

IN THE SUPREME COURT OF MISSISSIPPI

JADONNA PEARSON

APPELLANT

VS.

NO. 2009-WC-00908-COA

LIGHTHOUSE POINT CASINO

AND

FEDERAL INSURANCE COMPANY

APPELLEES

ON APPEAL FROM
CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI
NO. 2008-0235-CI
MISSISSIPPI WORKERS' COMPENSATION COMMISSION
NO. 07 13387-J-9219

REPLY BRIEF OF JADONNA PEARSON, APPELLANT

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ARGUMENT

1. The employer argues that Claimant's reliance on *Baker v. IGA Super Valu Food Store*, 990 So. 2d 254 (Miss. Ct. App. 2008), cert. denied, 994 So. 2d. 186 (Miss. 2008), is misplaced. Appellee's Brief, 5. In support of its argument, the employer attempts to make a distinction between a petition to controvert filed only two months after the last payment of medical benefits, as occurred in *Baker*, and one filed more than two years after the last payment of such benefits, as occurred in the instant case. *Id.* The issue in *Speed Mechanical*, however, upon which the Administrative Judge relied to deny benefits to Claimant, did not involve the length of time between the last payment of medical benefits and the filing of the Petition. Rather, the issue was whether Miss. Code Ann. § 71-3-35(1) (1972), barred the claimant's claim filed more than two years after the date of injury. *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317, 318 (Miss. 1977). The claimant in *Speed Mechanical* and the Claimant in the instant case both filed their petition to controvert more than two years after the date of injury, thus creating the relevant issue.

The employer's argument, therefore, attempting to create an issue concerning the time which elapsed between the date of the last payment of medical benefits and the filing of the Petition is not relevant. What is interesting, however, is that the employer then admits that the employer in *Baker* was "simply ordered ... to pay any outstanding bills (because) ... the employer had already undertaken the obligation to pay those expenses." Appellee's Brief, 5-6. Claimant submits that the employer in the instant case also voluntarily paid at least part of Claimant's medical bills. Thus, the employer appears to agree with Claimant's argument that Pearson's bills should also be paid since the casino "had already undertaken the obligation to pay (some of) those expenses." *Id.*, at 6.

Claimant would point out that the facts in *Speed Mechanical* involved a claimant who

sought benefits for medical expenses incurred after the elapse of two years from the date of injury. 342 So. 2d at 318. The injury in that case occurred in May 1971 and the employer paid medical benefits as late as April 25, 1973. *Id.*, 318-19. The claimant then filed his Petition in November 1973 seeking additional benefits for medical expenses incurred after the expiration of two years from the date of injury. *Id.*, 318. The *Speed Mechanical* Court barred that claim. *Id.*, 320.

By contrast, the Claimant in this case seeks the payment of benefits for expenses incurred within the two-year period following her accident and injury. In this respect, the Claimant is in the same position as the claimant in *Baker*. The administrative judge in *Baker* ruled that the two year statute applied and precluded Baker's claim for benefits after January 9, 2004, (more than two years after the injury) but ordered the employer to pay all bills incurred before that date. *Baker*, 990 So. 2d at 257. The Court of Appeals affirmed the administrative judge's ruling. *Id.*, at 261. In a similar manner and pursuant to the holding in *Baker*, the Claimant in the instant case is entitled to compensation for disability and medical expenses incurred within the two year period following the date of her accident and injury.

2. In any event, the leading experts in this state in the field of workers' compensation law have criticized the rationale and result of *Speed Mechanical*. John R. Bradley & Linda A. Thompson, *Mississippi Workers' Compensation*, §7:12, 7-20 - 7-24 (2009). These experts criticized *Speed Mechanical* because it "produced disharmony with at least three other pillars of workers' compensation law and thereby introduced a point of tension in the law." *Id.*, 7-21.

First, allowing the two year statute to run when medical benefits only have been paid contradicts a previous ruling of the Court which explained that such a result is inequitable because it lulls the injured worker into inaction and thus bars his claim before there is such a claim to file. *Id.*, 7-21 - 7-22. (citing *Martin v. L. & A. Contracting Co.*, 249 Miss. 441, 162 So.

2d 870 (1964).

Second, *Speed Mechanical* ignored Miss. Code Ann. § 71-3-37(7) (1972), which requires that a Form B-31 be filed within 30 days of the final payment of compensation to serve as notice to the employee that the employer considers its obligation as having ended. *Mississippi Workers' Compensation*, 7-22. The notice provided by the filing of Form B-31 is essential to the constitutional requirement of due process. *Id.* (citing *H. C. Moody & Sons v. Dedeaux*, 223 Miss. 832, 79 So. 2d 225 (1955)). As explained by Professor Bradley and Judge Thompson, "*a claimant who has received medical only benefits in such a circumstance is at jeopardy of having all rights terminated without benefit of the statutory notice and a possible denial of due process guaranteed by such notice.*" *Mississippi Workers' Compensation*, 7-22. (Italics in original). Finally, the Court in *Speed Mechanical* ignored Miss. Code Ann. § 71-3-53 which allows the Commission to review a compensation case within one year of the date of the last payment of compensation and to issue a new compensation order, including an order awarding compensation. *Id.*, 7-22 - 7-23.

After stating their criticism of *Speed Mechanical*, Professor Bradley and Judge Thompson offer a solution to the inequities created by that case.

There is a better answer when only medical benefits have been paid. According to § 71-3-37(7), the matter can be closed only after notice to the employee. This would mean that a claim filed within one year after the last payment could result in a reopening under the provisions of § 71-3-53. If no B-31 has been filed, a claim filed more than one year after the last payment would still be timely under § 71-3-53. One effect of following the statute and not terminating rights without notice is to make the one-year provision applicable in a medical-only case. The notice provided by the Form B-31 would preclude the employee from being lulled into inaction, and would give precisely the balanced type of protection the court recognized as necessary in *Martin v. L. & A. Contracting Co.*

Id., 7-23 - 7-24.

In the instant case, a Form B-31 was never filed. The failure to provide notice by filing Form B-31 denied Claimant the essential statutory and constitutional right of due process of law.

Although Claimant filed her petition more than two years after the date of injury, her claim was still filed timely under the provisions of § 71-3-53.

The Circuit Court decision, affirming the orders of the Commission and the Administrative Judge, violated Claimant's statutory and constitutional rights of due process of law, is not supported by substantial evidence and must be reversed. Alternatively, the decision must be reversed under the authority of *Baker* which entitles Claimant to the payment of benefits and expenses incurred during the first two years following injury.

CONCLUSION

The decision of the Circuit Court, affirming the decisions of the Full Commission and the administrative judge, must be reversed.

RESPECTFULLY SUBMITTED, this the 15 day of September, 2009.

JADONNA PEARSON

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CERTIFICATE OF SERVICE

I, David N. Gillis, attorney for Claimant, do hereby certify that I have this date served, by United States Mail, postage prepaid, a true and correct copy of the foregoing document, as follows:

Mark W. Verret
Allen & Gooch
3900 N. Causeway Blvd., Suite 1450
Metairie, LA 70002

Honorable Ashley Hines
Circuit Court Judge
P. O. Box 1315
Greenville, MS 38702

THIS, the 15th day of September, 2009.


David N. Gillis