

BEFORE THE MISSISSIPPI COURT OF APPEALS

FRANCIS MURRAY

CLAIMANT/APPELLANT

VERSUS

CASE NO. 2008-WC-01221-COA

**INGALLS SHIPBUILDING/NGSS &
CONTINENTAL CASUALTY COMPANY**

EMPLOYER/CARRIER/APPELLEES

BRIEF OF THE APPELLANT
FRANCIS MURRAY

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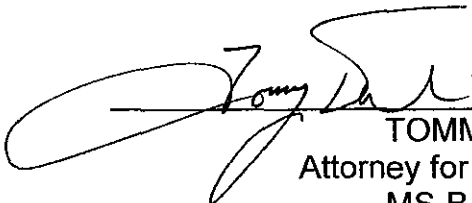
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CERTIFICATE OF INTERESTED PERSON

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

- (1.) Francis Murray
Claimant/ Appellant
- (2.) Tommy Dulin/Dulin & Dulin, LTD.
Attorney for Claimant/Appellant
- (3.) Ingalls Shipbuilding/NGSS
Employer/Appellee
- (4.) Continental Casualty Company
Carrier/Appellee
- (5.) Andrew G. McCullough/Markow Walker, P.A.
Attorney for Employer/Carrier/Appellees


TOMMY DULIN
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I.

**STATEMENT OF
ISSUES ON APPEAL**

A.

MISDIAGNOSIS

The Claimant had no duty to file her Petition to Controvert for an injury which was misdiagnosed. The Claimant's; duty to file her Petition to Controvert did not arise until after she received a medical diagnosis causally relating her head injury to employment, and suffered lost time from work.

B.

LATENT INJURY

The head injury, which the Claimant sustained at Ingalls, caused discreet brain damage. The Claimant's duty to file her Petition to Controvert did not arise until her latent brain injury was evaluated, ascertained, and related to employment by Drs. Millette and Ozon, and she suffered lost time from work.

C.

EMPLOYER/CARRIER'S FAILURE TO FILE

FIRST REPORT OF INJURY OR ILLNESS

The Court of Appeals must take judicial notice of the fact that the Employer/Carrier never filed the requisite First Report of Injury on Illness; thus, the Claimant had no duty to file her Petition to Controvert prior to August 2, 2006.

II.

STATEMENT OF THE CASE

The Claimant, Francis Murray, Appellant herein, slipped and fell at work on April 7, 1999. She was examined at the Employer's onsite medical facility and released to return to her regular duties as a clerk. She missed approximately four (4) hours from work on April 7, 1999. The Claimant was subsequently evaluated by her family physician, Dr. Groff, who advised her to continue her regular clerk duties. On May 18, 2004, the Claimant was evaluated by a neurologist, Dr. Millette, who diagnosed brain stem confusion, and referred her to Dr. Ozon for treatment. The Claimant was unaware of her latent brain stem injury and the relationship of her injury to her fall at Ingalls until May 18, 2004. The Claimant did not sustain lost time from work due to the fall of April 7, 1999 until after August 2, 2006. Even after the Claimant filed her Petition to Controvert, the Employer/Carrier still failed to file its First Report of Injury or Illness despite the fact that the Claimant had incurred substantial accident related medical expenses and had experienced more than five (5) days lost time from work after August 2, 2006.

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III.

SUMMARY OF THE ARGUMENT

The Employer/Carrier failed to file the First Report of Injury or Illness, MWCC Form B-3; thus, the Claimant's duty to file her Petition to Controvert was suspended. Holbrook vs. Albright Mobile Homes, Inc., 703 So. 2d 842 (Miss. 1997). The Employer/Carrier is estopped from denying the claim because they failed to comply with the Notice requirement of the Act. Holbrook, Supra; see also, Prentice vs. Schindler Elevator Co., 14 So. 3d 59 (Ms. C.O.A. 2008).

The Claimant's injury was misdiagnosed at the Employer's medical facility as well as by the Claimant's family physician. The Claimant had no reason to file a Petition to Controvert until she received a diagnosis of work related injury and sustained lost time from work attributable to the correctly diagnosed work related medical condition. Her lost time from work did not begin until August 2, 2006.

The Claimant's injury was a latent discreet injury and remained largely untreated until the Claimant came under the care of Dr. Ozon.

The Employer/Carrier, likewise, wholly failed to file the Notice of Final Payment, MWCC form B-31, which is required to be filed in order to close the Commission file. Section 71-3-37 (7) MCA, 1972, as amended; MWCC Procedural Rule 17.

IV.

THE ARGUMENT

It is important to note that the provisions of the Mississippi Workers' Compensation Act must be construed liberally and all doubtful cases are to be resolved in favor of compensation to allow the benefit purposes of the Act to be achieved. . Reichold Chemical, Inc. vs Sprankle, 503 So. 2d 799 (Miss. 1987); Walmart Stores, Inc. vs Patrick, 5 So. 3d 1119 (Miss. 2008).

The standard of review requires that this Honorable Court not overturn the decision of the Commission if the Commission's decision is supported by substantial creditable evidence unless the Commission's decision constitutes an error of law. Smith vs. Jackson Construct. Co., 607 So. 2d 1119 (Miss. 1992); Barber Seafood, Inc. vs Smith, 911 So. 2d 454(Miss. 2005).

This Honorable Court reviews issues of law de novo. Clark vs. Spherion Corp., II So. 3d 774 (Ms. C.O.A. 2009), KLLM, Inc. vs. Fowler, 589 So. 2d 670 (Miss. 1991); Patrick, Supra. The Commission erred as a matter of law in concluding that the statute of limitation had expired despite the total failures of the Employer/Carrier to ever file a First Report of Injury or Illness, MWCC Form B-3. Therefore, this Honorable Court must review this issue de novo.

This Honorable Court has before it a compelling case for equitable consideration. Likewise, this case presents the Court with the opportunity to correct a manifest error of law. The facts of this case establish a latent injury which was misdiagnosed by the Employer's onsite medical staff. The Claimant did not lose time from work due to her April 1999 accident until after she filed her Petition to Controvert in August 2006.

The Employer has established no prejudice since the Employer had actual knowledge of the Claimant's April 1999 accident.

The competing interest between an Employer's need for finality of claims and the Claimant's need for accident related medical and indemnity benefits must be resolved in a manner beneficial to the Claimant.

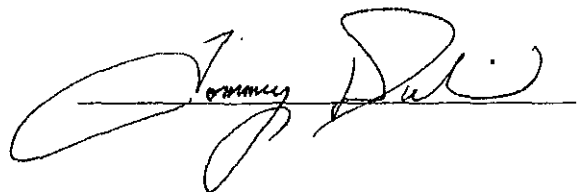
In the case sub judice, the two-year limitation did not begin to run until after August 2, 2006, because the Claimant did not sustain a disabling injury until she began to lose time from work after August 2, 2006. Quaker Oats Co. vs. Miller, 320 So. 2d 1363 (MS. 1979); see also, Pepsi Coal Bottling Co. of Tupelo, Inc. vs Long, 362 So. 2d 182 (MS. 1978).

V.

CONCLUSION

The Claimant, FRANCIS MURRAY, Appellant herein, respectfully requests this Honorable Court to review de novo the issue of law which is misapplication of the two year statute of limitation and to reverse and render this issue in favor of the Claimant and to remand the case to the Commission for adjudication of the merits.

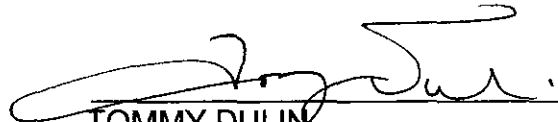

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Francis Murray", is written over a horizontal line.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have had this mailed postage prepaid a true and correct copy of the above and foregoing document to Honorable Andrew G. McCullough, attorney for the Employer, and Judge Kathy Jackson at his/her usual business address.

This the 4^{7th} day of Dec., 2009.


TOMMY DULIN
MS BAR 

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