, labyrinthine, and the labyrinthine is an inner ear, portion of the inner ear, and so when he uses labyrinthine concussion, he is saying that is damage to the inner ear.

Q. And that's different from the first concussion?

A. Completely. Everybody said you have a head problem, and he was

the first one to diagnose an ear problem.

(Gen. Ex. 6, Panuska Dep, p. 80).

The medical records of Dr. Miller and Dr. Harrington (R. Vol. 4, p. 268-300) attest that Mr. Panuska acted with reasonable care and diligence in seeking medical treatment. He sought treatment from a family doctor, neurosurgeon, neurologist, and was finally referred to an ear doctor, the proper specialist in this case. He was told that he had a brain injury but he nor his doctors knew of his inner ear injury until September 6, 2000. The Mississippi Supreme Court in *Struthers Wells-Gulfport, Inc. v. Brandford*, 304 So. 2d 645 (Miss. 1974) held that "this state's laws do not penalize workers when they, with their physician's assistance, cannot confirm that their injuries are compensable."

The Employer and Carrier argues in its brief (page 21, Brief of Appellant) that the Administrative Judge and the Full Commission committed reversible error when they made no finding of fact as to "when Mr. Panuska should have known, as a reasonable man, that his head injury and residuals from that injury were work related." (See Brief of Appellant, page 21). It is implicit in the Administrative Judge's findings that Mr. Panuska could not have known that his ear injury was compensable until September 6, 2000, the date on which the Administrative Judge found that the statute of limitations began to run. Mr.Panuska, as a reasonable man, could not known that the ear injury was a compensable work related injury until that injury was discovered. The Administrative Judge specifically found in his Order of May 9, 2003 (R.E. 4, R. Vol. 3, page 150) that "the labyrinthine concussion was not discovered until September 6, 2000, at which time the Statute began to run

concerning that condition." Under the Mississippi Worker's Compensation Act, the Employer is required to pay compensation only for a disability that is support by medical findings. *Struthers Well-Gulfport, Inc., supra* at 649. Mr. Panuska's injury was not supported by any medical findings until Dr. Fetterman diagnosed the ear injury on September 6, 2000.

In *Tabor Motor Company v. Garrard*, 233 So. 2d 811 (Miss. 1970), the Supreme Court pointed out that the statute of limitations begins to run from the date of the injury and not from the date of the accident. It was this case that was cited by the Administrative Judge in his initial Order denying the Employer and Carrier's motion to dismiss. The claimant in *Tabor* was welding under an automobile while lying on the ground when a hot spark (which later was found to be a piece of slag) from the cutting torch fell in his left ear. The claimant went to the company physician who treated him for the accident and did not regard it as of a serious nature. During the same month that the accident happened, he was seen again by the company physician who sent him to an ear specialist.

The ear specialist diagnosed a perforated left ear drum and discharged him as cured. Even after he was supposedly cured, the claimant had other problems – drainage of the ear, headaches and dizziness -- and saw the company physician again. He went back to the ear doctor complaining of an ear infection. The ear specialist referred the claimant to Dr. Shea, a specialist in otology and over two years after the accident, Dr. Shea, during an operation found a piece of slag in the claimant's ear and removed it. Dr. Shea advised the claimant that the slag which had apparently fallen into his ear over two years ago, was causing his dizziness and

related physical problems. The slag had burned a hole in the ear drum and penetrated the middle ear out of the eyesight of examining physicians.

The Mississippi Supreme Court held that the two-year statute of limitations did not bar the claimant's claim for worker's compensation benefits. *Id.* at 814. The Court interpreted the Mississippi Worker's Compensation Act to date the claim period from the date that the compensable injury becomes apparent and not from the date of the accident.

The facts in *Benoist Elevator Company, Inc. & U.S. F & G. Co. v. Mitchell*, 485 So. 2d 1068 (Miss. 1986) and other cases cited by the employer and carrier in its brief can be distinguished from the facts of our case. The claimant in *Benoist Elevator Company, Inc. & U.S. F & G. Co. v. Mitchell*, 485 So. 2d 1068 (Miss. 1986), had previously been compensated with partial disability payments for a known injury to his finger, thus, the Supreme Court held, he had not sustained a latent injury. Mr. Panuska did not know that he had the injury --a labyrinthine concussion --until September 6, 2000.

In *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317 (Miss. 1977) another case cited by the Employer/Carrier, there was no latent or unknown injury presented. *Jordan v. Pace*, 2002 WL 82677 (Miss. App. 2002) likewise does not apply to this case. There was no latent aspect of Ms. Jordan's injury.

In this case, Mr. Panuska had been told by Dr. Miller that his symptoms would resolve. (R. Exh. Vol. 1, Gen. Exh. 1, p. 22 & 23). The first time that he or any of his physicians knew that Mr. Panuska had an inner ear injury as a result of the accident was when his traumatic ear injury was diagnosed by Dr. Fetterman on

September 6, 2000. It was not until this diagnosis that his condition was known to by any physician or by Mr. Panuska to be permanent and disabling.

The employer and carrier cite as authority, in support of their position to reverse the Full Commission and the Circuit Court, the Court of Appeals decision in *Parchman v. Amwood Products, Inc.* 2007 WL 239509 (Miss. App. 2007), a case that has now been reversed by the Mississippi Supreme court on statute of limitations grounds. *Parchman v. Amwood Products, Inc.*, 2008 WL 2373035 (Miss. 2008). Even if the case had not been reversed by the Mississippi Supreme Court, the Court of Appeals decision in *Parchman, supra*, did not apply to this case because Mr. Panuska and all his treating physicians did not know that he had an ear injury until the ear injury was discovered on September 6, 2000.

The Employer and Carrier argue that *Morris v. Landell's Frame Co.*, 547 So. 2d 782 (Miss. 1989) and *Howard Industries v. Robinson*, 846 So. 2d 245 (Ct of App. 2003) are controlling. The Employer and Carrier have misinterpreted the *Morris* case. The *Morris* case speaks to the issue of pain and whether disabling pain in the absence of positive medical testimony as to the cause of that pain is compensable under the Act. The Mississippi Supreme Court held that in cases based predominantly upon pain, it is prudent to obtain medical evidence to either support or dispute the claim of pain *Morris*, supra at 785 but reinstated the Commission's award based upon the standard for review of Commission rulings ---that Appellate Courts are bound by the Commission's rulings if supported by substantial evidence even if the evidence would convince the Appellate Court

otherwise. *Morris*, supra, at 784 & 785.

The Court of Appeals in *Howard Industries v. Robinson*, supra, at 252, confirms that a claim of disability must be supported by medical findings. Mr. Panuska had no medical support for any claim of disability for his ear injury until there were medical findings that he did have an ear injury, that it was causing his symptoms and that this ear injury was a direct result of his work related accident. Under the Employer and Carrier's theory that the statute of limitations began to run before Mr. Panuska's ear injury was discovered, Mr. Panuska should have filed his Petition to Controvert not knowing what was causing his symptoms and when there was no medical evidence to support a claim. Therefore, Mr. Panuska could have filed his Petition to Controvert and then later learned that there was some other cause of his symptoms. What if he had found out that he had a brain tumor or some other neurological problem that was not related to his on the job accident? He had been told by his physician that his brain contusion was not causing his symptoms. He was making every effort to determine the cause of his symptoms and the cause was not discovered until September 6, 2000.

B.

THE FAILURE TO FILE A B-3, FIRST REPORT OF INJURY, IS ONLY RELEVANT IF THIS COURT REVERSES THE FULL COMMISSION AND THE CIRCUIT COURT ON THE ISSUE OF WHEN THE INJURY WAS DISCOVERED

The failure to file the B-3, First Report of Injury, was not an issue before the first Administrative Judge when he ruled that the statute of limitations had not

C.
COLLATERAL ESTOPPEL AND/OR RES JUDICATA BAR RE-LITIGATION OF THE STATUTE OF LIMITATIONS ISSUE ALREADY DECIDED BY THE FULL COMMISSION

The Employer and Carrier did not appeal the Full Commission's Order of October 21, 2003 which affirmed Judge Henry's denial of the Employer/Carrier's Motion to Dismiss and his denial of the employer/carrier's Motion to Reconsider. Therefore, the Administrative Judge's Order in this case of May 9, 2003 (on the statute of limitations issue) became final when the Employer and Carrier did not appeal the Full Commission's Order.

Under the doctrine of Res Judicata, a former judgment on the merits, between the same parties, in a court of competent jurisdiction, is conclusive and final as to an issue actually litigated and determined in the former action, and which issue is essential to the maintenance of a second action between them. *Aetna Cas. & Sur. Co. v. Espinosa*, 469 So. 2d 64 (Miss. 1985).

Collateral estoppel prevents a litigant from retrying a material issue which has already been finally decided in another proceeding. *Miss. Employment Security Comm. v. Philadelphia Municipal Separate School District*, 437 So. 2d 388 (Miss. 1983); *City of Jackson v. Holliday*, 149 So. 2d 525 (Miss. 1963).

The Employer and Carrier elected not to appeal the Full Commission's Order on the statute of limitations issue, thus making its decision final. The doctrines of Collateral Estoppel and Res Judicata preclude re-litigation of the statute of limitations issues already decided by the Administrative Judge, affirmed by the Full Commission and not appealed to the Circuit Court.

The Administrative Judge's Order of August 1, 2006, did not address the statute of limitations question that had previously been adjudicated by Administrative Judge Henry on May 9, 2003. Because there was no adjudication on the statute of limitations issue by the Administrative Judge in his Order of August 1, 2006, from which this Appeal arose, it was not proper to bring the issue before the Full Commission and it is, likewise, not proper to bring the issue before the Circuit Court on this Appeal.

V.

CONCLUSION

The accident occurred on March 27, 1999. The inner ear injury was not known to exist until September 6, 2000. The claimant sought medical treatment immediately after the accident and continued to seek medical treatment until his medical condition that was causing his symptoms was finally diagnosed on September 6, 2000. The Petition to Controvert was filed on February 7, 2002. The claimant, Mr. Panuska, could not have known of the compensable nature of his injuries because, although he continued to seek treatment, even his physicians remained unaware of the compensable nature of his injuries until September 6, 2000. The statute of limitations begins to run when the claimant is or reasonably should be aware of having a compensable injury, but the statute is deemed not to have begun running if the claimant's reasonably diligent efforts to obtain treatment yield no medical confirmation of compensable injury. see *Georgia Pacific Corp. v. Taplin,* 586 So. 2d 823 (Miss. 1991). The statute of limitations in this case,

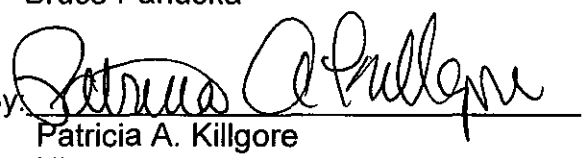
therefore, did not begin to run until September 6, 2000 when the injury was first diagnosed.

If the Court of Appeals reverses the decisions of the Full Commission and the Circuit Court and rules that the Petition to Controvert should have been filed within two years of March 27, 1999, then the Employer and Carrier should have filed the B-3, First Report of Injury as required by statute and they are estopped to plead the statute of limitations as a defense. If the Court of Appeals affirms the Full Commission and finds that the injury was not discovered until September 6, 2000, and therefore the Petition to Controvert was filed within the statutory period, then it is irrelevant whether a B-31, First Report of Injury was filed with regard to the estoppel issue

Furthermore, the doctrines of collateral estoppel and res judicata prevent re-litigation of an issue previously decided. Because no appeal was taken from the Full Commission's Order of October 21, 2003, the issue of whether the statute of limitations began to run on September 6, 2000 can not now be reviewed by the Circuit Court.

The Employer and Carrier's Appeal should be dismissed and the Full Commission's Order dated February 13, 2007 and the Order of the Circuit Court dated January 22, 2008, should be Affirmed.

Respectfully submitted,
Bruce Panuska

By: 
Patricia A. Killgore
His Attorney

VI.
CERTIFICATE OF SERVICE

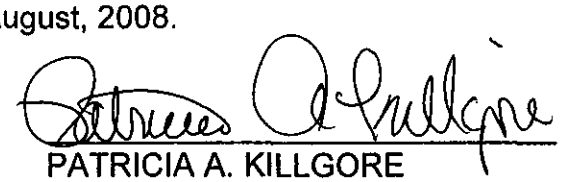
I, Patricia A. Killgore, one of the attorneys for the claimant, hereby certify that I have this date mailed, by U.S. Mail, postage prepaid, a true and correct copy of the above BRIEF OF THE CLAIMANT/APPELLEE to:

Joe Wilkins, Esq.
Wilkins, Stephens & Tipton, P.A.
Post Office Box 13429
Jackson, MS 39236-3429

The Honorable James Homer Best
Administrative Judge
Mississippi Worker's Compensation Commission
Post Office Box 5300
Jackson, MS 39296-5300

The Honorable James T. Kitchens, Jr.
Circuit Court Judge
Post Office Box 1387
Columbus, MS 39703

So certified, this the 6th day of August, 2008.



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