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

MISSISSIPPI STATE UNIVERSITY AND MISSISSIPPI INSTITUTIONS OF HIGHER LEARNING, SELF-INSURED	**APPELLANTS**
VS.	**CASE NO. 2008-WC-00340-COA**
BRUCE PANUSKA	**APPELLEE**

(*)

REPLY BRIEF FOR APPELLANTS

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

(*)

> ORAL ARGUMENT IS REQUESTED <

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I. REPLY ARGUMENT

A. STANDARD OF REVIEW.

Appellee, Dr. Bruce Panuska, seeks to recover benefits for a latent injury when no doctor has ever described Panuska's condition as a latent injury. Panuska was injured March 27, 1999 when he was struck in the forehead on the MSU campus. He never recovered from this injury and residuals from that blow to his head, the fatigue, the dizziness, the nausea, the mental fog, etc., continued throughout the summer and fall semesters to the present.

Appellants, Mississippi State University and Mississippi Institutions of Higher Learning, Self-Insured, sought dismissal of the claim early on, averring that Panuska's filing for filing for benefits on February 7, 2002 was time barred by § 71-3-35 which required the making of a claim within two years following the injury. The Administrative Law Judge ruled that Panuska suffered two injuries, a cerebral concussion and a labyrinthine concussion; that the cerebral concussion began running on March 27, 1999 but resolved. The Administrative Law Judge ruled that not until Dr. Fetterman diagnosed Panuska as having a labyrinthine concussion on September 6, 2000 did the running of the statute begin for the disabling condition which is the subject of the claim. Therein, it was determined that the start date was September 6, 2000 for the running of the statute of limitations and not March 27, 1999. Was this the legal standard to use, when the condition was diagnosed rather than the date of the injury?

The landmark case involving the two-year statute of limitations is Quaker Oats Co. v. Miller, 370 So. 2d 1363 (Miss. 1979). This case sets forth the criteria for determination of when the period of time begins to run for the statute of limitations. Interestingly, Miller is not cited by the Administrative Law Judge who ruled in this matter nor was it cited by Appellee in his Brief.

Appellee seeks to use Dr. Fetterman's first visit and diagnosis on September 6, 2000 as the date to begin the running of the statute. This is because Dr. Fetterman diagnosed the labyrinthine concussion as a cause of the ongoing disabling condition experienced by Panuska since March 1999 to include the same fatigue, dizziness, nausea, mental fog, etc. Though not designated as a latent injury, the Administrative Judge and Mississippi Workers' Compensation Commission assumed that this was a latent injury and erroneously found that the condition did not manifest itself until Dr. Fetterman diagnosed the condition in September 2000. Yet, Dr. Fetterman testified that Panuska's condition was **not** a latent condition; that the conditions suffered by Panuska had been present since the date of the injury; that Panuska fully appreciated the seriousness of his condition and attributed his disabling condition to the March 1999 trauma to his head and to no other injury or condition.

Thus, the Mississippi Workers' Compensation Commission utilized the wrong legal standard in finding that the statute of limitations began in September 2000 rather than in March 1999 and the following months as Panuska's condition deteriorated and he did not improve. The Mississippi Workers' Compensation Commission's and Circuit Court's failure to recognize that the start began to run from the date of the injury and not from the date of the accident, is reversible error. The Commission utilized the date of the diagnosis of the labyrinthine concussion as the start date. This is the wrong legal standard for a non-latent injury. The Commission erred in not following the legal standard adopted in Miller, *supra.*

Appellants submit that a *de nova* review is required in order to address the error of law; that reversal is proper on this threshold issue. Error was further committed when the Commission failed to make a finding of fact as to when Panuska knew as a reasonable man that the nature of his injury, the

seriousness and disabling character of his condition occurred when he was struck in his forehead in March 1999.

B. WHAT IS THE CORRECT LEGAL STANDARD FOR DETERMINATION OF THE START DATE FOR THE RUNNING OF THE TWO-YEAR STATUTE OF LIMITATIONS?

Appellants submit that the correct legal standard for determination of the running of the two-year statute of limitations is set forth in Quaker Oats Co. v. Miller, 370 So. 2d 1363 (Miss. 1979). This case is referred to as the landmark decision under § 71-3-35 and briefly stated provides that the two-year period of limitation begins to run with the claimant, as a reasonable man, recognized the nature, the seriousness, and probable compensable character of his injury.

Dunn's treatise, Mississippi Worker's Compensation addresses the case utilized by the Administrative Judge and Appellee in taking the position that Tabor Motor Co. v. Garrard, 233 So. 2d 811 (Miss. 1970) is controlling. Dunn addresses this case by stating the following:

> Where latent injuries are involved, the time for filing a claim commences to run when it becomes reasonably discoverable that the claimant has sustained a compensable injury and disability. In other words, the two year period runs from the time that a compensable injury becomes reasonably apparent, and ordinarily, this is an issue of fact. . . . if the claimant is aware of the injury at the time of the accident, the time begins to run, despite the fact that the effects of the injury, in terms of degree of disability are not immediately apparent to the fullest extent.

Thayer Mfg. Co. v. Keyes, 108 So. 2d 876 (Miss. 1969).

Thayer involved a back injury by Mr. Keyes which required medical attention by a family practitioner. Mr. Keyes returned to work for his former employer and actually left to work for another employer out of state. Because of Keyes' back complaints, he routinely took medication, and testimony presented was that he never recovered from his back condition Nevertheless, he did not discover until

April 1957 that he had suffered a ruptured disc in his lumbar spine. He filed his Petition to Controvert 27 months after the initial injury in January 1955. The Court ruled that the claim was time barred; that the claim began to run when "Mr. Keyes knew as a reasonable man and could recognize the nature, seriousness and probable compensable character of his injury. " The failure to institute the proceedings within the required time bars the claimant from compensation. Further, the court stated even though the claimant "did not definitely ascertain until April 1957 the exact results of the injury from which he had suffered since January 1955, this did not prevent the running of the statute of limitations since neither the employer nor the carrier had knowingly or fraudulently concealed from him the result of the injury complained of."

Appellants submit that the result of the trauma in March 1999 was evident immediately thereafter and has been evident to Panuska during the remainder of 1999. The results of the injury caused him to seek handicapped parking; change his teaching duties; experience problems of fatigue, sluggish movements; reduce physical activities; experience the mental fog and difficulty with concentration, balance, etc. These all resulted from the trauma. Panuska even argued with AmFed often in 1999 regarding medication and treatment. This is ample proof of workers' compensation coverage and Panuska's knowledge of compensability. This Thayer case was the progenitor of Miller, *supra*.

What did Panuska think following the blow to his head on March 27, 1999? Did he suffer an injury? Did it have an obvious effect on his ability to work as a college professor? Did it affect his activities of daily living? Did the University accommodate Panuska because of his injury and ongoing effects by altering his class schedule and load? Yes, to all of the above.

Panuska's injury was not a latent injury as the ruling of the Mississippi Workers' Compensation Commission would indicate. The effects of the blow to Panuska's forehead became readily apparent in the weeks and months following the injury. The difficulty concentrating, the mental fog, the difficulty walking in the halls, in the college classrooms, across campus, his fatigue, and difficulty balancing, all were continuous problems and conditions which did not improve with time after the incident in March 1999. These conditions were obvious **results** of the immediate injury from the blow.

Each condition has prompted Panuska to walk more slowly, to seek handicap parking at his office, to change his teaching schedule, and cancel a trip in the summer of 1999. There was never a recovery or cure of his condition. Panuska's condition did not improve. He appreciated the seriousness of his condition as indicated by the numerous calls to the third-party administrator, AmFed, seeking medication, additional treatment, etc.

Therefore, Appellants submit that there is no doubt that Panuska knew the seriousness of his injury in the late spring, summer, and fall semesters of 1999. The necessity of dropping or changing his teaching assignments is evidence of the disability and/or his inability to maintain his regular teaching schedule. This is clear evidence of a disability recognized by Panuska to be the result of the trauma.

What is the significance of September 6, 2000? Dr. Fetterman saw Panuska for the first time and diagnosed the labyrinthine concussion on that date. Appellee now denotes this visit as the discovery of an ear injury for the first time, rather than the labyrinthine concussion. Regardless, this is the first diagnosis of a labyrinthine concussion as opposed to the traumatic cerebral concussion initially

diagnosed by Dr. Jimmy Miller. No treatment change resulted from the new diagnosis. No cure or improvement has been forthcoming as a result of the new diagnosis. Panuska's condition remained the same as it had been in March 1999 to September 6, 2000 and thereafter.

Does the statute begin to run with the new diagnosis or when Panuska recognized that his injury was disabling? All physicians acknowledge that Panuska knew that his condition was a result of the trauma experienced in March 1999.

The diagnosis of the labyrinthine concussion in September 2000 does not make this a latent injury. This conditions manifested itself in March 1999 and never resolved. All of the symptoms of the condition were present prior to September 2000. Just as in Thayer, *supra*, the **results** of the injury were apparent to Panuska certainly during the entire year of 1999. Just as Keyes suffered with his back for two years, Panuska suffered with his concussion and the residuals therefrom. The diagnoses changed nothing for the reason that the results of the injury were apparent and had been apparent from the date of the injury.

This Court must address the proper criteria for which the statute begins to run. Appellants contend that Thayer and Miller, *supra*, are controlling. Therein, this calls for reversal on the threshold issue of the running of the two-year statute of limitations as provided by § 71-3-35.

Appellee in his brief states that his injury was not supported by any medical findings until Dr. Fetterman diagnosed the ear injury on September 6, 2000. What was the mental fatigue, lack of concentration, dizziness, mental fog, reaction to computer patterns, etc.? Why did Panuska ask for a handicapped parking sticker if he did not recognize the results of the head trauma in March 1999? Why did he insist that AmFed provide additional treatment?

Appellee takes the position that the statute runs from the date of the injury and not from the date of the accident, citing Tabor Motor Co. v. Garrad as controlling. In Garrad, the slag was removed from Mr. Garrad's ear and his condition of dizziness improved after the procedure by Dr. Shea. Absolutely nothing changed when Dr. Fetterman diagnosed Panuska's condition as a labyrinthine concussion as opposed to a cerebral concussion. Simply stated, a new name was attached to the condition. The date of manifestation of the condition and the acknowledgment of the results of the injury denotes the time of the injury. All of these condition suffered by Panuska did not begin on September 6, 2000, they began in March 1999.

Panuska still maintains that he suffered a latent or unknown injury in spite of testimony from Dr. Fetterman to the contrary. (R.E. 15, pp.31-32). Even in a latent injury case, the manifestation date is the start date of the running of the statute of limitations. Can Appellee state that the manifestation of the injury did not begin during the year 1999 with all of these symptoms that have continued? The diagnosis date is not the start date for the running of the statute of limitations and use of the wrong standard by the Mississippi Workers' Compensation Commission calls for reversal.

C. DOES THE FAILURE TO FILE A B-3 (FIRST REPORT OF INJURY) PRECLUDE RAISING THE STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE?

Appellants addressed in their brief the matter of estoppel. The cases of Martin, Holbrook, McCray, and Prentice have all been distinguished. It is the position of the Appellants that there was no wrongdoing on the part of the employer; that there was no inequitable behavior of the part of Mississippi State University which would cause the Court to infer prejudice or inequity by not filing the First Report of Injury, B-3. Therein, this should not be a factor in the Appellants seeking reversal. It should not preclude use of this affirmative defense.

D. DOES COLLATERAL ESTOPPEL OR *RES JUDICATA* BAR APPELLANTS FROM SEEKING REVIEW OF THE ISSUE OF THE RUNNING OF THE TWO-YEAR STATUTE OF LIMITATIONS?

The Appellants sought an early resolution of this matter when it became apparent that more than two years had elapsed from March 27, 1999 before Panuska filed his Petition to Controvert. Appellants' review of medical records and Panuska's deposition confirmed manifestation of the injury and knowledge of the injury at least during the year 1999. Therein, thinking the expense of numerous of depositions could be avoided, the Motion to Dismiss was filed solely on the basis of the time bar as promulgated by § 71-3-35. Judge Henry, the Administrative Judge, denied this motion and utilized the September 6, 2000 date as the start date. Appellants appealed this decision to the Full Commission which affirmed the Order of the Administrative Judge. These were interlocutory orders and not final orders. This is evidenced by the fact that the proceedings went forward with additional depositions and a hearing on the merits before Judge Homer Best. Only after this hearing on the merits before Judge Best, was there a final order issued. Appellants have timely appealed each final order.

Collateral estoppel and *res judicata* are not proper since in the hearings below, the parties dealt with interlocutory orders and not final orders. Bickham v. Department of Mental Health, 592 So. 2d 96, 97 (Miss. 1991). *Res judicata* is utilized to prevent a second lawsuit evolving from the same previously litigated cause. It is necessary that the previously litigated cause be adjudicated to a final judgment. This did not occur because of the interlocutory nature of the workers' compensation/state agency appeal process. This matter was not final until the Full Commission ruled in its final Order affirming the decision of Judge Best. That decision was timely appealed to the Circuit Court and this matter is properly before the Court of Appeals.

II. CONCLUSION

This Court must decide when did Panuska know that his head trauma created a disability. Panuska knew an injury had manifested itself when he returned to his teaching duties at Mississippi State University at a much reduced level, e.g., when he was forced to cancel trips in 1999. This condition was not a latent condition but one which manifested itself immediately and one wherein the disabling condition never improved. Therefore, it cannot be said that Panuska's condition waxed and waned or appeared intermittently. His own testimony is that as early the fall academic term of 1999, he was limited in performing his job as an instructor and required accommodations.

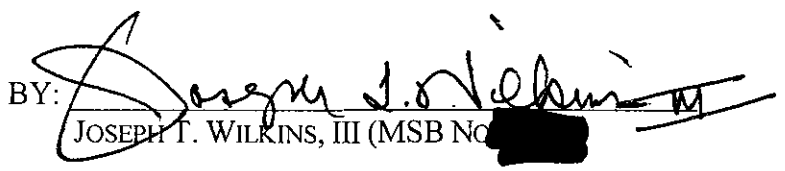
As a Ph.D academician, Panuska knew that his concussion, be it cerebral or iabyrinthine, emanated from his March 1999 head trauma from which he had never recovered. That Dr. Fetterman called the ongoing condition a labyrinthine concussion, is of no consequence. It was not a latent condition just discovered by Dr. Fetterman but had been ongoing since March 1999. This injury to Panuska became reasonably apparent in 1999. His incapacity is evidenced by his reduced work load at Mississippi State University as well as his decreased activities. This incapacity is confirmed by his own testimony as well as medical evidence. Panuska did not subsequently determine in September 6, 2000 that he suffered an injury as was the case in Pepsi-Cola Bottling Co. v. Long, 362 So. 2d 182, 184-185 (Miss. 1978) when Long discovered a herniated disc. The fact that Panuska contacted the third-party administrator regarding medication and treatment is evidence alone that he knew the condition was compensable and that workers' compensation was available for treatment.

All criteria requirements of Quaker Oats Company v. Miller were met by Panuska. The Administrative Judge and the Full Commission applied the wrong legal standard in ruling that the statute of limitations did not begin to run until the labyrinthine discovery date of September 6, 2000. The statute of limitations began to run on the injury date, March 27, 1999, or certainly during the following months during the year 1999 when different treatments and medication were not successful and Panuska adamantly voiced his opinion that his condition was not improving.

Substantial evidence clearly shows that Dr. Panuska knew that his condition was the result of the head trauma suffered in March 1999 while at work for Mississippi State University and that workers' compensation treatment had been provided by way of medication and physicians. That another diagnosis was not made until September 2000 is of no consequence. The key factor is that the manifestation and result of the injury was evident in the year 1999. This knowledge by Panuska and his failure to act timely bars him from receiving benefits. The claim was not timely made. The Order of the Mississippi Workers' Compensation Commission and the Circuit Court must be reversed.

Respectfully submitted, this the 25th day of August, 2008.

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

BY: 
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CERTIFICATE OF SERVICE

I, JOSEPH T. WILKINS, III, attorney for the Appellants, do hereby certify that I have this day mailed, via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing **REPLY BRIEF FOR APPELLANTS** to:

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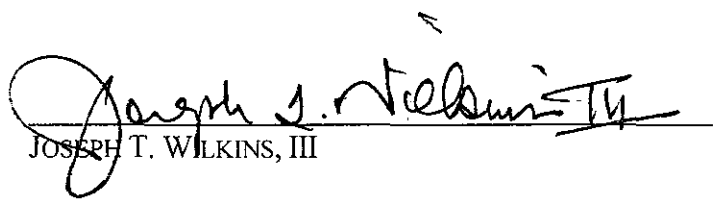
THIS, the 25th day of August, 2008.



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