

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

BRIEF OF JADONNA PEARSON, APPELLANT

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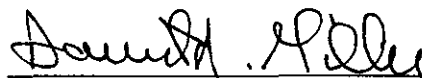
APPELLEES

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 justices of the Supreme Court or Court of Appeals may evaluate possible disqualification or recusal.

1. Jadonna Pearson, 2310 West 7th St., Apt. 34, Hattiesburg, MS 39401;
2. Lighthouse Point Casino, c/o Mark W. Verret, Allen & Gooch, Attorneys for Appellees, 3900 N. Causeway Blvd., Suite 145, Metairie, LA 70002;
3. Federal Insurance Company, c/o Mark W. Verret, Allen & Gooch, Attorneys for Appellees, 3900 N. Causeway Blvd., Suite 145, Metairie, LA 70002;
4. Honorable Deneise Lott, Administrative Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296-5300;
5. Honorable Liles B. Williams, Honorable Augustus L. Collins, Honorable John R. Junkin, II, Commissioners, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296-5300;
6. Honorable Ashley Hines, Circuit Court Judge, P. O. Box 1315, Greenville, MS 38702;
7. Mark W. Verret, Allen & Gooch, Attorneys for Appellees, 3900 N. Causeway Blvd., Suite 145, Metairie, LA 70002;

8. David N. Gillis, Attorney for Jadonna Pearson, Appellant, 405 Tombigbee St., Jackson, MS 39201.

A handwritten signature in black ink, appearing to read "David N. Gillis", written over a horizontal line.

David N. Gillis
Attorney for Jadonna Pearson, Appellant

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STATEMENT OF THE ISSUES

Is the claimant's claim for workers' compensation benefits barred by the two year statute of limitations provided for in Miss. Code Ann. Section 71-3-35 and the legal precedent found in *Speed Mechanical, Inc. v. Taylor*, 342 So.2d 317 (Miss.1977).

STATEMENT OF THE CASE

(A) Nature of the Case.

While in the course and scope of her employment as a slots floor person with Lighthouse Point Casino, Jadonna Pearson sustained a work-related accident and injury on October 17, 2005. On that occasion, the claimant was struck in the head by a piece of glass which fell from the top of a slot machine. Claimant was temporarily totally disabled for a period of seven weeks following her accident and injury.

(B) The Course of the Proceedings and its Disposition in the Circuit Court of Washington County, Mississippi, and in the Mississippi Workers' Compensation Commission.

In its Order rendered May 12, 2009, the Circuit Court of Washington County, Mississippi, affirmed the decision rendered by the Mississippi Workers' Compensation Commission which had affirmed the order of the Administrative Judge. In her order, the Administrative Judge dismissed claimant's Petition To Controvert as barred by the applicable two year statute of limitations provided for in Miss. Code Ann. Section 71-3-35 and the legal precedent found in *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317 (Miss. 1977).

Claimant filed her Notice Of Appeal in the Circuit Court on May 29, 2009, on the grounds that the Order rendered by the Circuit Court was not supported by substantial evidence, was contrary to the overwhelming weight of the evidence, was contrary to law and was clearly erroneous.

(C) Statement of Facts.

On October 17, 2005, Jadonna Pearson sustained injuries while employed as a slots floor

person with Lighthouse Point Casino in Greenville, Mississippi. R.E. 5. On that date, after claimant had placed money inside a slot machine, a large piece of glass fell from the top of the machine and struck claimant in the head. *Id.* The accident caused claimant to suffer injuries to her head, neck, upper back and shoulders. *Id.* At the time of the accident and injury, claimant earned an average weekly wage of \$320.00. *Id.*

The claimant presented to Delta Regional Medical Center emergency room in Greenville, Mississippi, on the day of the accident. R.E. 116-125. Claimant complained of headaches after being struck in the head by a piece of glass while working on a slot machine. *Id.* The medical record indicates there were no cuts, no bleeding and no loss of consciousness. *Id.* The impression was listed as a contusion to the head and the claimant was given Tordadol and a prescription for Ultracet and discharged to her home. *Id.* On November 11, 2005, the claimant returned to Delta Regional for a CT of the head, the results of which indicated no acute intracranial pathology. *Id.*, 126-27.

On November 7, 2005, claimant presented to Leland Medical Clinic in Leland, Mississippi, for complaints of neck and shoulder pain and headaches since being struck in the head on October 17, 2005. R.E., 128. She was diagnosed with headaches, head injury and head contusion occurring on October 17, 2005. *Id.* Recommendations included a CT scan of the head, use of moist heat, medications as prescribed by the ER physician, and she was advised to keep her appointment with Dr. Dorsey. *Id.* The claimant returned to Leland Medical Clinic on November 15, 2005, to discuss the results of the CT scan and was advised she could return to work on November 17, 2005. *Id.*, 129.

The claimant was treated on ten occasions by Harry L. Dorsey, D.C., Dorsey Chiropractic Clinic, in Greenville, Mississippi, between October 24, 2005, and November 30, 2005. R.E., 103-115. During his treatment of claimant, Dr. Dorsey assigned several different restrictions.

On October 24, 2005, claimant was instructed not to work until October 30, 2005. *Id.*, 109. On October 28, 2005, claimant was instructed not to work until November 5, 2005. *Id.*, 110. On November 9, 2005, claimant was instructed to reduce lifting 50% until November 25, 2005. *Id.*, 111. On November 30, 2005, claimant was assigned restrictions of lifting, pulling and pushing 25 pounds maximum until December 20, 2005. *Id.*, 112. On December 5, 2005, Dr. Dorsey stated claimant had no further work limitations and could return to work on December 5, 2005. *Id.*, 113.

The employer and carrier paid for claimant's medical treatment rendered at Delta Regional Medical Center and Leland Medical Clinic but refused to pay for treatment at Dorsey Chiropractic Clinic. R.E. 5-6; 8. The employer and carrier did not pay temporary total disability benefits. *Id.*

Claimant filed her Petition to Controvert on December 27, 2007, more than two years after her date of injury. R.E., 5-6. On August 8, 2008, the Administrative Judge rendered her order dismissing claimant's Petition to Controvert as barred by the applicable two year statute of limitations provided for in Miss. Code Ann. 71-3-35 and the legal precedent found in *Speed Mechanical, Inc. v. Taylor*, 342 So.2d 317 (Miss.1977). R.E., 93. The Administrative Judge's Order was affirmed by the Full Commission on November 7, 2008. R.E., 130. The Full Commission Order was affirmed by the Order of the Circuit Court on May 12, 2009. R.E., 163-64.

In her claim, Jadonna Pearson seeks temporary total disability benefits from the date of the injury on October 17, 2005, through the date Dr. Dorsey released her to return to work on December 5, 2005, a period of seven weeks. Claimant additionally seeks all unpaid medical benefits, including benefits for treatment rendered by Dr. Dorsey.

SUMMARY OF THE ARGUMENT

1. Although the Claimant filed her claim more than two years after the date of accident and injury, the ruling in *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317 (Miss. 1977), does not preclude Claimant from entitlement to disability benefits and medical expenses incurred during the two year period following injury. *Baker v. IGA Super Valu Food Store*, 990 So. 2d 254 (Miss. Ct. App. 2008), cert. denied, 994 So. 2d. 186 (Miss. 2008).

2. Because the Form B-31 was never filed in this cause, the Claimant never received notice advising that the employer's obligation owed to Claimant had been satisfied. Because the employer failed to provide such notice, the Claimant was denied her right of due process of law.

3. The employer voluntarily paid medical benefits to Claimant and, thus, waived the filing of a formal claim. Therefore, Claimant's failure to file a claim within the two-year period was reasonable, and the employer is estopped from asserting otherwise.

4. Because the employer failed to file a Form B-31, Claimant's failure to file her claim within one year after the last payment of compensation benefits was still filed timely under the provisions of Miss. Code Ann. Section 71-3-53.

5. In its Answer to the Petition to Controvert, the employer failed to state the affirmative defense of statute of limitations and, thus, waived that defense.

6. Claimant's claim must be construed in the light most favorable to her with all doubts resolved in her favor. When her claim is viewed in this light, it is clear Claimant is entitled to receive benefits under the Act.

7. The Commission ignored Claimant's Motion to Admit Additional Evidence. The Commission's failure to issue a ruling on the motion is clearly erroneous under the provisions of Commission Procedural Rule 9.

ARGUMENT

1. Under the authority of *Baker v. IGA Super Valu Food Store*, 990 So. 2d 254 (Miss. Ct. App. 2008), cert. denied, 994 So. 2d. 186 (Miss. 2008), Claimant is entitled to disability benefits and medical treatment for a two-year period from the date of injury on October 17, 2005, until October 17, 2007. In *Baker*, the claimant was injured on January 9, 2002, and the employer paid Baker's medical expenses for a two-year period from the date of injury until January 9, 2004. *Id.*, 256. Baker filed his petition to controvert more than two years after his injury on March 25, 2004. *Id.*, 257. The administrative judge found that Baker's claim seeking disability benefits and medical benefits occurring after January 9, 2004, was barred because the two-year statute of limitations applied. *Id.* **However, even though the Petition to Controvert was filed more than two years after the date of accident, the administrative judge ordered the employer to pay all medical expenses incurred by Baker prior to January 9, 2004.** *Id.* The Court found "that the voluntary payment of medical benefits did not toll the two-year statute of limitations provided in section 71-3-35(1) as to the payment of current and future medical benefits." *Id.*, 258. (Emphasis added). "We find that the trial court did not err when it affirmed the Commission's affirmation of the administrative law judge's ruling that **the two-year statute of limitations applied and precluded Baker's claim for disability benefits and medical treatment after January 9, 2004.**" *Id.*, 261. (Emphasis added).

The holding in *Baker* means that in a case where medical benefits only are paid and the claim is filed more than two years after the date of injury, the two year statute precludes a claim for any disability benefits or medical expenses occurring after the expiration of the two year period. However, under the holding in *Baker*, the statute does **not** preclude a claim for disability benefits due and medical expenses incurred during the first two years after the injury. In the instant case, Jadonna Pearson seeks disability benefits due and medical expenses incurred during

the seven-week period following the date of injury. Under the holding in *Baker*, Jadonna Pearson is entitled to those benefits.

The ruling of the administrative judge dismissing Pearson's claim pursuant to *Speed Mechanical, Inc. v. Taylor*, 342 So. 2d 317 (Miss. 1977), is not supported under the authority of *Baker*. Thus, the Order of the Circuit Court, affirming the orders of the Full Commission and Administrative Judge, is not supported by substantial evidence, is contrary to law, and, specifically, is contrary to the holding in *Baker*, and is clearly erroneous.

2. Alternatively, the employer in this cause failed to follow the notice requirements contained in the Mississippi Workers' Compensation Act.

Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the commission a notice in accordance with a form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails so to notify the commission within such time, the commission may assess against such employer a civil penalty in an amount not exceeding One Hundred Dollars (\$100.00). No case shall be closed nor any penalty be assessed without notice to all parties interested and without giving to all such parties an opportunity to be heard.

Miss. Code Ann. Section 71-3-37(7). A notice of final payment on Commission form B-31 was never filed in this case. R.E., 1-201. The employer was required to file a Form B-31 in this cause so that the Claimant would have notice that the employer considered its obligation owed to the Claimant as having been fulfilled. The failure of the employer in this case to file the Form B-31 denied the Claimant her right of due process of law. *H. C. Moody & Sons v. Dedeaux*, 223 Miss. 832, 79 So. 2d 225 (1955).

3. In the further alternative, the employer's payment of medical benefits to Claimant was made voluntarily. Thus, the employer waived the filing of a formal claim for benefits, and the Employer is now estopped from asserting otherwise. Claimant's failure to file her claim within

the two-year statutory period, therefore, was reasonable. *Martin v. L. & A. Contracting Co.*, 249 Miss. 441, 162 So. 2d 870 (1964).

4. Within one year from the date of the last payment of compensation benefits, the Commission has the statutory authority to review a compensation case, issue a new order or award compensation.

Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation....

Miss. Code Ann. Section 71-3-53. In the further alternative, in the instant case, since no Form B-31 was filed by the employer, the claim filed by the Claimant more than one year after the last payment of compensation was still filed timely under the provisions of Miss. Code Ann. Section 71-3-53.

5. In the further alternative, the employer failed to plead an affirmative statute of limitations defense in its Answer to the Petition to Controvert. R.E., 8. "In pleading to a preceding pleading, a party *shall* set forth affirmatively ... statute of limitations" M.R.C.P. 8(c). (Emphasis added). The rule does not state that a party *may* set forth such a defense but rather states that he *shall* set forth that defense. "A failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." Wright & Miller, *Federal Practice and Procedure: Civil 2d* Section 1278, p. 477 (1990).

In addition to the Mississippi Rules of Civil Procedure, the Commission's own procedural rules require that affirmative defenses be stated in the Answer to the Petition to Controvert. "All affirmative defenses such as ... statute of limitations ... must be pleaded. Unless so pleaded they shall be deemed waived." Procedural Rule 4.

At the time of filing its Answer, the employer had knowledge of the date of injury and knew the date on which the Petition to Controvert had been filed. Because the employer failed to raise in its Answer the affirmative defense of statute of limitations, the employer has waived that defense.

6. The Claimant's Petition to Controvert must be construed in the light most favorable to the Claimant. Wright & Miller, *Federal Practice and Procedure: Civil 2d* Section 1357, p. 304 (1990). "The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.*, at p. 332-36.

When the Petition to Controvert is construed in the light most favorable to Claimant and when all doubts are resolved in her favor, Claimant submits that her Petition states a valid claim to which she is entitled to relief under the Mississippi Workers' Compensation Act.

7. The Administrative Judge's Order dated August 8, 2008, was rendered as a result of the Motion To Dismiss filed by the employer. R.E., 93. At the time of the hearing of the Motion To Dismiss, the parties had not engaged in discovery and the only pleadings filed of record other than pleadings relating to the Motion were the Petition to Controvert and the Answer. Because there was no final evidentiary hearing, the Claimant never had the opportunity to file medical records relating to her claim. The Claimant, therefore, filed her Motion To Admit Additional Evidence on September 29, 2008. R.E., 100-129.

However, the Commission never made a ruling on Claimant's Motion. R.E., 1-201. There is no mention of the Motion in the Full Commission Order. R.E., 130. The Commission rules provide that when such evidence is offered on the review before the Full Commission, the Commission may admit the evidence in its discretion. Procedural Rule 9. Claimant submits that Rule 9 does not allow the Commission to ignore her motion. Claimant submits that, regardless

of the Commission's decision, she is entitled to a ruling on the motion. The Commission's failure to address the motion is not supported by substantial evidence and is clearly erroneous under the provisions of Procedural Rule 9.

CONCLUSION

The Order of the Circuit Court is not supported by substantial evidence, is contrary to the overwhelming weight of the evidence, is contrary to law and is clearly erroneous. The Order must be reversed, and the claimant must be allowed the opportunity to litigate her claim in the Commission.

RESPECTFULLY SUBMITTED, this the 11 day of August, 2009.

JADONNA PEARSON

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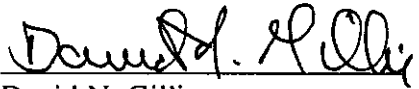
CERTIFICATE OF SERVICE

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
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3900 N. Causeway Blvd., Suite 1450
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Honorable Ashley Hines
Circuit Court Judge
P. O. Box 1315
Greenville, MS 38702

THIS, the 11 day of August, 2009.


David N. Gillis