

IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS

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NO. 2008-WC-00506-COA

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DAVID BYNUM

APPELLANT

VS.

ANDERSON-TULLY LUMBER  
COMPANY AND LIBERTY MUTUAL  
INSURANCE COMPANY

APPELLEES

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ON APPEAL FROM THE  
CIRCUIT COURT OF WARREN COUNTY,  
MISSISSIPPI; CAUSE NO. 07,0230-CI

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BRIEF OF APPELLEES

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualifications or recusals.

1. Anderson-Tully Lumber Company  
P.O. Box 38  
Vicksburg, MS 39181  
*Appellee/Employer*
2. Liberty Mutual Insurance Company  
P.O. Box 49000  
Charlotte, NC 28277  
*Appellee/Carrier*
3. David Bynum  
411 W. Washington St.  
Tallulah, LA 71282  
*Appellant/Claimant*
4. Honorable Frank G. Vollor  
Post Office Box 351  
Vicksburg, MS 39181-0351  
*Warren County Circuit Court Judge*

5. Honorable Liles Williams, Chairman  
Honorable John R. Junkin, Commissioner  
Honorable Augustus L. Collins, Commissioner  
1428 Lakeland Drive  
Post Office Box 5300  
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THIS, the 8 day of July, 2008.

  
\_\_\_\_\_  
W. BIENVILLE SKIPPER  
ATTORNEY FOR APPELLEES

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## **STATEMENT OF THE ISSUE**

Whether the Commission's decision is supported by substantial evidence.

## **STATEMENT OF THE CASE**

This appeal involves a review of the Order of the Mississippi Workers' Compensation Commission ("Commission"), which affirmed the Administrative Judge's ("AJ's") decision that David Bynum's ("Bynum's") workers' compensation claim is barred by the two year statute of limitation of Miss. Code Ann. § 71-3-35(1). As Bynum concedes his claim was filed more than two years after his date of injury and the record contains clear evidence Bynum does not meet the narrow exception to the statute of limitations, the Commission's decision is supported by substantial evidence. Therefore, the Commission's decision was properly affirmed by the Circuit Court of Warren County, Mississippi, and should be affirmed by this Court.

### **I. Nature of the Case and Course of Proceedings**

This particular appeal arises from an injury sustained while Bynum was employed by Anderson-Tully Lumber Company ("Anderson-Tully"). As a consequence of his injury, Bynum claims to have sustained temporary and permanent disabilities.

Following a hearing on the merits, the AJ entered an order on May 24, 2007, finding Bynum's claim is barred by the two year statute of limitations set forth in Miss. Code Ann. §71-3-35(1). Aggrieved by the AJ's decision, Bynum petitioned for review by the Commission, the statutory finder of fact. Following briefing, oral argument and a complete review of the record, on October 18, 2007, the Commission entered its Order affirming the AJ. Bynum then appealed to the Circuit Court of Warren County, Mississippi, which conducted its own independent review of the record and, on March 3, 2008, affirmed the Commission's decision. Bynum now appeals

to this Court, seeking to re-urge those arguments previously rejected by the AJ, the Commission and the Circuit Court. Despite Bynum's protests, the record fully supports the Commission's decision, and the employer and carrier, therefore, submit the Commission ruling should once again be affirmed.

## **II. Statement of Relevant Facts**

Bynum suffered a work-related injury to his leg on the night of February 26, 2001. (R.E. 5)<sup>1</sup>. At that time, Bynum was working the night shift when another forklift collided with his and knocked him to the floor. (R.E. 5). Bynum reported pain in his leg and presented to Parkview Regional Medical Center where he underwent a physical examination and drug tests. (*Id.*). Upon discharge, he returned to work and finished his shift. (*Id.*). Bynum continued working regular duty until March 20, 2001, when he went to see Dr. Jose Ferrer, a surgeon who had previously treated him for back pain. (*Id.*, Exh. 1). Bynum saw Dr. Ferrer and was returned to work with lifting restrictions for his back. (*Id.*).

After he first saw Dr. Ferrer, Bynum presented to Kamace Priest, Anderson-Tully's safety supervisor and former plant nurse. Bynum reported to Ms. Priest that he could no longer perform his job due to a back injury he had sustained at home. (R.E. 5). Bynum presented Anderson-Tully with an off work note from Dr. Ferrer and was placed on short term disability for this personal illness. (*Id.*). He received sick pay benefits through the employer's short term disability policy from March 2001 through September 2001. (*Id.*). When his short term disability ran out,

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<sup>1</sup> Citations to Appellant's Record Excerpts are abbreviated "R.E." followed by the applicable tab number. Citations to exhibits in the record before the Mississippi Workers' Compensation Commission are abbreviated "Exh. \_\_\_\_", and citations to the transcript of the hearing on the merits of Bynum's claim are abbreviated "Tr. \_\_\_\_".



Bynum was granted an automatic six month extension. (*Id.*). After he failed to return to work when his extension expired, he was terminated according to company policy. (*Id.*).

In March 2002, Bynum retained attorneys Michael Williams, Esq. and Josie Hudson, Esq. (R.E. 5). Both attorneys contacted Anderson-Tully regarding Bynum's work injury and inquired as to a possible workers' compensation claim on Bynum's behalf. (*Id.*). Mike Myrick, the Anderson-Tully's human resources manager, informed both attorneys in March 2002 that Bynum was not off work due to any workers' compensation injury, but that he was receiving sick pay benefits from the short term disability policy for his personal illness. (*Id.*, Exh. 9.) Both attorneys subsequently withdrew from representation of Bynum.

On December 23, 2003, more than two years after his injury, Bynum filed a Petition to Controvert with the Commission, alleging a work injury to have occurred on November 27, 2001. (R.E. 1). The employer and carrier denied any injury on that date. (R.E. 5). Bynum then filed an Amended Petition to Controvert, changing his date of injury to February 27, 2001. (R.E. 5). The employer and carrier admitted the occurrence of an injury on that date, but contested the cause of Bynum's alleged disability and asserted the two year statute of limitations barred Bynum's claim. (*Id.*).

A hearing was held before the AJ on March 2, 2007. (R.E. 5, Tr. 1). At the hearing, the parties stipulated that the employer and carrier paid the initial medical bills occasioned by Bynum's injury. (*Id.*, Tr. 3-4). At the hearing, Bynum testified that at the time of his accident, he did not realize that any other part of his body besides his leg had been injured. (Tr. 40). According to Bynum, once he returned to work, he realized his back was injured, causing him to see Dr. Ferrer. (*Id.* 40-41). He admitted the checks he received from Anderson-Tully were

labeled "sick pay," but stated he believed the checks represented workers' compensation benefits. (Tr. 42-43). Bynum denied ever telling Ms. Priest he injured his back at home. (Tr. 45). Bynum further alleged Mr. Myrick told him the sick pay checks were supposed to be workers' compensation payments. (Tr. 22). Mr. Myrick's contemporaneous letters to Bynum's attorneys were admitted into evidence, however, and belied Bynum's allegations. The letters sent to Bynum's former attorneys confirmed Mr. Myrick never stated Bynum was receiving any workers' compensation benefits or that he was off work due to his work injury. (Exh. 9).

Ms. Priest testified by deposition at the hearing. (R.E. 5, Exh. 4). She testified Bynum did not receive any workers' compensation benefits in 2001, but instead received short term disability benefits, known as "sick pay," for his personal injury to his back. (*Id.*). Ms. Priest recalled the incident involving the forklift in 2001, and testified Bynum underwent an evaluation at the emergency room and was released to return to work the next day, which he did. (*Id.*). Ms. Priest testified that, subsequent to the forklift incident, Bynum's foreman brought him to her office, at which time Bynum, himself, told Ms. Priest he had injured his back at home sometime ago. (*Id.*). Once Bynum provided a slip from Dr. Ferrer taking him off of work, he was placed on short term disability. (*Id.*).

Bynum's pay records from Anderson-Tully were admitted into evidence, and documented that he received "sick pay" from April 5, 2001, until September 27, 2001. (R.E. 5, Exh. 5). The records did not state or indicate the sick pay benefits were intended to be in lieu of workers' compensation payments. (*Id.*). Bynum's personnel records reflected he completed a request for medical leave on April 11, 2001, at which time he stated he was leaving work because of lower back problems and provided a leave date of March 26, 2001. (R.E. 5, Exh. 7). He made no

mention of any work connection to this illness. (*Id.*). On September 28, 2001, Bynum signed another request for leave of absence, stating he had been on leave from March 26, 2001, through September 27, 2001, for lower back problems and was requesting sixty additional days of leave for a personnel illness. (*Id.*).

At the close of evidence, the Administrative Judge determined Bynum's claim was barred by the two year statute of limitations and that Bynum had not met his burden of proving either that he had received wages in lieu of compensation or that the employer and carrier were estopped from asserting the statute of limitations defense. (R.E. 5).

On October 15, 2007, the Full Commission heard oral arguments on Bynum's claim. (R.E. 6). After a careful examination of the record, the Commission affirmed the AJ's order. (*Id.*). Bynum appealed to the Circuit Court of Warren County, which issued its ruling on March 3, 2008, affirming the Commission. (R.E. 8). It is from this decision that Bynum now appeals to this Court.

### **SUMMARY OF THE ARGUMENT**

The employer and carrier submit the Commission's ruling is due to be affirmed, as it is supported by substantial evidence. The Commission, whose Order is the only one subject to scrutiny in this workers' compensation appeal, received and reviewed all the evidence and determined the appropriate weight to give the testimony and each admitted exhibit. Bynum's appeal seeks nothing more than to have this Court allot different weight to the testimony and evidence – focusing primarily on his own testimony while discounting the contradictory proof – but, as the Court is aware, an appeals court cannot re-weigh the evidence and render its own opinion of the testimony. Under the law, deference is given to the Commission, which issued its

decision after its own independent review of the evidence. Even if the Order of the Full Commission is not the opinion the Court would have rendered, the fact that the Commission's Order is supported by evidence in the record necessitates it again be affirmed.

### ARGUMENT

The law applicable to this case is simple and straightforward. Miss. Code Ann. §71-3-35(1) provides that "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 injury or death, the right of compensation therefore shall be barred." (Emphasis added). It is uncontested Liberty Mutual Insurance Company never paid Bynum any workers' compensation indemnity benefits, though it paid medical benefits for Bynum's injury. Therefore, the two year statute of limitations applies unless Bynum meets one narrow exception.<sup>2</sup> Bynum admits this. See Brief of Appellant at 1. ("[c]laimant acknowledges that the Petition to Controvert was not filed within the two-year period set forth in the relevant portions of the Act.").

The Order of the Full Commission is supported by substantial evidence and should be affirmed. The overwhelming majority of the claimant's brief consists of repackaging the testimony, omitting certain detrimental evidence, to have this Court re-weigh the evidence. Since the Commission is the statutory finder of fact and entitled to deference, however, appellate inquiry should be limited to whether substantial evidence exists to support the Commission's determination.

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<sup>2</sup> his brief to this Court, Bynum argues "equitable estoppel" as an alternative exception to the mandates of §71-3-35 (1). As will be discussed herein, such a theory is not an exception to the statute of limitations, but rather an affirmative burden of proof.

## **I. Standard of Review**

The standard of review in workers' compensation appeals is both narrow and limited:

The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge to the contrary notwithstanding.

\* \* \*

[An appellate court may] reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

*Smith v. Container General Corp.*, 559 So. 2d 1019, 1021 (Miss.1990) [quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss.1988)]. "The Commission is the finder of facts. And if those facts are based on substantial evidence [an appellate court lacks] the power to disturb them, even though that evidence would not convince [the court] were [it] the fact finders." *Olen Burrage Trucking Co. v. Chandler*, 475 So. 2d 437, 439 (Miss. 1985). "An appellate court must defer to an administrative agency's findings of fact if there is even a quantum of credible evidence that supports the agency's decision." *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224 (Miss. 1997).

On appeal, as to factual matters, the Commission's findings are entitled to great weight and deference. *Natchez Equip. Co. v. Gibbs*, 623 So.2d 270, 273 (Miss. 1993). As long as the Commission's decision is based on substantial evidence, the Commission's Order must be affirmed. *Id.*; *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 675 (Miss. 1991); *Strickland v. M. H. McMath Gin, Inc.* 457 So. 2d 925, 928 (Miss. 1984). It is with these standards in mind that the Court must consider the instant case.

## **II. The Commission's Decision is Supported by Substantial Evidence**

The sole inquiry on appeal is whether the Commission's decision is supported by substantial evidence. The record is clear that it is. To avoid the statute of limitations, Bynum makes three arguments. He asserts: (1) he was paid wages in lieu of compensation, (2) his back injury was latent, and (3) equitable estoppel should apply. As will be shown, below, all of Bynum's excuses are insufficient.

### **A. Bynum Did Not Receive Wages in Lieu of Compensation**

Wages paid by an employer in lieu of workers' compensation benefits can serve to toll the two year statute of limitations if the wages are paid either expressly or impliedly in recognition of compensation liability. See *Brown v. F. W. Woolworth Co.*, 348 So. 2d 236, 240 (Miss. 1977); Dunn, Mississippi Workmen's Compensation § 318.1 (3d ed. 1982). However, to prevail on this theory, there must be some proof employer and carrier intended such payments to be in lieu of indemnity benefits. *Parchman v. Amwood Prods., Inc.*, 2008 Miss. LEXIS 303, \*7 (Miss. S.Ct. June 12, 2008), citing *George S. Taylor Constr. Co. v. Harlow*, 269 So. 2d 337, 338 (Miss. 1972). "Whether or not any part of [a claimant's] wages should be found to be in lieu of compensation is an issue of fact, and this Court defers to the Commission's findings of fact." *Baker v. IGA Super Valu Food Store*, 2008 Miss. App. LEXIS 246, \*7 (Miss. App. Ct. April 22, 2008), citing *Lanterman v. Roadway Express, Inc.*, 608 So. 2d 1340, 1345 (Miss. 1992). In *Harlow*, the Court remarked that "since there is seldom any evidence on whether such an intention lay behind the payment, it must be inferred from the circumstances surrounding the payment." *Id.* Fortunately in the case *sub judice*, unlike in most cases, the record contains contemporaneous

evidence that Bynum's sick pay checks were *not* intended to be in lieu of any worker's compensation liability.

In the case at bar, Bynum presented absolutely no corroborative evidence to support his allegation his sick pay checks were intended by Anderson-Tully to be in lieu of compensation benefits for a work-related back injury. The most he offered at the hearing – and now offers again on appeal – was his own testimony that he thought his sick pay was meant to be compensation. He also alleges Mr. Myrick told him the payments were supposed to be workers' compensation benefits. Completely contradicting Bynum's allegations, however, was direct testimony from Ms. Priest that the sick pay Bynum received was intended to be short term disability payments for a personal injury to Bynum's back, and specifically were not workers' compensation benefits.

Bynum's pay records supported Ms. Priest's testimony. Conspicuously absent from the evidence offered before the Commission is any proof in the form of pay stubs, letters or any other documentation that the payments at issue were intended to be workers' compensation benefits, as Bynum claims, or that the employer considered Bynum's back condition part of his work injury. Indeed, the only evidence supporting Bynum's claims comes from Bynum's own testimony as to what he claims he was told or what he believed. Clearly, the Commission was well within its rights to give greater credence to the testimony of Ms. Priest, which was corroborated by the both Bynum's medical leave forms, his contemporaneous pay records and Mr. Myrick's letters, than to Bynum's unsupported statements.<sup>3</sup> Understandably, Bynum's brief to the Court makes little mention of these facts.

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<sup>3</sup> Further undermining Bynum's allegations, the AJ properly noted the parties stipulated Bynum's average weekly wage at the time of his injury was \$426.71, which would have provided him with a weekly workers' compensation benefit of \$284.49, not the \$200 he received as sick pay. Bynum had no explanation for this discrepancy.

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Contrary to the bald statement in Bynum's brief that his testimony about what Mr. Myrick allegedly told him was uncontradicted, objective proof was admitted into evidence which directly contradicted Bynum's claim that Mr. Myrick told him he was receiving workers' compensation payments. In letters to Bynum's first two attorneys in March 2002 (well inside the two year statute of limitations period), Mr. Myrick stated Bynum was not receiving workers' compensation benefits. Mr. Myrick's letters conclusively prove that, only months after beginning sick pay benefits to Bynum, Anderson-Tully informed Bynum's own attorneys he was not receiving any workers' compensation payments and that Bynum was not off work due to any work injury. The dates of the letters are also important, as they show the information was communicated to Bynum within the statute of limitations period, thereby allowing Bynum the opportunity to file a timely Petition to Controvert, which he simply did not do. Bynum's representation that his testimony as to what he claims Mr. Myrick told him stood unopposed is simply inaccurate.

To prevail on the argument he received sick pay checks in lieu of workers' compensation, Bynum must prove both that Anderson-Tully knew his back condition was work-related and also that it intended his sick pay checks to be paid in lieu of that recognized workers' compensation liability. Ms. Priest testified Bynum told her his back was injured at home and the objective proof does not demonstrate the sick pay checks were intended to be workers' compensation payments. Given all of the evidence in the record, the Commission, in its role as statutory fact-



finder, had a substantial evidentiary basis to determine Bynum failed to meet his burden of proof that the two year statute of limitations was tolled. As such, the Commission's decision should be affirmed.

#### **B. Bynum's Injury Was Not Latent**

Tacitly recognizing the insufficiency of his proof regarding payments of wages in lieu of compensation, Bynum briefly attempted at the hearing to argue his back injury was "latent," in hopes of tolling the statute of limitations. He revisits this same rejected argument in his brief to this Court, describing his injury as "continuing." However, as the AJ, the Commission and the Circuit Court correctly noted, this argument holds no merit.

"[T]he claim period [for an injury] runs from the time a compensable injury becomes reasonably apparent." *Tabor Motor Co. v. Gerard*, 233 So. 2d 811 (Miss. 1970). The Mississippi Court of Appeals has defined a "latent injury" as "an injury that a reasonable prudent [person] would not be aware of at the moment it was sustained." *Tommy Boykin v. Sanderson Farms, Inc.*, 910 So. 2d 52, 55 (Miss. 2005) (citing *J. H. Moon & Sons, Inc. v. Johnson*, 753 So.2d 445,448 (Miss. 1999) (citing *Georgia Pac. Corp. v. Taplin*, 586 So.2d 823,827 (Miss. 1991)) (emphasis added). In *Boykin*, the Court ruled the two year statute limitations barred a claim for benefits, since the claimant had been aware of his injury at the time it was initially sustained, despite his insistence that he was unaware of the extent of his injuries. *Id.* at 56. Likewise, the records in this case is clear that Bynum knew he sustained an injury at the time his accident occurred, because he sought medical treatment for it. His argument, in essence, is that he did not know the extent of his injury, which is insufficient to toll the statute of limitations.

Regardless of how Bynum attempts to categorize his injury, i.e., “latent” vs. “continuing,” the Commission correctly noted that Bynum began seeing Dr. Ferrer and was taken off work for his back on March 20, 2001. Even were one to accept Bynum’s argument, the two year statute of limitations applicable to his claim would have begun running at that time and Bynum’s claim would still be time-barred by §71-3-35 (1), since his Petition to Controvert was not filed until December 23, 2003. As such, this argument is without merit.

### **C. Equitable Estoppel Cannot Apply**

In a final attempt to avoid the statute of limitations, Bynum argues the employer and carrier should be prevented from asserting the two year statute of limitations defense on equitable grounds. In so urging, Bynum alleges the employer and carrier failed to follow the provisions of the Mississippi Workers’ Compensation Act (“Act”) requiring the filing of a First Report of Injury and cites the Court to inapposite case law. Yet, Bynum’s argument is fatally flawed and, as the Commission determined, equitable estoppel is not appropriate in this case.

An affirmative matter requiring proof, the Mississippi Supreme Court has determined that under certain circumstances, equitable estoppel can prevent the use of the two year statute to bar a claim. However, such a theory only applies if the employer and carrier engage in inequitable conduct with the intent of misleading the claimant into not filing a claim. *Brock v. Hankins Lumber Co.*, 786 So. 2d 1064, 1067-68 (Miss. App. 2000).

“In order to raise an estoppel against an employer from pleading limitations, as by a statement that there is no insurance in effect, the proof must show actionable fraud or misrepresentation.” Dunn, *Workmen’s Compensation*, 3d. Ed. §250. (emphasis added). For example, in *Holbrook v. Albright Mobile Homes, Inc.*, 703 So.2d at 842, (Miss. 1997), an

employee alleged he was misled by his employer as to whether workers' compensation coverage existed at all. After the employee subsequently filed a civil suit against the employer, however, the employer claimed the exclusive remedy provision of the Act as a defense. *Id.* The employer was granted summary judgment by the trial court, but the Supreme Court reversed the decision, stating the employer and carrier would be estopped from asserting a two year statute of limitations defense since they had failed to comply with the notice requirement of the Act and the proof suggested misrepresentation. *Id.* at 884; citing *Martin v. L & A Contracting Co.*, 162 So.2d 870 (Miss. 1964).

Important in understanding when equitable estoppel may be urged, then, are two key components that must be present: (1) an employer and carrier's failure to file a First Report of Injury when required by Miss. Code Ann. § 71-3-67, and (2) action or conduct by the employer and carrier with the intent of preventing a worker from filing a workers' compensation claim. Both elements must be present for estoppel to apply and the second requires a factual finding by the Commission that fraudulent conduct occurred. See *Parchman* at \*27-8 (dissenting opinion). "The crux of those decisions [*Holbrook* and *Martin v. L. & A. Contracting Co.*, 162 So. 2d 870 (Miss. 1964)] was other conduct by the employer besides failure to give notice, that being misrepresentation . . ." *Id.* Since neither prong is met in Bynum's case and the Commission found estoppel did not apply, Bynum's argument in this regard is merely a red herring.

**1. A First Report of Injury was not required.**

According to Miss. Code Ann. §71-3-67, employers and carriers are required to file First Reports of Injury only upon the fatal termination of an injury or upon an injury for which indemnity benefits are paid ("in the event of an injury which shall cause loss of time in excess of

the waiting period . . .”). It is uncontested that no indemnity payments were ever made to Bynum by Liberty Mutual Insurance Company. Since indemnity benefits were never paid by the carrier, and Bynum’s claim was not a fatal injury, there was no requirement that a First Report be filed, at all (although a First Report was, in fact, filed). Indeed, regarding injuries in which no lost time benefits are paid, Miss. Code Ann. §71-3-67 (2) states they “are not required to be reported to the Commission.” (Emphasis added). This simple fact, alone, is dispositive of Bynum’s argument, without inquiry into the fraud prong. As the Circuit Court properly concluded, “[u]nder § 71-3-67 MCA, no report was initially required. This argument is without merit.”

**2. There was no fraudulent conduct.**

Even a First Report of Injury been required in this claim, Bynum presented no proof to the Commission that Anderson-Tully acted to keep him from discovering that he could file a workers’ compensation claim, the second element required. In fact, Mr. Myrick’s letter to Bynum’s attorneys in 2002 gave Bynum notice that he should have filed a claim, if he felt he was entitled to benefits. Bynum must prove such fraudulent conduct in order to argue estoppel. *Parchman*, at \*9-10. Bynum presented no proof that he was defrauded into not filing a claim. As such, his argument is without merit.

Bynum cites this Court to only one case in his entire brief, *McCrary v. City of Biloxi*, 757 So. 2d 978 (Miss. 2000). In *City of Biloxi*, the Court estopped an employer from asserting the two year statute of limitations since a notice of controversy had not been filed. *Id.* at 981-82. However, a reading of the case reveals that the employer told the injured employee that it would file his claim for him, misleading the employee into not filing a claim. *Id.* at 982. The Court

found the claimant had detrimentally relied on the averments of the employer and carrier that they would file his compensation claim and, thus, had missed the statute of limitations. *Id.*

The Court in *City of Biloxi* made clear, though, that a claimant has the burden of proving sufficient facts to support an estoppel claim. *Id.* at 981, citing *Chapman v. Chapman*, 473 So.2d 467, 470 (Miss. 1985) (“[t]he burden of establishing the elements of an estoppel is on the party asserting the estoppel. The existence of the elements of an estoppel must be established by the preponderance of the evidence.”). In this case, however, the Commission found Bynum presented inadequate proof he had been intentionally misled by his employer into not filing a claim or that he detrimentally relied on anything allegedly told to him. As the Commission noted, Bynum simply cannot make such an argument since his own attorneys were informed, within the two year statute period, that the employer and carrier were not paying compensation benefits. Bynum’s reliance on this single case is not supported by the evidence. However, even were it applicable, Bynum’s estoppel argument would fail due to his admitted knowledge of the existence of workers’ compensation coverage.

Assuming, *arguendo*, that employer and carrier could be estopped from asserting the statute of limitations by reason of not filing a First Report of Injury, Bynum’s claim remains barred. Although understandably not mentioned by Bynum’s brief, the estoppel theory is subject to a corollary to the *City of Biloxi* line of cases. Specifically, the Supreme Court has held employers and carriers are not estopped from asserting a statute of limitations defense if it is shown a claimant knew or should have known of the availability of a workers’ compensation claim. The reason is simple: a claimant cannot sit idly on his rights and not file a workers’ compensation claim if the availability of such opportunity is known.

In *Childs v. Mississippi Industries for the Blind*, 184 So.2d 872 (Miss. 1966), the Supreme Court held that, despite a claimant's contention an employer was estopped from asserting the statute of limitations defense due to alleged acts and misrepresentations which induced a delay in filing his claim, the record "disclosed that the claimant had notice a claim could have been filed, but chose not to do so." (Emphasis added). Additionally, in *Casey v. Deason Cash Grocery*, 246 So.2d 534 (Miss. 1971), the Supreme Court refused to bar the employer and carrier from pleading the two-year statute of limitations defense, on the grounds that claimant evidenced no detrimental reliance. The Court specifically noted that "the evidence showed that she [claimant] was aware of her rights before the expiration of the limitation." *Casey*, 246 So.2d at 535; citing *Childs v. Mississippi Industries for the Blind*, 184 So.2d 872 (Miss. 1966) (Emphasis added). Succinctly stated, if the evidence reveals a claimant is on notice of the existence of workers' compensation coverage and has the opportunity to file a workers' compensation claim, the employer and carrier may assert the two year statute of limitations defense even if a First Report of Injury was not filed when required. The rationale behind the corollary is simple; a claimant cannot allege to have been detrimentally misled in failing filing a workers' compensation claim if he was on, or should have been on, notice he had the opportunity to do so.

In this case, Bynum admits he knew Anderson-Tully had workers' compensation coverage. (Tr. 40). He also retained two workers' compensation attorneys during the statute of limitations period. (Tr. 46-47). The evidence clearly reflects Bynum knew of the availability of coverage and had ample opportunity to prosecute a workers' compensation claim within the statutory time frame. The Commission's determination he simply did not do so is in accordance with the overwhelming evidence and mandates affirmance of the Order of the Full Commission.

### CONCLUSION


Based on the evidence in the record, the Commission was within its right as the statutory finder of fact to determine Bynum's claim is barred by Miss. Code Ann. §71-3-35(1) and, therefore, the Circuit Court properly affirmed the Commission decision. In accordance with the deferential standard of review, the appellees submit that the Order of the Full Commission should once again be affirmed.

Respectfully submitted,

ANDERSON-TULLY LUMBER CO. AND  
LIBERTY MUTUAL INSURANCE CO.

BY: 

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**CERTIFICATE OF SERVICE**

I, W. Bienville Skipper, of counsel for employer and carrier herein, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees to:

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THIS, the 2 day of July, 2008.

  
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W. BIENVILLE SKIPPER