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**

(*)

BRIEF OF THE 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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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 Court may evaluate possible disqualification or recusal.

1. Bruce Panuska, claimant/appellee;

2. Mississippi State University, employer/appellant;

3. Mississippi Institutions of Higher Learning, Self-Insured Mississippi, carrier/appellant;

4. Patricia A. Killgore, Esq, attorney for the claimant/appellee;

5. Joseph T. Wilkins, III, Esq., attorney for the employer-carrier/ appellants;

6. The Honorable James Homer Best and The Honorable Mark Henry, Administrative Judges, Mississippi Workers' Compensation Commission; and

7. The Honorable James T. Kitchens, Jr., Circuit Court Judge.

THIS, the 7th day of July, 2008.

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I. STATEMENT OF THE ISSUES

1. Did the Administrative Judge and the Full Commission use the wrong legal standard in ruling that the two-year statute of limitations had not run?

2. Did the Administrative Judge and the Full Commission commit reversible error in ruling that the failure to file a Form B-3 precluded the employer and carrier from alleging the affirmative defense of the two-year statute of limitations, § 71-3-35?

3. Did the Administrative Judge and the Full Commission commit reversible error in not providing a finding of fact as to when Dr. Panuska knew as a reasonable man that his condition was compensable in accordance with Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. App. 2002)?

4. Does the doctrine of estoppel or *res judicata* preclude argument by the appellants that the two-year statute of limitations has now time barred Dr. Panuska's claim?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY.

The Claimant/Appellee, Bruce Panuska, filed his *Petition to Controvert* on February 7, 2002, alleging that he received a compensable injury due to a board striking his head while at work. The Employer-Carrier/Appellants, Mississippi State University and Mississippi Institute of Higher Learning (hereinafter "MSU"), answered admitting that Appellee had suffered an injury in the course and scope of his employment but denied that it was compensable due to the Appellee's failure to file his petition prior to the tolling of the statute of limitations.

The Appellants filed a Motion to Dismiss the claim based upon the two-year statute of limitations (§ 71-3-35) averring that since Dr. Panuska was injured on March 27, 1999 and no Petition to Controvert was filed until February 12, 2002, a date which is 47 weeks and 4 days following the running of the two-year period from the date of the accident. Medical records of treating physicians were introduced by joint motion of the parties. On May 9, 2003, the Administrative Judge denied the Motion to Dismiss; acknowledged two separate medical conditions occurred on March 27, 1999, and that the statute of limitations began running only for Dr. Panuska's cerebral concussion injury. That the statute did not begin to run for the labyrinthine concussion until September 6, 2000, the date that condition was first diagnosed by Dr. Fetterman. No finding of fact is contained in this Order as to when Dr. Panuska knew, as a reasonable man, that his condition was compensable.

This Order was resubmitted to the Administrative Judge by a Motion to Reconsider and was denied by Order dated July 14, 2003.

An Interlocutory Appeal was filed on July 25, 2003 and the Full Commission affirmed the Administrative Judge's Order of May 9, 2003, denying dismissal of the claim.

Orders denying dismissal of the claim for benefits was incorporated in the Order on the Hearing on the Merits dated August 1, 2006. This Order contained no findings of fact as to Dr. Panuka's knowledge of his injury being compensable, addressing only that Dr. Panuska suffered an injury on March 27, 1999, was disabled, etc.

Motions to reconsider were denied and the Full Commission affirmed the Administrative Law Judge's ruling refusing to dismiss the claim.

The Commission was not aware of the appeal pending in the Court of Appeals in the case of Parchman v. Amwood Products, Inc., 2007 WL 239509 (Miss. App. 2007). (R.E. 11). This case was affirmed by the Court of Appeals on January 30, 2007. However, on June 12, 2008, this case was ruled upon by the Mississippi Supreme Court on Writ of Certiorari. Parchman, *supra*, is pertinent in that it distinguishes or overrules Holbrook and Martin, two cases utilized by the Commission to estop the appellants from alleging the affirmative defense of the two-year statute of limitations, § 71-3-35. Parchman allowed the employer to assert the two-year statute of limitations defense. Parchman was reversed on June 12, 2008 in 2006-CT-00075-SCT but addressed only the issue of the tolling of the statute of limitations. (R.E. 12). Accordingly, the issue of utilization of the affirmative defense, still stands.

The decision of the Administrative Judge was appealed to the Full Commission by the employer and carrier on August 21, 2006. The Full Commission affirmed the Order of the Administrative Judge in its Order dated February 6, 2007. Appeal was timely filed February 14, 2007 to the Circuit Court.

No Order of the Administrative Judge or the Full Commission had any finding of fact as to when Dr. Panuska should have known that his head injury condition was compensable.

The Circuit Judge of Oktibbeha County affirmed the decision of the Full Commission. Appeal of that decision is made to the Mississippi Court of Appeals.

III. STATEMENT OF THE FACTS

On February 7, 2002, the Appellee filed his *Petition to Controvert* alleging a work-related injury resulting from being struck in the head with a board. Appellee alleges that as a

result of his work-related injury, he is now permanently disabled. Appellants answered, admitting that the Appellee suffered an injury in the course and scope of his employment, but denied that his injuries were compensable due to the fact that the Appellee failed to file a claim until after the two-year statute of limitations had expired. A hearing was held in this matter on April 3, 2006. At the hearing, the Appellee testified and the depositions of Dr. Jimmy Miller, Dr. Donna Harrington, Dr. Bruce Fetterman, Glenda Tranum and Donald Woodall were made an official part of the record.

The Appellee is a fifty-four year old male. He is wed to Carla Panuska, an employee of the Mississippi State University Veterinary School. The two were married in June 2002. Appellee has no children. The Appellee received his doctorate from the University of Alaska in 1974. The Appellee began teaching at Mississippi State University in 1991 until his resignation in 2002. At the time of his resignation, the Appellee was an associate professor in the Department of Geosciences. (R. Vol. 7, p.8).

A. JOB FUNCTION.

As an associate professor at Mississippi State University, the Appellee routinely taught three courses per semester. Those three courses, would typically have three hours of lecture time per week. (R. Vol. 7, pp.13-14). While teaching, the Appellee stated that he was required to use a slide projector pretty much every day. (R. Vol. 7, p.15). The courses might also include laboratory courses. The Appellee testified that he did not teach the introductory course labs, but would teach the advanced labs. In addition to teaching, the Appellee was required to attend faculty meetings at the university. (R. Vol. 7, p.17).

The Appellee testified that research was also a part of his duties as an associate professor. (R. Vol. 7, p.14). Examples of the Appellee's research assignments included geological studies in Alaska and the Bahamas during the summer. (R. Vol. 7, p.14). The Appellee also testified that he worked Puerto Rico performing paleomagnetic work. (R. Vol. 7, p.14). The Appellee testified that there were instances in which he would escort students to Virginia, Colorado, and Costa Rica in the summer to give the students research experience. (R. Vol. 7, p.15).

The effects of the injury were readily apparent to Dr. Panuska. His teaching duties were altered because of his fatigue and he utilized a handicapped parking space to minimize walking to his office from his car. (R.E. 13, pp.8-13).

In the fall semester of 1999, he had cut back to two classes to teach because of his fatigue. (R.E. 13, p.32). Dr. Panuska cancelled a trip to Guam because of difficulty traveling. (R.E. 13, pp.35-36). Dr. Panuska requested a letter from Dr. Miller excusing him from flying. (R.267). Dr. Panuska admitted his condition still caused problems involving fatigue, sluggish movements, etc., which caused problems with his workers' compensation carrier. (R.E. 13, pp.36-37). These conditions suffered by Dr. Panuska made the disabling nature of his injury quite clear during the year 1999. He made arrangements for teaching changes, reduction in his activities, etc. He contacted the insurance carrier about treatment and medical care.

B. INJURY AND SUBSEQUENT TREATMENT.

The Appellee was injured on March 27, 1999 while employed at Mississippi State University after a board struck him in the head. Dr. Panuska went to the emergency room the

day of the accident, and was told to take it easy and rest a lot. (R. Vol. 7, p.9). The Appellee followed up with Dr. McKibben, a family physician, on March 31, 1999 as a result of experiencing severe symptoms. (R. Vol. 7, p.10). Dr. McKibben performed an CT can and diagnosed the Appellee with a hemorrhagic concussion. (R. Vol. 7, p.10).

Dr. McKibben referred the Appellee to Dr. Jimmy Miller at the Neurosurgical Center in Southaven, Mississippi. Dr. Miller testified that he first saw the Appellee on April 5, 1999. (R.E. 14, p.5:9-10). The Appellee indicated to Dr. Miller that he had pain in the front of his skull and forehead area, which would last about thirty seconds. (R.E. 14, p.5:15-16). The Appellee also alleged that he felt like he was in a mental fog and was having difficulty with concentration, change in direction, fatigue, balance and tightness in his facial muscles. (R.E. 14, p.5:16-24). After evaluating the Appellee and reviewing his CT scan, Dr. Miller testified that it was his opinion that the Appellee suffered from a cerebral contusion. (R.E. 14, p.7:24).

Dr. Miller testified that he saw the Appellee again on May 3, 1999. (R.E. 14, p.8:8). The Appellee had returned in regard to a diving trip which he had planned for the summer. Dr. Miller testified that he advised against the diving trip because Dr. Panuska was still having symptoms, and that he was worried about a possible seizure disorder. (R.E. 14, p.9:17-24). Dr. Miller testified that during the May 3, 1999 visit, he scheduled a MRA and MRI scan to evaluate possible endocranial aneurysm and to look at the contusion. (R.E. 14, pp.9:29-10:1-2). Dr. Miller testified that those tests indicated that the brain was normal. (R.E. 14, p.10:28). Dr. Miller testified that the it was his understanding that the Appellee had an appreciation of his injury and was informed that his injury was related to being struck in the head March 27, 1999.

(R.E. 14, p.12:8-25). Dr. Miller testified that in January 2000, during the course of his treatment of Appellee, Dr. Panuska appreciated the seriousness of his condition. (R.E. 14, p.19). Furthermore, Dr. Miller testified that the Appellee never stated that his condition could have been caused by something else. (R.E. 14, p.19). Additionally, Dr. Miller testified that he never considered the Appellee's injury to be a latent injury and that, in his opinion, Dr. Panuska's condition when he saw Appellee in January 2000 related back to Appellee's March 1999 injury. (R.E. 14, pp.27-28). Dr. Miller ultimately referred Appellee to Dr. Donna Harrington, a neurologist, in January of 2000. Dr. Miller never took Appellee off work.

Dr. Donna Harrington testified via deposition and treatment records. Dr. Harrington testified that she first saw Dr. Panuska on February 10, 2000, regarding Appellee's ongoing complaints of disequilibrium and vertigo. Dr. Harrington testified that the precipitating cause of Appellee's condition was Dr. Panuska's head trauma. (R.435). Dr. Harrington testified that she was treating Appellee for his symptomology and that she ultimately referred Appellee to the Shea Ear Clinic in August 2000. (R.436). Dr. Harrington testified that during the time that Appellee sought treatment from her, Dr. Panuska appreciated the seriousness of his condition, the fact that he had a condition that required medical attention, and that his condition was caused by the head trauma received in March of 1999. (R.437). Dr. Harrington never took Appellee off work.

Dr. Bruce Fetterman, a specialist in ear, hearing and balance disorders (otology/neuro-otology) testified via deposition. Dr. Fetterman testified that he first treated Dr. Panuska on September 6, 2000, wherein Appellee provided a history of being dizzy since being struck in

the head with a 2 by 4 in March 1999. (R.E. 15, p.5:10-19). Dr. Fetterman testified that Appellee stated that he had symptoms of feeling dizzy, nauseated, and feeling light headed. (R.E. 15, pp.5:21-25, 6:1). Dr. Fetterman had several tests performed by audiologists, and he arrived at a diagnosis of inner ear or labyrinthine concussion, which he described as trauma to the inner ear causing disruption of the inner ear's balance function. Dr. Fetterman attributed this condition to the 1999 head injury. (R.E. 15, p.8). Dr. Fetterman prescribed physical therapy and home exercises designed to improve Appellee's balance.

Dr. Fetterman treated Appellee for the second time on May 2, 2002, a date Dr. Fetterman set as Appellee's maximum medical improvement date. He further stated that Appellee was permanently and totally disabled as far as working as a college professor. (R.E. 15, pp.13-14). Dr. Fetterman testified that it was his understanding that Dr. Panuska always knew what caused his condition for which he sought treatment in September 2000. (R.E. 15, p.30). Dr. Fetterman testified that there was never any doubt in his mind that Appellee's condition in September 2000 stemmed from his March 1999 injury. (R.E. 15, p.30). In addition, Dr. Fetterman testified that based on his conversations with Appellee, it was his opinion that Dr. Panuska told him that it was reasonably apparent to him (Panuska) that his condition came from the trauma to his head in March 1999. (R.E. 15, p.31). Dr. Fetterman testified that Appellee's condition was not a latent injury. (R.E. 15, p.32). Dr. Fetterman testified that, in his opinion, Appellee's condition was present since the beginning, and that Appellee appreciated and realized the seriousness of his injury. (R.E. 15, pp.32-33).

A physical therapist at the Oktibbeha County Hospital, Glenda Tranum, testified via her deposition. (R. Exh. Vol. 2, Gen. Exh. 4). Ms. Tranum testified that she provided physical therapy for Appellee prescribed by Dr. McKibben beginning on January 16, 2001. Ms. Tranum testified that her goals were to try and improve Dr. Panuska's balance. She testified that she treated Appellee until his last session held on March 2 ,2001, by which time, Appellee had plateaued and his symptoms had become less severe. Ms. Tranum testified that Appellee was very cooperative with treatment.

Donald E. Woodall testified via deposition regarding his report on behalf of the Appellee. (R. Exh. Vol. 2, Gen. Exh. 5). Mr. Woodall is a vocational rehabilitation expert and was retained to evaluate Appellee's prospects for employment. Mr. Woodall testified that it is his opinion that Appellee was incapable of returning to work.

IV. ARGUMENT

A. THE APPELLEE'S WORK-RELATED CLAIM AGAINST THE APPELLANTS IS TIME BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS PURSUANT TO MISS. CODE ANN. § 71-3-35 (1) (1972).

The Appellants contend that the two-year statute of limitations provision of Mississippi Code Annotated 1972, § 71-3-35 (1) barred Dr. Panuska's claim for benefits. MISS. CODE ANN. § 71-3-35 (1972). The statute reads as follows:

> . . . Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred.

"The two-year statute, by its terms, can bar the right to compensation, compensation being defined in § 71-3-3 (j) to include the money allowance payable to an injured worker." John R. Bradley, *Time Limitations Which Bar Claims in Mississippi Workers' Compensation: A Re-examination*, 62 Miss. L. J. 511 (Spr. 1993). It should be reiterated MISS. CODE ANN. § 71-3-35 (1) (1972) states that a claimant has only two years from the date of injury to file his claim rather than from the date of the accident. The Mississippi Supreme Court has interpreted this statutory language to mean that the two-year statute of limitations begins to run from the time a claimant, as a reasonable person, knew or should have known that he has had an industrial accident which has caused him an occupational disability. Tabor Motor Co. v. Garrard, 233 So.2d 811 (Miss. 1970); Struthers Wells-Gulfport, Inc. v. Bradford, 304 So.2d 645 (Miss. 1975); Pepsi Cola Bottling Co. of Tupelo, Inc. v. Long, 362 So.2d 182 (Miss. 1978).

The Administrative Judge ruled that the two-year statute ran for the cerebral concussion suffered on March 29, 1999; that two injuries were involved and the statute did not begin to run for the labyrinthine concussion until it was diagnosed on September 6, 2000. (R.E.4, pp.4-5).

The Full Commission (R.E. 6, 8, 9) and the Circuit Court (R.E. 10) adopted the original Order of finding two injuries and two separate start dates. This is not the legal standard for a non-latent injury. The start date begins with the injury date, March 27, 1999, or later in the year 1999 when Dr. Panuska experienced disability from his trauma.

Dunn, Mississippi Worker's Compensation, § 249 (3rd ed. 1982) states, ". . . 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 the degree of disability, are not immediately apparent

to the fullest extent." Dunn, Mississippi Worker's Compensation, § 249 (3rd ed. 1982). Dunn goes on further to point out the following:

> The true rule is that the running of the time for limitation or notice purposes begins when the claimant, as a reasonable man, should recognize the nature, seriousness and disabling nature of his problem and the disability is one of a probable compensable character, which, in turn, means only, and nothing more than, that the injury or disease is work-related. Id.

Hence, the standard is basically the claimant's reasonable recognition of his injury. It is not necessary that the claimant's knowledge be beyond a reasonable doubt, or to a degree of medical certainty. All that is required is that it be "reasonably apparent" to the claimant that the injury or disability arose out of and in the course of his/her employment. Tabor Motor Co., 233 So.2d at 815.

The landmark case of Quaker Oats Co. v. Miller sets forth the standard for dismissal of a workers' compensation claim due to failure to file for benefits within the two-year period following injury referenced in MISS. CODE ANN. § 71-3-35 (1972). Quaker Oats Co. v. Miller, 370 So.2d 1363 (Miss. 1979). Quaker Oats Co. v. Miller states that the statutory period will begin to run once the claimant, as a reasonable man, recognizes (1) the nature, (2) the seriousness, and (3) the probable compensable character of the injury or disease. Id. at 1366. In Quaker Oats Co. v. Miller, the claimant suffered from a progressive disease of which he was aware. Id. at 1364. He had been in consultation with medical doctors who had informed Mr. Miller of the nature and seriousness of his illness. Id. Miller left work eventually and later retired. Id. However, Miller did not know his disability entitled him to indemnity benefits, but regardless, the two-year limitation was held to have already begun. Id. at 1366. The claimant

in Quaker Oats Co. v. Miller knew the source of his illness and that the work performed aggravated the condition. Id.

This Court further explained that knowledge of a compensable injury means knowledge that a disabling injury is work-related. Id. Therefore, the Court ruled that the two-year statute of limitations had begun to run on March 31, 1973, when Mr. Miller left his job at Quaker Oats Company on sick leave. Id. It was at this point Mr. Miller, as a reasonable man, had actual knowledge about the nature, seriousness, and disabling character of his hypertension. Id. Therefore, Mr. Miller's claim was barred by the two-year statute of limitation. Id.

In Benoist Elevator Co., Inc. v. Mitchell, 485 So.2d 1068 (Miss. 1986), this Court followed the same standard set out in Quaker Oats Co. v. Miller to disallow an untimely claim involving the finger wherein Mr. Mitchell waited from 1959 until the year 1975 to file a claim. Id. Mitchell was informed by a doctor in 1959 that he had injured 15 percent of his finger and had a permanent partial disability. Id. The Commission Form B-31 was filed September 14, 1959. Id.

In a more recent Mississippi Court of Appeals decision, Jordan v. Pace Head Start and Mississippi Casualty Ins. Co., there was another situation similar to the present case. Jordan v. Pace Head Start and Mississippi Casualty Ins. Co., No. 2001-WC-00608-COA (Miss. Ct. App. 2002). In Jordan, the claimant was a data entry clerk and suffered a work-related injury in August 1995. Id. at 2. However, the worker filed her claim for benefits in February 1999. Id. Both the Commission and the trial court found this claim to be barred by the two-year statute of limitations, as well as, the appellate court. Id. MISS. CODE ANN. § 71-3-35 (1972) applies in

cases where neither disability income nor nonburial death benefits has been paid, and neither of those had been paid in the case of Jordan. Id. at 4. Therefore, the claimant in Jordan had until August 1997 to file her claim for benefits with the Commission in order to have a valid claim; yet, since she had not done so, her claim was barred. Id.

It should be further noted in the case of Speed Mechanical, Inc. v. Taylor, that if a claimant fails to file for any kind of benefit, including only medical benefits, as opposed to lost time subsidy, within the two-year statute of limitations, then all benefit requests will be barred. Speed Mechanical, Inc. v. Taylor, 342 So.2d 317, 320 (Miss. 1977). In Speed Mechanical, Inc. v. Taylor, Taylor sustained a work-related injury to his mouth due to a fall at his employer's Business, Speed Mechanical, Inc. in May 1971. Id. at 318. However, he filed for only medical benefits (he had no lost wages) in November 1973. Id. The Court held the two-year statute of limitations bar, that begins at the date of injury, applies to all benefits sought by a claimant. Id.

Dunn, Mississippi Workers' Compensation, § 259 (3rd ed. 1982) further states that once a claim is time barred, "It cannot be revived by furnishing compensation benefits of any character." Dunn, Mississippi Workers' Compensation, § 259 (3rd ed. 1982); Turnage v. Lally's Swimming Pool Co., 247 Miss. 713, 159 So.2d 84 (Miss. 1963).

Dr. Panuska's application for workers' compensation benefits (his Petition to Controvert) was filed on February 7, 2002. Accordingly, the burden is on the Appellee to show that he did not know that his work caused or contributed to his condition prior to February 7,

2000. This burden was not met by Dr. Panuska. In fact, Dr. Panuska admitted that his injury/disability all stemmed from the March 1999 head trauma.

The Appellee in the instant case alleges in his petition that the two-year statute of limitations did not begin running until September 6, 2000, when Dr. Fetterman diagnosed the Appellee as having a labyrinthine concussion. However, it is the Appellants' contention that Dr. Panuska never recovered from his injury of March 1999. He always had some residual effect of the injury, be it fatigue, lack of concentration, dizziness, disequilibrium, instability, lack of concentration, reaction to patterns treating this condition, etc. (R.E. 13, pp. 8, 10, 22). It is documented that the Appellee saw Dr. Miller in May of 1999, which prompted Dr. Miller to issue his letter that Dr. Panuska had a serious condition and he should avoid unnecessary travel, etc. (R.E. 13, Exh. 1).

In his deposition, the Appellee stated Dr. Miller informed him that "I was well on the way to recovery." Dr. Panuska then also admitted the following in regards to the fall semester after his March 1999 injury:

> Q. Doctor, the resumption of your course work then at Mississippi State in the fall of 1999, did you have any relapses or mental fogs evolve during that period of time, the fall semester?
>
> A. Okay. So this is after, okay, spring. Spring is when I had the initial injury, and you are asking the following fall.
>
> Q. The following fall of 1999.
>
> A. Yes, I am sure I did. Where was I? Yes, I had continued problems with that. I was still sluggish, very slow. I still needed my close parking area, and I guess it was throughout that -- yes, throughout that school year I had continued problems, and they would be triggered at various intervals, but

I still noticed the problems. Actually Miller almost said, "You are probably okay to cease seeing me. See me in August if you want to," and I did go to see him in the August, and said, "Well, I am having some problems in here," and the workers' comp people said, "Well, Miller said that you were fine. The case was over." No, it was fine if I didn't have continued problems, and I had to fight with workers' comp people to understand that this was the same condition, that it was continued treatment and Miller made a prediction which was not borne out, so I had continued problems throughout that time period.

Q. Now your contact with workers' comp, is this the AmFed representative?

A. That's the people. AmFed, some place in Jackson.

Q. So they would call and inquire as to your condition and want to know if you –

A. No, they didn't do anything. They just had this big stamp that said rejected or no or whatever, so I had to call, go through a bunch of people, find out, oh, well, this is a different problem. You were discharged. No, I was not discharged. It was if I had problems and the answer is, yes, I do have problems, and I had to sort of fight with them, and then they understood it and realized that it was a continuation of the same stuff and don't jump to any conclusions. I am not better, please, thank you.

Q. So your medical bills, your drug bills for the Dilantin, that was paid for by AmFed, by workers' comp?

A. Yes, I guess so. I think I was reimbursed for drugs.

Q. What about your mileage say to see Dr. Miller, did they reimburse you for your trips to see Dr. Miller?

A. I don't believe so.

Q. Do you know if you have even submitted that to be reimbursed?

A. I don't know. I think when I went up to see Federman in Memphis, I think I -- I may have submitted mileage. I know I tried to submit a hotel room, because I was supposed to go in at like 7:30 in the morning, so I had to stay

there the night before, and I know for sure they didn't pay the motel bill when I was up there. I don't recall about the mileage.

Q. But the situation when you went to see Dr. Miller at least when you presented to Dr. Miller and you said you filled out all those forms, you announced to them it was a workers' comp case.

A. Oh, yes. Yes.

(R.E. 13, pp. 36-38)

Dr. Panuska even gave AmFed the telephone number of his secretary so they could inquire about various medical bills, reimbursement, etc. (R.E. 13, p.39).

Even the Order of the Administrative Judge confirms Dr. Panuska's disability during the year 1999. (R.E. 7, pp.552-553).

The Appellants submit that the spring and fall of 1999 clearly show by Dr. Panuska's actions with AmFed that he knew his condition was covered by workers' compensation benefits inasmuch as his medical was being paid, and he insisted that he still had an ongoing problem. (R.E. 13, pp.42, 44, 45). The fact that Dr. Fetterman diagnosed a labyrinthian concussion rather than a cerebral concussion is of no consequence. It had been apparent to Dr. Panuska from day one that his injury or disability arose out of employment with Mississippi State University; that there had been no intervening injury or condition which would cause any physician to consider that another physical condition caused his injury. The statute of limitations began running in March 1999, but certainly in May 1999, when he was treated by Dr. Miller and was discussing payments with AmFed. (R.E. 14, p.17). If that is not sufficient, then in November 1999, he again was taking Dilantin and this caused his condition to "relapse" and he went to see Dr. Miller in January 2000. (R.E. 14, p.18). Even at that late date, the

Appellee is still precluded from making a claim because of the running of two-year statute of limitations.

Did Dr. Panuska appreciate the seriousness and compensable character of his condition in March 1999 or even in December 1999? Did he realize that the condition which caused him fatigue, dizziness, etc., was work-related and this condition and nothing else affected his ability to work?

Dr. Panuska admitted changes in his activities of daily living, at work, and his requirement of a handicapped parking space at the Mississippi State University campus near his office; his fatigue and sluggishness at work in the performance of his duties, etc. (R.E. 13, pp.20, 23, 32, 36).

All of Dr. Panuska's physicians point to the March 1999 injury as the traumatic event which caused Dr. Panuska's disabling condition. All of these physicians testified that Dr. Panuska knew and appreciated the cause of his condition was the March 1999 injury.

When then did the time begin for the running of the two-year statute of limitations, § 71-3-35? Was it the September 6, 2000 date when the statute of limitations began running, rather than March 27, 1999? This Order stated "The statute did not begin running until September 6, 2000 when Dr. Fetterman discovered the cause of Dr. Panuska's symptoms (the labyrinthine concussion) and related that cause to the head injury on March 27, 1999." (R.E. 4). The Judge noted that the case of Tabor Motor Co. v. Garrard, 233 So.2d 811 (Miss. 1970) was controlling.

The Appellants submit that the Tabor case is distinguishable from the case at bar. Garrard was a welder lying on the ground and working on an automobile when a piece of slag entered his left ear. This perforated his ear drum and inner ear. The injury was reported and treated but the slag was never recognized or removed from his inner ear which caused him headaches and dizziness. The slag was not discovered until Dr. Shea, a specialist in Memphis, saw Mr. Garrard and removed the slag. The Court ruled that the statute of limitations in that case did not begin to run until Dr. Shea discovered the slag in Mr. Garrard's ear on March 14, 1966 and not when the slag entered his ear on October 7, 1964. Removal of the slag explained and relieved Mr. Garrard's problems involving dizziness and headaches which had plagued him since the injury. The key in the Tabor case is the discovery of the actual cause which resulted in a change of disability. Tabor did not know that slag remained in his ear and caused the discomfort.

Dr. Fetterman's diagnosis was that of a labyrinthine concussion rather than the cerebral concussion condition, diagnosed by Dr. Miller when he began treating Dr. Panuska following the injury in March 1999 but for the same complaints. What change in Dr. Panuska's condition, treatment, or disability resulted from the start date of September 6, 2000? Did this diagnosis knowledge by Dr. Fetterman improve Dr. Panuska's condition? Did it result in medication and treatment which changed his disability or relieved the symptoms as it did with Mr. Garrard? Absolutely nothing changed. There is no real "treatment" for Dr. Panuska's condition. (R.E. 15, pp.8-9). Dr. Fetterman prescribed some exercises but Dr. Panuska received no treatment which affected his disability before or after September 2006.

All physicians who have seen Dr. Panuska, to include Dr. Miller, Dr. Harrington and Dr. Fetterman, testified that Dr. Panuska associated his disability to the March 1999 blow to his head. According to Dunn, Mississippi Workers' Compensation, § 249 (3rd ed. 1982):

> . . . 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.

Even Dr. Fetterman admitted that Dr. Panuska's condition was no latent injury, that Dr. Panuska knew his fatigue, dizziness, etc., were caused by the March 1999 injury. (R.E. 15, pp.31-32). The effects of the injury never diminished but continued to the extent that Dr. Panuska had to reduce his hours, alter his teaching courses, change his activities while still making calls to AmFed, the workers' compensation carrier, seeking payment for medical services during the year 1999 and thereafter.

Dr. Panuska, a Ph.D recipient, certainly knew, as a reasonable man, that his injury was compensable during the year 1999.

The evidence presented in this case clearly is similar to the situations in Quaker Oats Co., Benoist Elevator Co., Inc., Jordan, and Speed Mechanical, Inc. in that this claim should be time barred. Yet, unlike Mr. Miller in Quaker Oats Co., there is no question that an injury occurred in the present case. Whereas in Quaker Oats Co., Mr. Miller suffered with hypertension, and it was argued that his hypertension could or could not be aggravated by work. In Dr. Panuska's case, the cause and effect of the injury of March 1999, has never been disputed. Further, no other intervening injuries or conditions emerged following the March 1999 injury from which Dr. Panuska never recovered. His failure to timely file his claim for

benefits now is time barred pursuant to MISS. CODE ANN. § 71-3-35 (1972). Therefore, the Appellants take the position that Dr. Panuska, as a reasonable man, recognized (1) the nature, (2) the seriousness, and (3) the probable compensable character of his injury in March 1999, and certainly May 1999. Accordingly, like Mr. Miller's claim, Dr. Panuska's claim should be dismissed.

The recent case of Parchman v. Amwood Products, Inc., 2007 WL 239509 (Miss. App. 2007), had not been decided when the Commission ruled on the case at bar. This case is in point regarding several issues raised in Panuska. The issue of the two-year statute of limitations, § 71-3-35, is addressed in Parchman and emphasizes the rule of law that the statute began to run when Dr. Panuska became aware that his injury was disabling; that the application for benefits must be filed "within two years from the date of injury". In his appeal, Mr. Parchman made many of the same arguments as did Dr. Panuska. Nevertheless, the Court in Parchman ruled that Mr. Parchman's foot injury was not a latent injury even though medical treatment was received over an extended period of time. The Court noted that even if found to be a "progressive injury, that the Quaker Oats Co., 320 So.2d 1366, criteria applies. Parchman was reversed on other grounds. Nevertheless, it remains good law as to MSU's right to plead the statue argument.

Panuska's knowledge of his injury and disabling effect in the year 1999 is controlling. The statute began running during the year 1999 and not when Panuska saw Dr. Fetterman in September 2000. His claim is time barred.

Similarities are also found in like circumstances in Jordan and Speed Mechanical, Inc. In both of the these cases, the claimants filed for benefits after a period of time in excess of two years. Their claims were completely barred as to any kind of benefit. The benefits Dr. Panuska now seeks are barred by the two-year period which began to run either on March 27, 1999, May 1999, or certainly, in the fall of 1999 when Dr. Panuska contacted AmFed about his medicine and knew that his condition was work-related. Evidence proving that the date of injury should relate back to March 27, 1999, is shown through Dr. Panuska's own statements made during his deposition. (R.E. 13, pp.36-37). With his testimony, Dr. Panuska confirmed his knowledge of a compensable injury at least in March 1999 and certainly no later than May 1999. The Appellee recognized and has known that since March 1999 that his condition involved dizziness, nausea, mental fog, disequilibrium, instability, fatigue, etc. (R.E. 13, pp. 8, 10). These events all stemmed from the March 1999 traumatic injury to his head. Thus, like Mr. Miller in Quaker Oats Co., Dr. Panuska knew as a reasonable man that his condition was work-related. Dr. Panuska was well aware that his difficulty in walking, teaching and the necessity that he continue to take medication for his condition was due to his head injury suffered in March 1999.

Reversible error was committed by the Administrative Judge and the Full Commission when neither addressed a finding of fact as to when Dr. Panuska should have known, as a reasonable man, that his head injury and residuals from that injury were work related. This requisite is set forth in the case of Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. App. 2002). The Court noted:

> The Commission did not make a finding as to when Robinson should have been aware that the carpal tunnel syndrome not only existed, and not only that it was work-related, but that it created a "disability". For this reason we reverse and remand to the Commission for a finding of fact on when Robinson knew or should have known by the reasonable use of care and diligence that the carpal tunnel syndrome was a compensable injury. If Robinson should have known more than two years prior to June 22, 1999, then his claim is time-barred.

Id. 846 So.2d 245 (258).

In Panuska, the Administrative Judge stated:

> The Administrative Judge is of the opinion that as to a claim based on the cerebral contusion the Statute of Limitations began running March 27, 1999, the date of the injury (and certainly no later than April 5, 1999, when Dr. Miller diagnosed that condition). In any event, the Statute has run for any cerebral contusion claim; but, Dr. Panuska bases his claim, not on a cerebral contusion, but rather on the labyrinthine concussion.
>
> As to the labyrinthine concussion the Administrative Judge is of the opinion that the Statute did not begin running until September 6, 2000, when Dr. Fetterman discovered the cause of Dr. Panuska's symptoms (the labyrinthine concussion), and related that cause to the head injury on March 27, 1999.
>
> . . . The labyrinthine concussion, however, was not discovered until September 6, 2000, at which time the Statute began to run concerning that condition.

(R.E. 4, pp.4-5).

This Order adopted on appeal is reversible error. The basis for the Order should be when Dr. Panuska's condition defined his disability and caused him to alter his classes, changed how he lived, walked, etc., because of his dizziness, not when the diagnosis was made of a labyrinthine concussion in September 2000. The Appellants submit that this is not the legal standard. The standard is when did Dr. Panuska know as a reasonable man that his head trauma was compensable, that is, work-related? He knew in the year 1999.

All physicians attribute his changed condition, dizziness, fatigue, etc., to the trauma. There can be no question regarding the extent of his injury and its effect which was immediate and continuing.

There is no denial that the resulting dizziness, fatigue, etc., was precipitated by the head trauma. Dr. Panuska even asked that his course load be altered because of his inability to maintain the level of teaching he had performed the year previous. This must be regarded as substantial evidence that in the year 1999, the serious head injury occurred and that disabling effects of his injury followed immediately.

Mississippi State University submits that it is its position that disability began in the year 1999 and is supported by medical findings. The case of Morris v. Lansdell's Frame Co., 547 So.2d 782, 785 (Miss. 1989) held that "medical findings of a disability need not be supported by a physician's identification of a specific physical condition causing disabling pain." Therein, the test is not identification by a physician that the condition is a labyrinthine concussion as opposed to a cerebral concussion. Rather, the key is the disabling condition.

Rather than focusing on the classification of Dr. Panuska's condition, the changes which plagued Dr. Panuska in 1999 and thereafter represented his disability and established the start time for the two-year statute of limitations. The Administrative Judge and Full Commission erroneously looked for a new diagnosis which they show to be the labyrinthine concussion as opposed to the cerebral concussion. They say that this discovery date in September 2000 should be the start time. The Appellants submit that based upon the decisions in Morris v. Lansdell's Frame Co., *supra*, as well as Howard Industries v. Robinson, 846 So.2d

245, 249, the legal standard is when Dr. Panuska knew that his medical condition which occurred at work was a disabling condition.

B. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COMMISSION RULING THAT THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL SEPTEMBER 6, 2000.

Orders of the Mississippi Workers' Compensation Commission are binding on all appellate courts if the decision by the Commission is supported by substantial evidence. Fought v. Stuart C. Irby Co., 523 So.2d 314, 317 (Miss. 1988). In Panuska, neither the Commission nor the Administrative Judge made a finding of fact as to when Dr. Panuska knew as a reasonable man that his disabling condition was work related as required in Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. App. 2002). The error by the Commission in holding that the statute of limitations did not begin to run until September 2000 is not based upon substantial evidence since the criteria must be based upon Panuska's knowledge of his condition, not when another diagnosis was made of his condition, i.e., cerebral concussion vs. labyrinthine concussion. Morris v. Lansdell's Frame Co., 547 So.2d 782, 785 (Miss. 1989). This error in law in the Commission's failure to follow the criteria for disability must be regarded as arbitrary and capricious calling for reversal. McGowan v. Mississippi State Oil & Gas Bd., 604 So.2d 312, 322 (Miss. 1992) and Calhoun County Bd. of Ed. v. Hamblin, 360 So.2d 1236, 1240 (Miss. 1978).

C. THE APPELLANTS SHOULD NOT BE ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS DEFENSE SIMPLY BECAUSE THEY DID NOT FILE A MWCC FORM B-3, FIRST REPORT OF INJURY.

1. The Administrative Judge erred in relying on the holdings of Martin, Holbrook, McCrary, and Prentice in finding that the Employer and Carrier are estopped from raising the statute of limitation defense outlined in MISS. CODE ANN. § 71-3-35 (1) because a First Report of Injury, MWCC Form B-3, was never filed in this case.

In the case *sub judice*, the Administrative Judge relied on Martin, Holbrook, McCrary, and Prentice in finding that the employer and carrier were estopped from raising the statute of limitation defense because a First Report of Injury had never filed in this claim. However, the employer and carrier submit that these cases are distinguishable from the case at bar. If this issue was dispositive, why was not a hearing ever held on this singular issue?

a) Martin v. L. & A. Contracting Company, 1964

Martin v. L. & A. Contracting Co., 249 Miss. 441, 162 So.2d 870, 873 (Miss. 1964) was the first Mississippi Supreme Court decision which suggested that the failure of an employer to timely file a notice of injury (MWCC Form B-3) could possibly result in the employer being estopped from asserting a statute of limitations defense. However, the Martin Court was clear in stating that, *"[w]e do not hold that failure to comply with Section 28 (requiring employer to give notice to commission) alone would estop the employer from relying on the statute of limitations."* Id. In 1964, MISS. CODE ANN. §71-3-67 was identified in the code as Laws 1948, ch. 354, § 28.

The case at bar is distinguishable from Martin. Martin was an employee of L. & A. Contracting Company, (hereinafter "employer"), a Mississippi company located in Hattiesburg

Mississippi. Id. at 871. While working temporarily in Florida for his employer, Martin was injured. *Id.* The employer submitted a notice of injury to the Florida Industrial Commission. Id. Although Martin was also eligible for workers' compensation benefits under the Mississippi Workers Compensation Act, the employer never provided the Mississippi Workers' Compensation Commission with a notice of injury.

Martin received medical treatment under the Florida act and also compensation under the Florida Act. Id. Martin received (45) weeks of temporary total disability benefits at $35.00 per week, from the day of the injury, March 17, 1959, until February 1, 1960. Id. Martin then received 87.5 weeks of permanent partial disability benefits at $35.00 per week, resulting in a total compensation of $3,062.50. Id.

The Court held that only after the Florida benefits were exhausted, did Martin reasonably learn that he was in fact eligible for Mississippi benefits as well. The Court ruled that "successive awards can be made in different states, deducting the amount of the first award from the second." Id. at 872. The employer defended the denial of Martin's receipt of Mississippi workers' compensation benefits based on MISS. CODE ANN. §71-3-35 which expressly outlines the two-year statute of limitations defense.

The Court, however, found that the language of the statute is precipitated upon two conditions, the first being "if no payment of compensation (other than medical treatment or burial expenses) is made" within two years. In this case, the Court found that Martin had in fact received benefits and that the statute did not require those benefits be "from Mississippi". Id. at 872-73. Secondly, the Court found that Martin had no reasonable knowledge that the

benefits which he was receiving were from Florida and not Mississippi. Id. at 873. Thus, it would be inequitable to allow Martin to be barred by the statue of limitations when the employer had in fact voluntarily paid compensation benefits, under the Florida Act and not the Mississippi Act.

As stated, Martin differs from the case at bar. In Panuska, the Appellee never received compensation benefits. Receipt of compensation appeared to be the threshold issue of the Supreme Court's decision, stating, "[t]he most important factor here is that appellees voluntarily paid compensation to claimant, and this constituted a waiver of formal claim, estopping appellees from asserting the contrary." Id.

b) Holbrook, by and through Holbrook v. Albright Mobile Homes, Inc., 1997

The Martin decision paved the way for Holbrook, by and through Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997). In Holbrook, the Mississippi Supreme Court laid out a broad generalization, which erroneously broadened the Martin decision. In Holbrook, the Supreme Court stated:

> This Court has previously found that an employer and its insurance carrier would be estopped from denying that the two-year statute of limitations was tolled where they failed to comply with the notice requirement of the act.

Id. at 844 (citing, Martin v. L. & A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (Miss. 1964)). This is not the general rule which the Supreme Court in Martin attempted to lay down. As previously stated the actual language of Martin was that:

> We do not hold that failure to comply with section 28 (requiring employer to give notice to commission) **alone** would estop the employer from relying on the statute of limitations.

Martin, 249 Miss. 441, 162 So.2d at 872.

Even without the fine-line distinction between the Holbrook court's application of Martin, the *Order of the Administrative Judge*, issued August 1, 2006, erroneously applied Holbrook in Panuska. Holbrook involved an employee, who was employed by Albright Mobile Homes Inc., a Mississippi corporation. Mr. Holbrook was electrocuted and killed on June 26, 1990, while working for his employer temporarily in the U.S. Virgin Islands. Albright not only failed to file a report of injury to the Mississippi Workers' Compensation Commission pursuant to MISS. CODE ANN. §71-3-67, but there was also a factual dispute as to whether Albright actually possessed workers compensation coverage at the time.

Mississippi Code Annotated §71-3-67(1) requires an employer to provide a report of injury within ten (10) days of the fatal termination of any injury. The statute goes on to state that "[i]njuries not otherwise provided for in this section, and for which only medical benefits are due, are ***not required to be reported to the commission.***" MISS. CODE ANN. §71-3-67(2). In the case at bar, the Appellee was being paid his full salary until his resignation in 2002. The Commission in Prentice v. Schindler Elevator Co., 2008 WL 2498249 (Miss. App. 2008), stated that "a day of disability is considered to be any day on which the injured employee is unable, because of injury, to earn the same wages as before the injury...." It is clear in this case that, the claimant did not establish the five (5) "days of disability" outlined by MISS. CODE ANN. § 71-3-11 which would create a statutory requirement to report the injury to the Workers Compensation Commission.

The Court in Holbrook, also based its decision to reverse the circuit court's grant of summary judgment more so on the fact that there was a factual dispute as to coverage. The Supreme Court in Holbrook ruled:

> It is clear that genuine issues of material fact exist in this case such as that summary judgment should not have been granted. First, the existence or non-existence of Albright's workers' compensation coverage remains in dispute. Second, whether Albright misled the Holbrooks into believing no coverage existed is disputed. Third, whether the Holbrooks relied on any such misleading statements such that the statute of limitations should be tolled must be resolved.

Holbrook, 703 So.2d at 845. Based on a closer analysis of Holbrook, the employer and carrier in this case contend that the Administrative Judge's reliance upon Holbrook with regard to this case was misplaced.

c) McCrary v. City of Biloxi, 2000

Another recent case that the Supreme Court has reviewed regarding the issue of the statute of limitations and the filing of the notice of injury indicates that the intent of the Supreme Court was not to over-rule Martin; therein, making the failure to file a report of injury alone, sufficient to preclude a defense of statute of limitations. The court in McCrary clearly stated that, "inequitable or fraudulent conduct must be established to estop a party from asserting a statute of limitations defense." McCrary v. City of Biloxi, 757 So.2d 978 (Miss. 2000) (citing, Carr v. Town of Shubuta, 733 So.2d 261 (Miss. 1999)).

In Martin, the employer paid compensation to the claimant and the claimant was thus unaware that his benefits had been from Florida as opposed to Mississippi. Thus, the Martin Court found that it would be inequitable to bar his claim, when he had been receiving

compensation from what he could have reasonably assumed to be Mississippi workers compensation benefits. The Court also found that because he had been paid compensation, the statute of limitations had been tolled, because the statute did not require that the compensation be "Mississippi compensation" specifically.

In Holbrook, the Court found that applying the statute of limitations would be inequitable because there was a factual dispute as to whether the employer had workers compensation coverage at time the employer died. This factual dispute may or may not have played some kind of role on the claimant's beneficiaries' decision to file. Because the claimant in Holbrook had been killed, there was unquestionably going to be a right to compensation, and the employer was in the best position see that those benefits were procured on behalf of the decedent's estate. This is totally different from the case at bar. Here, Dr. Panuska never ceased to perform working until the year 2002. Dr. Panuska was never given a compensation award; he only received medical benefits. It was never misrepresented to him that the employer did not have workers' compensation coverage. There was no factual dispute regarding the issue of coverage. Dr. Panuska even acknowledged calling the carrier to discuss payment of medical benefits.

The McCrary court in its decision reverted back to the original language of Martin, stating that there was no intention to create an absolute bar to the statute of limitations defense on account of the employer not filing the notice of injury. The court wrote, "[w]hile it is true that the failure to file the required notice by itself does not prevent the employer from raising the statute of limitations, this is ***a factor to be considered*** in the overall scheme." McCrary,

757 So.2d at 982. This language is contradictory to this Commission's conclusion that "it appears to be the present position of the Supreme Court that the failure to file the notice of injury when required to do so by Section 71-3-67 - standing alone - is sufficient to estop the employer from pleading the Statute of Limitations, despite the statement to the contrary in [Martin]."

The Supreme Court's last words on this issue indicated the following:

> The burden of establishing the element of an estoppel is on the party asserting the estoppel. The existence of the elements of an estoppel must be established by a preponderance of the evidence. Chapman v. Chapman, 473 So.2d 467, 470 (Miss. 1985). Although under certain circumstances a defendant's actions may be such that to estop that defendant from claiming the protection of a statute of limitations, we do not agree that equitable estoppel should be applied so liberally as to allow a plaintiff to assert estoppel where no inequitable behavior is present.

McCrary, 757 So.2d at 981.

d) Parchman v. Amwood Products, Inc., 2007

The Court of Appeals addressed Holbrook and Martin in Parchman v. Amwood Products, Inc., 2007 WL 239509 (Miss. App. 2007), which was affirmed on January 30, 2007 and reversed by the Supreme Court on June 12, 2008 on the issue of the tolling of the two-year statute of limitations, only. (R.E. 12). Mr. Parchman was plant manager in March 2000 when he was assisting another employee to perform a welding job and received a burn injury to his right ankle. The burn did not heal and several weeks later, Mr. Parchman sought medical treatment. Treatment continued weekly through February 2002 to include hospitalization in

2002 to evaluate the wound. Mr. Parchman was paid a salary during his three-week hospital stay and later in 2002 when Mr. Parchman missed five weeks of work due to his ankle burns.

In the summer of 2002, his physician recommended skin grafts to treat the ankle burns which would require him to miss work for approximately three months.

After beginning treatment with the skin grafts, Amwood recommend that Mr. Parchman seek workers' compensation benefits while he was off work. However, it is important to note that soon thereafter, Mr. Parchman was fired by Amwood.

Mr. Parchman filed his Petition to Controvert seeking benefits on July 23, 2003. Amwood filed a Motion to Dismiss, averring that the claim was now time barred by the two-year statute of limitations. The Administrative Judge who heard the motion, granted the Motion to Dismiss and held that the statute of limitations had expired. The Commission affirmed the dismissal. Appeal was made by the claimant, alleging that since no first report (B-3) had been filed, that Amwood was estopped from alleging the two-year statute of limitations defense, *citing* Holbrook and Martin, *supra*.

The Court ruled that Holbrook and Martin were not applicable in Parchman since he knew that workers' compensation benefits were available and he made no effort to use them. In Panuska, Dr. Panuska did use his benefits for medical treatment immediately following his injury and thereafter, even calling the third-party administrator, AmFed, by name. There is no allegation by the Appellee and the record does not show any misrepresentation by the Appellants in preventing Dr. Panuska from seeking benefits. There is not a scintilla of evidence that the Appellants ever sought to deny Dr. Panuska any treatment or any other benefit.

Parchman alleged that the start time of the statute did not begin to run until the year 2002 since it was then that his injury became disabling and impacted his wages.

The Court of Appeals ruled that Mr. Parchman's injury was not a latent injury defined as "an injury that a reasonable and prudent person would not be aware of at the moment it was sustained." Further, the Court found that Parchman knew at the time of his injury that the accident was work-related, and therein, not a latent injury but a progressive injury; that Parchman knew that workers' compensation would pay for his treatment; Parchman's denial of benefits was affirmed by the Court of Appeals on the same grounds raised in Panuska. Parchman should be controlling in Panuska with regard to knowledge of the injury to start the running of the statute.

The reversal by the Supreme Court was solely on the issue that payment of salary to Parchman was in lieu of compensation benefits and that this issue was dispositive of the case. The payout tolled the running of the two-year statute. No comments were made regarding any other issues raised on appeal.

Appellant MSU would show that they should be allowed to argue that the statute of limitations defense is a viable defense and proper; that the Parchman Court of Appeals' ruling with regard to the Holbrook, by and through Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997) and Martin v. L. & A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (1964) is applicable in this case. There has never been any allegation of fraud or wrongdoing by MSU or AmFed, the third-party administrator, to prevent Dr. Panuska from filing his Petition to Controvert. Dr. Panuska, in his deposition, confirmed that he knew that workers'

compensation insurance was involved and that this condition emanated from the March 1999 traumatic head injury. See *Brief of the Appellants*, pp.14-16, *supra.*

More recently, in Prentice v. Schindler Elevator Company and Zurich American Insurance Company, 2008 WL 2498249 (Miss. App. 2008), decided June 24, 2008, the Court of Appeals did rule that Schindler was estopped from asserting the statute of limitations as a defense because of the presented factual situation similar to that in Martin v. L. & A. Contracting Co. developed. Therein, Prentice was led to believe that notice of his injury had been properly filed and his claim acknowledged by his employer. The B-3 notice was supposedly sent to Alabama for filing and the claimant sought medical attention for his injuries. Only after he was informed that medical bills had never been paid, did he file his Petition to Controvert. Schindler, his employer, sought dismissal because his claim was filed more than two years following the date of his injury, April 23, 1998.

This Court ruled that a Form B-3 was necessary because Prentice missed five days from work; that Schindler was estopped from asserting the two-year statute of limitations defense, relying on the prior decisions in Holbrook, by and through Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842, 844 and Martin v. L. & A. Contracting Co., 249 Miss. 441, 162 So.2d 870 (Miss. 1964). The Court specifically noted that, "because Schindler failed to comply with the notice requirements mandated under Martin and § 71-3-67(1), we must reverse the judgement of the Circuit Court."

In Prentice, absolutely no mention was made of the distinction addressed in Parchman v. Amwood Products, Inc.. (R.E. 11). Parchman addressed equitable estoppel and discussed

distinction made in Holbrook and Martin, *supra*. There was no inducement by Amwood to have Parchman not file for workers' compensation benefits. There was no fraud or deceit by Amwood to have Parchman not file for workers' compensation benefits. Therein, this Court of Appeals ruled that the elements of estoppel were not present in Parchman which would allow the punitive use of a bar of the statute of limitations by Amwood in its defense. Now, it appears that ruling in Parchman, though reversed by the Supreme Court on another matter, was not considered. Appellants herein submit that the reasoning utilized in Parchman to disregard Martin and Holbrook was proper and should be followed in Panuska.

In Panuska, there was no deception, fraud, or intentional delay by the employer or by AmFed, the third-party administrator, to prevent Dr. Panuska from filing his Petition to Controvert. There has been no reference by any Administrative Judge of any wrongdoing by MSU or AmFed to not file the Form B-3, first notice of injury. (R.E. 4, 5). Accordingly, in Panuska, unlike Martin and Holbrook, the employer never swayed or deceived Dr. Panuska when seeking workers' compensation benefits for his head trauma in March 1999. Dr. Panuska continued to receive his salary from the University and worked as an associate professor even though at a much reduced scale and with much reduced activities because of his disabilities.

To prevent MSU from utilizing the two-year statute of limitations, would be punitive and exceed the legislative intent for § 71-3-67. If anything, only the $100.00 fine should be imposed. MSU should not be estopped from pleading the two-year statute of limitations in this matter where Dr. Panuska clearly knew the seriousness and compensable nature of his work-related injury.

We submit that no inequitable behavior is present in this case. None has ever been alleged and error was committed when the claim was not dismissed initially on the Motion to Dismiss filed by the Appellants.

e) Conclusion

The employer was not required to file a notice of claim with the Mississippi Workers' Compensation Commission. Dr. Panuska worked until he voluntarily resigned. At that point, the statute of limitations had conclusively run, thus there was no prejudice or inequity in the employer's failure to file the notice of injury under these circumstances where the claimant had only received medical benefits.

In the alternative, the Mississippi Supreme Court has consistently held that there is no blanket rule in regard to filing the notice of injury and estoppel of the statute of limitations defense. The last word of the Supreme Court was that failure to file may be a factor in the overall scheme, but it is not a stand-alone determinate. The cases bearing on this issue all differ from the case at bar. To create such a doctrine would be contradictory to the language of the statute and Mississippi Supreme Court case-law interpreting such.

2. **Mississippi Code Annotated § 71-3-67 (Rev. 1995) does not require an employer and carrier to file a First Report of Injury, MWCC Form B-3, where the claimant has only received medical benefits, and even if it did require such, the employer and carrier should not be penalized by losing their right to assert the two-year statute of limitations affirmative defense or any other affirmative defense based on the legislative history of § 71-3-67.**

The employer and carrier submit that the Administrative Judge erred in finding that MISS. CODE ANN. § 71-3-67 (Rev. 1995) required a filing of a First Report of Injury, MWCC

Form B-3. Mississippi Code Annotated § 71-3-67(2) (Rev. 1995) expressly provides that "Injuries not otherwise provided for in this section, and for which only medical benefits are due, are not required to be reported to the commission." The case at bar falls under this exception.

The Mississippi Supreme Court has long held that in construing a statute, the court's duty is to carefully review the statutory language and apply its most reasonable interpretation and meaning to the facts of a particular case. Pope v. Brock, 912 So.2d 935 (Miss. 2005). The Court gives a statute that meaning which best fits its language, history, and spirit recognizing the electromagnetic force of positive principles embedded in the rule. City of Jackson v. Williamson, 740 So.2d 818 (Miss. 1999). Thus, the Court's task in the end requires that Court give to the work of the legislature the most coherent and principled reading available. Id. Where the legislative language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion to resort to rules of statutory interpretation. State v. Heard, 246 Miss. 774, 151 So.2d 417, 1963 A.M.C. 2185 (Miss. 1963). It is necessary to interpret statutes consistent with reason and common sense. Dulaney v. National Pizza Co., 733 So.2d 301 (Miss. App. 1998).

When interpreting a statute that is not ambiguous, the Court shall apply the plain meaning of the statute. Pitalo v. GPCH-GP, Inc., 933 So.2d 927 (Miss. 2006). Whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent. Mississippi Dept. of Transp. v. Allred, 928 So.2d 152, 208 Ed. Law Rep. 980 (Miss. 2006); Jenkins v. State, 913 So.2d 1044 (Miss. App. 2005). The Court's primary objective when

construing statutes is to adopt that interpretation which will meet the true meaning of the legislature. University of Mississippi Medical Center v. Robinson, 876 So.2d 337, 339-340 (Miss. 2004); Mauldin v. Branch, 866 So.2d 429, 435 (Miss. 2003). Courts interpreting a statute must first examine the language of the statute. MIC Life Ins. Co. v. Hicks, 825 So.2d 616 (Miss. 2002).

As stated *supra*, the statutory text of MISS. CODE ANN. § 71-3-67 does not require that a First Report of Injury must be filed in every instance where an employee receives a workplace injury. There are express exceptions, and the facts in this case fall under the exception. Panuska v. MSU began a medical-only case, and §71-3-67 provides that First Reports of Injuries are not required for injuries which are medical-only cases. The legislature did not intend to flood the Mississippi Workers' Compensation Commission with First Reports of Injuries for every workplace injury. The legislature purposely set up guidelines in § 71-3-67 as to when an employer and carrier are to file a First Report of Injury. Thus, a First Report of Injury is not needed in every circumstance, and an employer and carrier should not be penalized and lose their right to assert an affirmative defense for not filing a First Report of Injury when the legislature never required them to do so.

Even if a filing of a First Report of Injury was required in this case, § 71-3-67 addresses the penalties against the employer for its failure to comply with § 71-3-67. Mississippi Code Annotated § 71-3-67 provides that "Whenever an employer or carrier fails or refuses to file any report required by the statutory section within the time prescribed, the commission may, in its discretion, and after giving the employer or carrier notice and an opportunity to show cause to

the contrary, levy a penalty against such employer or carrier not to exceed One Hundred Dollars ($100.00). This penalty shall be payable to the Administrative Expense Fund provided for by this chapter, and if not voluntarily paid, may be collected by civil suit brought by the commission." The legislature has gone even further and stated that "In addition to the above civil penalty, a sum not to exceed One Hundred Dollars ($100.00) may, in the discretion of an administrative judge or the commission, be added to any award which may be made as a result of any injury not timely reported hereunder." §71-3-67. Thus, it is evident that the legislature never intended to penalize the employer or carrier by estopping the employer and carrier from asserting the affirmative defense. The legislature never addressed forfeiture of an affirmative defense as a penalty. The language in § 71-3-67 is unambiguous. The statute should be interpreted based on its plain meaning in this case.

In 1948, when the Workers' Compensation Act was first introduced by the House of Representatives[1], the legislature expressly stated that the Workers' Compensation Act was created to address the following:

> AN ACT to provide a system of workmen's compensation for industrial injuries and **prescribing the rights and liabilities of employers**, employees, and third parties in respect to such injuries; to provide methods of insuring and securing the payment of such compensation; to create and establish the Mississippi workmen's compensation commission and prescribe its powers and duties; to provide a system of appeals to the courts from which the decisions of the commission; **to prescribe penalties for the violation of this act**; and to repeal all laws or parts of laws in conflict with this act to the extent of such conflict; and for other purposes.

Emphasis added. Codes, 1942 § 6998-34; Laws, 1948, ch. 354 § 28.

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[1]House Bill No. 351, Laws 1948 Ch. 354 § 28

Thus, it is quite clear that at the inception of the Act, the legislature expressly addressed the issue of penalties for an employer and carrier which violated their obligations set out under §71-3-67. Further, the legislature addressed the employer's obligations under §71-3-67, noting that the statute expressly provided that an employer and carrier were to report all injuries that cause fatal termination and all injuries which cause a loss of time beyond the day or working shift on which the injury occurred, or which shall require medical treatment beyond ordinary first aid within ten (10) days. Regarding penalties, the 1948 statute expressly stated "Whenever an employer fails or refuses to file any report required of him by this section, the commission may in its discretion add a penalty not to exceed one hundred dollars ($100.00) to all or any awards which may be made as a result of the unreported injury." 1942 § 6998-34; Laws, 1948, ch. 354 § 28 Therein, the legislative intent was to require the employer and carrier to report all injuries that resulted in loss time beyond the date of the injury, when medical treatment was beyond ordinary first aid, and when the injury resulted in death. The penalty for failure was a $100.00 fine. The employer and carrier submit that had the legislature intended to penalize the employer and carrier beyond this monetary fine, then it would have so stated in House Bill No. 351. The penalty intended for the employer and carrier for noncompliance with this statute is not ambiguous. The legislature did not state that the employer and carrier would lose their right to assert the affirmative defense because of their failure to comply with the initial 1948 statute.

The legislature had a second opportunity to address the obligations of the employer and carrier and the penalties for noncompliance of same in the year 1950. In that year, the House

of Representatives introduced House Bill No. 433[2], for the main purpose of making amendments to certain sections including § 28 (§71-3-67) and to liberalize and clarify the workmen's compensation law, and eliminate certain deductions from the state premium tax. This law was reenacted without any changes in 1982, Laws, 1982 ch. 473 §34 and in 1990, Laws, 1990 ch. 405 § 36. A thorough review of this statute, which was reenacted without change in 1982 and 1990, evidenced the legislature's intent to minimize the number of First Report of Injury filings. With the new amendment, the legislature now only required employers and carriers to report injuries within ten (10) days after the fatal termination of an injury and after the occurrence of an injury which would cause a loss of time beyond the day or working shift on which the injury occurred. The legislature removed the obligation of an employer and carrier to report injuries which required medical treatment only. The purpose was to minimize the number of filings.

Regarding the penalties for the employer and carrier's failure to comply with the reporting, no changes were made. The legislature had an opportunity to address the $100.00 penalty, but it purposely did not alter the penalty enacted in the 1948 statute. It did not intend for the employer and carrier to lose their right to assert any affirmative defense. This would be too harsh and unfair for the employer and carrier.

Mississippi Code Annotated § 71-3-67 was revised once again in 1995 to further reflect the legislature's intent regarding an employer and carrier's reporting obligations and to address penalties for the failure to comply with same. In 1995, the House of Representatives introduced

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[2]Laws, 1950, ch. 412, §13.

House Bill No. 1421, Laws, 1995, ch. 582, § 1, eff from and after July 1, 1995. This is the current § 71-3-67. House Bill No. 1421 was introduced as an act to address the following:

> **An act to amend Section 71-3-67, Mississippi Code of 1972, to revise methods of reporting injuries under the Workers' Compensation Law**; to amend Section 71-3-15, Mississippi Code of 1972, to revise reporting methods of and payment for medical treatment of injuries of employees under the workers' compensation law; and for related purposes.

Emphasis added. Laws, 1995, ch. 582 § 1.

In this amendment, the legislature again addressed the employer and carrier's obligations to report injuries by only requiring the employer and carrier to report injuries where an injury has caused death, where an injury has caused a loss of time in excess of the waiting period set out in § 71-3-11, and where the employer and carrier knows, or reasonably should know, that an injury has resulted in permanent disability within ten (10) days. The legislature provided further clarity in expressly stating that injuries which require only medical benefits are not required to be reported to the commission, and that records of such injuries shall be maintained by the employer, if self-insured, or its carrier. Laws, 1995, ch. 582 § 1; § 71-3-67.

The legislature also amended the penalties an employer and carrier could face for their noncompliance with the reporting obligations set out in Laws, 1995, ch. 582 § 1; § 71-3-67. Regarding penalties, the legislature stated that the commission could still levy a penalty against the employer and carrier not to exceed One Hundred Dollars ($100.00), and that this penalty should be payable to the Administrative Expense Fund provided for by this chapter, and if not voluntarily paid, may be collected by civil suit brought by the commission. The legislature stated that in addition to the above civil penalty, a sum not to exceed One Hundred Dollars

($100.00) may, in the discretion of an administrative judge or the commission, be added to any award which may be made as a result of any injury not timely reported hereunder.

This textual language is unambiguous as to what the legislature intended with regards to an employer and carrier's reporting obligations and as to what civil penalties they should face for noncompliance of Laws, 1995, ch. 582 § 1; § 71-3-67. Had the legislature intended for the employer and carrier to lose their right to assert an affirmative defense, they could have easily drafted this penalty into the statute in 1948, 1950, 1982, 1990 or 1995. However, because the legislature did not include this estoppel as a penalty, then the language of the statute is the best evidence that this is not what the legislature intended to be a penalty for the employer and carrier.

The employer and carrier concede that estoppel may be appropriate in instances where an employer and carrier made a misrepresentation to the employee about whether benefits are available or the need for action by the claimant and the claimant relied on the representation, and this reliance caused the claimant to allow the time to file a claim to expire. This is not the case in Panuska.

When comparing the reporting requirements to the Mississippi Workers' Compensation Commission, MISS. CODE ANN. § 71-3-35 expressly states that "No claim for compensation shall be maintained unless within, thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer." Therefore, it appears that the legislative intent was that the penalty for a claimant who fails to report his or her injury to an employer be that he or she loses his or her

right to bring a claim. However, this is not how this statute has been interpreted. A claimant can still maintain a claim against an employer and carrier even when the claimant provided the notice outside the thirty (30) days requirement. The employer and carrier take the position that since the employee's reporting requirements are interpreted liberally for the claimant; that the reporting obligations of the employer and carrier set out in § 71-3-67 should be interpreted likewise and in accordance with the textual language of § 71-3-67. The claimant does not face the hardship of losing his right to bring a claim for his or her noncompliance with their reporting obligations under MISS. CODE ANN. § 71-3-35. Therefore, the employer and carrier should not lose their right to assert an affirmative defense to a claim for the employer and carrier's noncompliance with § 71-3-67.[3] This construction of both statutes should be fairly construed to both the claimant and the employer and carrier. The legislature has expressly stated that the Workers' Compensation Act should be fairly construed, see MISS. CODE ANN. § 71-3-1.

Accordingly, the employer and carrier assert that they should not be estopped for asserting the two-year statute of limitations in this case; that MISS. CODE ANN. § 71-3-67 does not provide for such an unfair and prejudicial penalty against an employer and carrier and this preclusion should not be read into it.

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[3]As stated *supra*, the employer and carrier were not even required to file a First Report of Injury in the case at bar because it was a medical-only claim.

3. The claim of estoppel and/or *res judicata* does not apply in precluding review of the issue of the statute of limitations matter.

The Full Commission in its Order dated October 21, 2003 addressed the appeal from the Administrative Judge regarding the Motion to Dismiss filed by the employer and carrier. (R.E. 6, p.376). The Administrative Judge's Order, the basis for the appeal, denying the Motion to Dismiss is dated May 9, 2003. (R.E. 4, p.146). The Judge's Order was directed only to the dispositive motion, the Motion to Dismiss, which was denied. The Full Commission Order of October 21, 2003, affirming, did not fully dispose of the entire claim. There was never a "rejection of the claim for compensation". The employer and carrier submit that since there had been no final adjudication by the Full Commission, this must be considered as an interlocutory order. It is long been established in Mississippi that appeals from an agency's decision are only permitted after there has been a final order and final resolution of the case. Bay St. Louis Community Ass'n v. Commission on Marine Resources, 729 So.2d 796, 798 (Miss. 1998). A party may not appeal a case where the agency itself is continuing its consideration on the merits of the case. Bickham v. Department of Mental Health, 592 So.2d 96, 97 (Miss. 1991).

In Bickham, the Circuit Court granted appeals from interlocutory orders from the workers' compensation commission. Id. On appeal to the Supreme Court, Justice Hawkins set out the rule in his opinion that in the absence of statutory authority for hearing an appeal from interlocutory orders of the workers' compensation commission, court judgments emanated from such appeals were nullities. Id. The Circuit Court had no authority to entertain appeals based on any interlocutory order.

In our case, the Full Commission Order dated October 21, 2003, was an interlocutory order. (R.E. 6, p.376). Since there was no statute authorizing an appeal from anything other than a final judgment order of the Commission, the claim was still under the jurisdiction of the Commission and not a final order. *See* Bickham v. Department of Mental Health, *supra. See also* Dunn, Mississippi Workers' Compensation, § 285 *citing* St. Regis Paper Co. v. Lee, 249 Miss. 537, 163 So.2d 250 (Miss. 1964).

Further, the employer and carrier assert that *res judicata* is not applicable in this case. The doctrine of *res judicata* prevents a second lawsuit. McCorkle v. Loumiss Timber Co., 760 So.2d 845, 854 (Miss. App. 2000). The doctrine of *res Judicata* operates to bar legal action when the parties have already litigated causes of action to "final judgment" in a previous action. Ladnier v. City of Biloxi, 749 So.2d 139 (Miss. App. 1999).

In the instant case, this matter had not yet reached finality and was still before the Mississippi Workers' Compensation Commission which would allow the appeal to address all issues of the Commission in its final order. Therein, the Appellants are not precluded from arguing on appeal the issue of the two-year statute of limitations.

V. CONCLUSION

The Administrative Judge in his Order ruled that the statute of limitations did not begin to run until the labyrinthine concussion was discovered on September 6, 2000. This was not the test as to when disability began.

The test was when Dr. Panuska knew that the injury he suffered in March 1999 caused him an occupational disability. The record is clear that Dr. Panuska's activities changed

dramatically immediately following the injury to the extent that his teaching duties were compromised as were his functioning of routine activities. Dr. Panuska's fatigue, lack of concentration, dizziness, disequilibrium, instability, etc., should be sufficient to put a reasonable man on notice of a disabling condition, much less a university professor with a doctoral degree. Dr. Panuska knew in March, May, and certainly in the fall of 1999 that his condition was not improving; that it was disabling because it was affected his ability to teach as well as function outside of the University. Nothing changed with the September 6, 2000 visit with Dr. Fetterman. No new procedure was performed, no new medication was prescribed, no change in his condition evolved. All that changed was the diagnosis from that of cerebral concussion to labyrinthine concussion. As Dunn stated in § 249, the running of the statute began when Dr. Panuska realized the "disabling nature of his problem". This critical time period occurred at least in August 1999 when Dr. Panuska reduced his teaching duties at MSU and otherwise, reduced his activities because of his condition. The Administrative Law Judge erred in using the September 6, 2000 date as opposed to a date during the year 1999. This error calls for reversal.

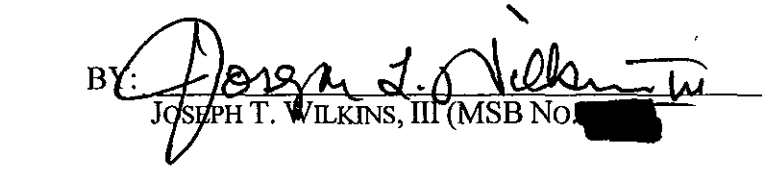
Regarding the non-filing of the First Report of Injury, B-3, as a bar to use the statute of limitations defense, the argument of the employer and carrier clearly shows that the Court overreached in Holbrook and its progeny. The action in Holbrook which stopped the carrier from alleging the two-year statute of limitations defense is error with disregard to the clear intent of the legislature.

The Commission was not aware of the Parchman status on appeal when Panuska was affirmed in the year 2006. Panuska is a major deviation from the legal standard announced and followed in Parchman. Parchman addressed both the two-year statute of limitations as well as the matter of filing the form B-3, § 71-3-67. Reversible error was committed when the Commission disregarded substantial evidence and misplaced the application of the decisions in Holbrook, Martin, and McCrary which was properly distinguished by Parchman. Parchman was reversed on appeal to the Supreme Court but only the issue of tolling of the statute of limitations was addressed. Therein, other issues addressed by Parchman stand. There has never been any allegation of egregious action by the Appellants to warrant estoppel of the affirmative defense asserted. Dr. Panuska availed himself of medical benefits provided and so acknowledged in his testimony.

There are no cases where the Mississippi Workers' Compensation Commission disallowed any affirmative defense for failure to file the First Report (B-3) involving medical only claims. The doctrine of estoppel or *res judicata* does not apply until a final Order has been issued by the Full Commission. The issue of the two-year statute of limitations was timely appealed to this Court and should be heard and the Order of the Commission reversed based upon its errors.

Respectfully submitted, this the 7th day of July, 2008.

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

BY: 

JOSEPH T. WILKINS, III (MSB NO. [redacted])

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 **BRIEF OF THE APPELLANTS** to:

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The Honorable James Homer Best
Administrative Judge
Mississippi Workers' Compensation Commission
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The Honorable James T. Kitchens, Jr.
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THIS, the 7th day of July, 2008.

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