

2008-WC-00463 T  
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**I. CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellant certifies that the following persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Carolyn Blanche Shipp, Byhalia, Ms.
2. David L. Walker, Southaven, Ms.
3. Thomas and Betts, Byhalia, Ms
4. LaUna Brubaker, Memphis, Tn.

Respectfully submitted,

This the 5<sup>th</sup> of June 2008.



David L. Walker MBN [REDACTED]  
Counsel of Appellant

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#### **IV. STATEMENT OF ISSUES**

- A. WHETHER THE TRIAL COURT ERRED IN AFFIRMING THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IN FINDING THAT THE TWO YEAR STATUTE OF LIMITATIONS HAD EXPIRED BEFORE THE APPELLANT FILED HER B-5-11.**
  
- B. WHETHER THE TRIAL ERRED IN AFFIRMING THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION THAT THE APPELLANT HAD NOT MET HER BURDEN OF PROOF, AS REQUIRED BY EXPERT MEDICAL TESTIMONY, THAT HER BILATERAL CARPAL TUNNEL SYNDROME WAS CAUSED OR AGGRAVATED BY HER EMPLOYMENT WITH THE EMPLOYER/ CARRIER.**

## **V. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

A hearing was conducted in this claim on October 4<sup>th</sup>, 2006. R. at 4. The parties agreed to bifurcate the hearing with the issue before the administrative judge being whether a work-related injury occurred on or about the date alleged in the petition to controvert. Id. That date was July 28<sup>th</sup>, 2004 based upon a repetitive motion injury. See B-5-11. The B-5-11 was filed with the Mississippi Workers' Compensation Commission on May 4<sup>th</sup>, 2005. Id. The administrative judge entered an order dated January 10<sup>th</sup>, 2007 finding that the Appellee properly raised the affirmative defense of the statute of limitations and that the claim was time-barred by section 71-3-35 MCA. Order of Administrative Judge at 11-12. Additionally, the administrative judge found that the Appellant had not proved by requisite medical evidence the causation of her bilateral carpal tunnel syndrome. Id. at 12.

The Appellant filed a petition for review of order of administrative judge with the Mississippi Workers' Compensation Commission on January 16<sup>th</sup>, 2007. R. at 29. The commission entered a full commission order on June 12<sup>th</sup>, 2007 affirming the order of the administrative judge. R. at 31. The Appellant filed an amended notice of appeal to the circuit court of Marshall County, Mississippi of the full commission order. R. at 34. The circuit court of Marshall County, Mississippi, entered an opinion and order affirming the decision of the commission on March

3, 2008. The circuit court found that the commission had substantial evidence to support the findings of the commission. Id. On March 18<sup>th</sup>, 2008, the Appellant filed a notice of appeal of the order of the circuit court. Circuit Clerk's Index.

### **APPELLANT'S TESTIMONY AT HEARING**

The Appellant testified that she was born on October 24<sup>th</sup>, 1955 and graduated from high school. Transcript of hearing at 6. She attended Knoxville College for a semester and Memphis Paramedical Institute. T at 7. However, she never worked as a paramedic. Id.

The Appellant started working for the employer on September 6<sup>th</sup>, 1989 and worked there until July 28<sup>th</sup>, 2004. T. at 9. She did various jobs for the employer at its warehouse. Id. She was terminated by the employer for not keeping up with production and some tardies. T. at 11. At the time of her termination, she had developed carpal tunnel in her hands. She could not lift. Her hands were quite painful. Id. The carpal tunnel syndrome developed on the job. T. at 12. She was operating a forklift on the receiving dock, unloading trailers, when her hands started getting numb. Id. She started dropping things. She did not have any grip in her hands. Id. She saw Dr. Harold Knight for the pain and he gave her some braces to wear. Id. She used her arms and hands on a repetitive basis on her job. She lifted a lot of boxes on her job, some of which weighed between seventy and one hundred pounds. T. at 12-13.

On cross examination, the Claimant testified that Dr. Knight never gave her

anything to specifically indicate that the bilateral carpal tunnel was caused by her job for the employer. T. at 15. She first noticed that her carpal tunnel syndrome when working on the forklift on the receiving dock. Id. This was in approximately 1999. T. at 16. This is when she began to wonder if her job had something to do with all the pain and Problems she was having. Id. This was not confirmed until she started seeing Dr. Knight. Id. She first saw Dr. Knight on May 9<sup>th</sup>, 2002. Deposition of Dr. Knight at 7. Dr. Knight recommended carpal tunnel surgery during her visit on March 30<sup>th</sup>, 2003. R. at 17. In the Claimant's deposition, she testified that she believed that her pain was related to her job and first started in early 2003. T. at 19. No physician had ever taken the Appellant off of work at the employer for carpal tunnel syndrome. T. AT 20. She never took off of work more than one day because of her pain. The employer never paid for any medical treatment for the carpal tunnel syndrome. T. at 23. She was never paid any money for missing work because of carpal tunnel syndrome. Id. The carpal tunnel syndrome braces ordered by Dr. Knight were not designed to work in. T. at 29.

On redirect examination, the Appellant testified that the carpal tunnel syndrome became disabling on July 28<sup>th</sup>, 2004. T. at 30.

#### **TESTIMONY OF DR. HAROLD KNIGHT**

Dr. Harold Knight testified by evidentiary deposition on June 15<sup>th</sup>, 2006. He testified that he is an orthopaedic surgeon with Memphis Orthopaedic Group. Deposition of Dr. Knight at 5. He first saw the Appellant on May 9<sup>th</sup>, 2002. Id at 6. However, this visit for an injury sustained in a motor vehicle accident. Id. He next saw her on March

17<sup>th</sup>, 2003 for bilateral hand pain, left shoulder pain. Id. at 9. This pain had been present for several months. Id. at 9. She was tender in the carpal tunnel area of both wrist. She had positive Tinel and Phalen in the right carpal tunnel and left wrist. He reached a diagnosis of tendonitis left shoulder and mild bilateral carpal tunnel. Id. at 11. He did not discuss with the Appellant at this time what may have caused the carpal tunnel. Id. at 12. When she returned to him, he concluded that she had carpal tunnel severe on the right and moderate on the left. Id. at 13. Again, there was no discussion as to the cause of the carpal tunnel between the patient and the physician. Id. He released her to regular duty. Id. at 15.

On September 4<sup>th</sup>, 2003, the Appellant returned to Dr. Knight with **recurrence** of right carpal tunnel symptoms and persistent shoulder pain. Id. at 15. She returned to him on February 19<sup>th</sup>, 2004 and complained of **recurring** wrist pain that occurred two weeks prior to the visit. Id. at 16. He released her from his care at that point. Id. He discussed carpal tunnel surgery with her. Id. at 17.

Dr. Knight affirmed that at no point in his treatment of the Appellant did he ever discuss with her what he thought may have caused the carpal tunnel syndrome. Id. at 18. Nor did she ask him about its cause. Id. There is a lot of controversy internationally about what exactly is the cause of carpal tunnel syndrome. Id. at 19. He did not have an opinion as to what caused the bilateral carpal tunnel initially in the Appellant. Id. at 19. He did not have a medical opinion to a reasonable degree of medical certainty of what caused of the Appellant bilateral carpal tunnel syndrome. Id.



On cross examination Dr. Knight admitted that there are no studies that demonstrate one way or another that carpal tunnel is caused by anything in particular except for fractures. Id. at 33. He did not doubt that the Appellant was an accurate historian. Id. at 36. There is a difference of opinion in the orthopaedic community as to the causation of carpal tunnel syndrome. Id. at 38.

### **TESTIMONY OF DR. JOSEPH C. BOALS, III.**

Dr. Joseph C. Boals, III testified by evidentiary deposition taken on March 1, 2006. Dr. Boals is board certified in orthopedic surgery. He first saw the Appellant on November 8<sup>th</sup>, 2005. Deposition of Dr. Boals at 6. She advised him that she had developed symptoms of pain and numbness associated with her job which was repetitive. Id. She attempted to have carpal tunnel surgery performed, but was told that Dr. Knight was no longer on the approval list for her company's insurance and thus had not undergone surgery. Id. at 7.

Dr. Boals' examination revealed her findings indicated carpal tunnel syndrome on both sides. Id. He had reviewed the medical records of Dr. Knight. Id. He reviewed the neurometrix test performed at the request of Dr. Knight and concluded that the Appellant had severe carpal tunnel syndrome on the right and moderate on the left. This is an objective test. Id. at 8. Carpal tunnel syndrome is aggravated by usually heavy gripping or repetitive use of the hand. Id. at 9. He assigned her an impairment rating of ten percent to each upper extremity. Id. at 10. This is based on the AMA Guidelines. Id. He recommended that she consider having surgery on the

worse side. Id. If this result is good, the Appellant may consider having the surgery on the other side. Id. Repetitive work and heavy lifting would bother the Appellant. Id. at 12.

The Appellant advised him of an over-time type of problem that developed due to repetitive use of her arms. Id. at 12. The doctor was asked to assume that the Appellant worked for the employer for an eight hour day, in general, five days a week, and that she would pick up cartons with her right hand on a repetitive basis during the work day. Her right hand started swelling on her. She would also work operating and driving a pallet jack and do that on a repetitive basis. Assuming these facts, Dr. Boals testified that those activities were consistent with causing carpal tunnel syndrome. The Appellant had not reached maximum medical improvement. Id. at 13-14. Dr. Boals was of the opinion that the Appellant was temporary totally disabled from July 2004 until the time that he first saw her. Id. at 15.

On cross examination Dr. Boals testified that the onset date for the carpal tunnel syndrome was in 2003. Id. at 18. The Appellant advised him that her work caused the numbness. Id. at 19. Thus, if the Appellant could document that the work caused the numbness, then he was of the opinion based upon a reasonable degree of medical certainty that the job caused the carpal tunnel syndrome. Id. Carpal tunnel syndrome is a dynamic condition. It comes and goes initially. Id. at 20.

On redirect examination Dr. Boals testified that the automobile accident did not have anything to do with the carpal tunnel syndrome. Id. at 28.

## **VI. SUMMARY OF ARGUMENT**

The circuit court erred in affirming the decision of the Mississippi Workers' Compensation Commission that the two year statute of limitations had expired prior to the Appellant filing her B-5-11. The Appellant last worked for the Appellee on July 28<sup>th</sup>, 2004 and filed her B-5-11 on May 4<sup>th</sup>, 2005. Carpal tunnel syndrome is a gradual infirmity and is not immediately recognizable.

The circuit court erred in affirming the decision of the Mississippi Workers' Compensation Commission that the Appellant had not met her burden of proof as required by expert medical testimony that her bilateral carpal tunnel syndrome was caused or aggravated by her employment with the employer. The commission, via the opinion of the administrative judge, relied upon the opinion of Dr. Harold Knight on this issue. Dr. Knight refused to recognize that the carpal tunnel syndrome is work-related condition that has been accepted in the State of Mississippi as such. Moreover, the causation issue was supported by the testimony of Dr. Joseph Boals, III.

## VII. ARGUMENT

The circuit court erred in affirming the decision of the Mississippi Workers' Compensation Commission that the two year statute of limitations set forth in section 71-3-35 MCA had expired before the Appellant filed her B-5-11 herein. The administrative judge's order of administrative judge was affirmed by the Commission without any changes or amendment. Thus, it became the decision of the Commission.

The Court of Appeals is bound to conduct a de novo review of a question of law such as whether a correction application as been made of a statute of limitations. James v. Bowater Newsprint, decided May 27<sup>th</sup>, 2008 No. 2007-WC-00817-COA Court of Appeals and Ellis v. Anderson Tully Co., 727 So.2d. 716, 718 (Miss. 1998). The administrative judge noted in her order that this two year statute of limitations is tolled until the injury becomes apparent. Struthers Wells-Gulfport, Inc. v. Bradford, 304 So. 2d 645, 649 (Miss. 1974). She conceded that carpal tunnel syndrome is a gradual infirmity and is not immediately recognizable. Lucas v. Angelica Uniform Group, 733 So. 2d 285, 288 (Miss. Ct. App. 1998).

The Appellant had no reason to believe, as a reasonable person, the nature, seriousness and probable compensable character of the injury until she was terminated by the employer on July 28<sup>th</sup>, 2004. Dr. Knight never advised her of a connection between the bilateral carpal tunnel syndrome that he treated her for and her employment. Moreover, he returned her to regular work. Deposition of Dr. Knight at 13, 15.

The two year statute of limitations is inapplicable in a workers' compensation

claim when the disability is gradual and the result of cumulative exposure, rather than from one particular event. **Bolivar County Gravel Co. v. Dial**, 634 So. 2d 99, 104 (Miss. 1994). There was no occupational disability on the part of the Appellant that would have caused her to file for workers' compensation benefits until she could no longer perform her duties for the employer. Dr. Knight had not performed carpal tunnel surgery on her.

When a claimant's condition gradually worsens during his or her term of employment with the employer and the claimant files a workers' compensation claim with the Commission within two years of terminating his or her employment with the employer, the claim is not barred by the two year statute of limitations. **Jenkins v. Ogletree Farm Supply**, 291 So. 2d 560, 562 (Miss. 1974). This the fact situation before the Court in this instant appeal. The Appellant last worked for the employer on July 28<sup>th</sup>, 2004 and filed her B-5-11 on May 4<sup>th</sup>, 2005.

The flaw in the administrative judge's analysis of this claim is that she apparently relied on Dr. Knight advising the Appellant that she had bilateral carpal tunnel syndrome on March 17<sup>th</sup>, 2003 and finding that the statute of limitations began to run on or before March 2003, and yet found that Dr. Knight did not have an opinion as to what caused the bilateral carpal tunnel syndrome in the Claimant. Order of Administrative Judge at 7. Moreover, Dr. Knight was of the opinion that carpal tunnel syndrome is not associated with repetitive activity, *Id.* If one believes Dr. Knight's testimony, then the Appellant had no reason from her visits

with him to relate her carpal tunnel syndrome to her job. Dr. Knight's position refuses to acknowledge that the Commission has previously adjudicated that carpal tunnel syndrome is a compensable injury. **Binswanger Mirror v. Wright** and **Howard Indus. v. Robinson**, 846 So. 2d 245 (Miss. Ct. App. 2002).

The Appellant would argue that the analysis of **Dial**, supra, is the correct analysis to apply to this issue. In that claim, the Mississippi Supreme Court in a well reasoned opinion, held that the time limitations period in which the claimant was required to file his workers' compensation claim based upon his lung disease caused work place exposure to welding fumes started when the claimant quit working because he could no longer perform his duties, rather than during prior periods of temporary total disability caused by breathing welding smoke, where the claimant recovered and was able to return to work following prior periods of disability. There was no occupational disability which would have caused the claimant to file for compensation. In the instant claim, there was also no occupational disability which would have caused the Appellant to file for compensation until she was terminated by employer herein on July 28<sup>th</sup>, 2004. T. at 30.

Thus the circuit court erred in failing to reverse the order of the Commission for an error of law. Commission orders may be overturned by the circuit court for errors of law or fact findings unsupported by the evidence. **Lankford v. Rent-A-Center, Inc.**, 961 So. 2d 774, 777 (Miss. App. 2007). The standard of review is that of a de novo standard of review when a reviewing court passes on a question of law.

Jordan v. Pace Head Start, 852 So. 2d 28, 29 (Miss. Ct. App. 2002) and Ellis v. Anderson Tully Co., 727 So. 2d 716, 718 (Miss. 1998). Thus, the Court is not bound by the decision of the circuit court under the familiar substantial evidence rule with respect to the issue of whether this claim is time barred. Goodlow v. Marietta-American, 919 So. 2d 149, 151-152 (Miss. App. 2005).

The circuit court erred in affirming the decision of the Commission that the Appellant had not proven by the necessary, requisite medical evidence the causation of her bilateral tunnel syndrome injuries, and more specifically, she had not provided medical testimony and/or medical evidence required by the Commission to establish that her employment with the employer caused or aggravated her bilateral carpal tunnel syndrome. **Opinion of Administrative Judge** at 12.

A claimant bears the general burden of proof of establishing every essential element of a claim and it is not sufficient to leave the matter to surmise, conjecture, or speculation. Fought v. Stuart C. Irby Co., 523 So 2d. 314, 317 (1988). As a general proposition, the claimant has the burden of proof. This burden must be met by showing an accidental injury arising out of and in the course of his employment and a causal connection between the injury and the claimed disability. Narkeeta Inc. v. McCoy, 247 Miss. 65, 69, 153 So. 2d 798, 800 (Miss. 1963). The workers' compensation act is to be construed liberally in favor of claimants. Sharpe v. Choctaw Electronics Enterprises, 767 So. 2d 1002 (Miss. 2000). To fulfill the purposes of the workers'

compensation act, doubtful claims should be decided in favor of compensation. Id.

The burden of proof is that of a fair preponderance of the evidence. Adams v. Lemuria, Inc. 738 So. 2d 295 (Miss. Ct. App. 1999). The standard of review for this issue is that a reviewing court can only reverse the decision of the Mississippi Workers' Compensation Commission in a workers' compensation claim if it finds that the decision is clearly erroneous and contrary to the overwhelming weight of the evidence. Lankford, supra at 777. The decision of the Commission must be supported by the evidence. Id. The Appellant would argue that the Commission erred in relying upon the testimony of Dr. Knight in finding that the Appellant failed to meet her burden of proving the causal connection between the Appellant's employment and the resulting disabling condition. His refusal to concede that Mississippi recognizes the compensability of carpal tunnel syndrome in a workers' compensation claim renders any decision based upon his testimony clearly erroneous and contrary to the overwhelming weight of the evidence. The deposition testimony of Dr. Boals indicates that he was not impeached in any manner by the Appellees. Looking at the whole of Dr. Boals' testimony herein, he stated that there was a casual connection between the Appellant's job functions and her bilateral carpal tunnel syndrome. Thus, a reversal of the decision of the circuit court is appropriate. See Airtran, Inc. V. Byrd, No.2006-WC-00674-COA, decided April 3, 2007 and Dixie Contractors, Inc. v. Ashmore, 349 So. 2d 532, 534 (Miss. 1977).

Finally, the administrative judge's reliance on South Central Bell Telephone Co.



v. Aden, 474 So. 2d 584, 593 (Miss. 1985) for the proposition that higher credibility and weight is to be given to the opinion of a treating physician as opposed to a physician or expert selected by the Appellant is misplaced because Dr. Knight refused to accept carpal tunnel syndrome as a work related condition. If this were a dispute between two physicians over the degree of impairment that a claimant had, then this general rule would be more likely to be applicable.

### VIII CONCLUSION

In conclusion, the Appellant urges the Court to hold that her claim is not time-barred and that the deposition testimony of Dr. Boals provides the appropriate medical causation connection between the Appellant's work injury and the activities at work for the Appellees.

Respectfully submitted,

This the 5<sup>th</sup> day of June 2008.



David L. Walker MBN [REDACTED]  
Counsel for Appellant  
POB 896  
Southaven, Ms. 38671  
662-280-3300

### IX. CERTIFICATE OF SERVICE

I, David L. Walker, counsel for the Appellant, hereby certify that I have this mailed, postage prepaid, a copy of the Appellant's Brief to Hon. Andrew Howorth, circuit court Judge, and M. Launa Brubaker, Esq., opposing counsel, at their usual mailing addresses

This the 5<sup>th</sup> day of June, 2008.



David L. Walker