

BEFORE THE MISSISSIPPI COURT OF APPEALS

FRANCIS MURRAY

CLAIMANT/APPELLANT

V.

NO. 2009-WC-01221-COA

INGALLS SHIPBUILDING/NGSS and
CONTINENTAL CASUALTY COMPANY

EMPLOYER/CARRIER/APPELLEES

APPELLEES' BRIEF

Oral Argument in Not Requested

Andrew G. McCullough, MSF [REDACTED]
MARKOW WALKER, P.A.
P. O. Box 13669
Jackson, MS 39236-3669
(601) 853-1911
ATTORNEY FOR APPELLEES

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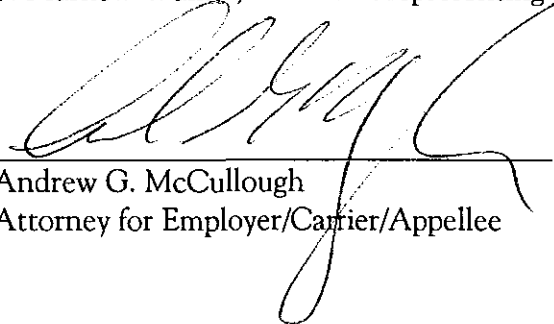
INGALLS SHIPBUILDING/NGSS and
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify 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 and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Francis Murray - Claimant/Appellant
2. Tommy Dulin, Esq. - Attorney for Claimant/Appellant
3. Dulin & Dulin, LTD - Firm representing Claimant/Appellant
4. Ingalls Shipbuilding/NGSS - Employer/Appellee
5. Continental Casualty Company - Carrier/Appellee
6. Andrew McCullough, Esq. - Attorney for Employer/Carrier/Appellees
7. Markow Walker, PA - Firm representing Employer/Carrier/Appellees



Andrew G. McCullough
Attorney for Employer/Carrier/Appellee

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES.....	4
STATEMENT OF ISSUES.....	6
STATEMENT OF THE CASE.....	7
Procedural History.....	7
Statement of Facts.....	8
SUMMARY OF THE ARGUMENT.....	10
ARGUMENT.....	11
Standard of Review.....	11
Argument.....	12
I. Appellant not required to file First Report of Injury (Form B-3).....	12
II. The 2 year statute of limitations began to run when the compensable injury becomes readily apparent, not when Claimant misses five working days.....	14
III. Regardless of whether the statute began to run on the date of injury or the date of later diagnoses, the statute of limitations has still expired.....	15
Conclusion.....	17

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

<i>Attala County Nursing Center v. Moore</i> 760 So. 2d 784, 788 (Miss. Ct. App. 2000).....	11
<i>Baker v. IGA Super Valu Food Store</i> , 990 So. 2d 254, 260 (Miss. Ct. App. 2008).....	14
<i>Barber Seafood, Inc. v. Smith</i> , 911 So. 2d 454, 461 (Miss. 2005).....	11
<i>Clements v. Welling Truck Service, Inc.</i> , 739 So. 2d 476 (Miss. Ct. App. 1999).....	11
<i>Cooper v. Miss. Dep't of Rehab. Servs.</i> , 937 So. 2d 51 (Miss. Ct. App. 2006).....	14
<i>Delta CMI v. Speck</i> , 586 So. 2d 768, 773 (Miss. 1991).....	11
<i>Hardins Bakery v. Taylor</i> , 631 So. 2d 201 (Miss. 1994).....	11
<i>Holbrook v. Albright</i> , 703 So.2d 842 (Miss.1997).....	13
<i>Holland v. State</i> , 705 So. 2d 307, 352 (Miss. 1997).....	15
<i>Myers v. State</i> , 832 So. 2d 540, 543 (Miss. Ct. App. 2002).....	15
<i>Prentice v. Schindler Elevator Co.</i> , 14 So. 3d 59, 60 (Miss. Ct. App. 2008).....	13
<i>Sealed Power Corp. v. Young</i> , 744 So. 2d 813 (Miss. Ct. App. 1999).....	11
<i>Smith v. Jackson Constr. Co.</i> , 607 So. 2d 1119, 1123-4 (Miss. 1992).....	11
<i>Struthers v. Bradford</i> , 304 So.2d 645 (Miss. 1974).....	16

Tabor Motor Co. v. Garrard, 233 So. 2d 811 (Miss. 1970).....16

Wilburn v. Wilburn, 991 So. 2d 1185, 1192 (Miss. 2008).....15

STATUTES

Miss. Code Ann. § 71-3-35.....*passim*

Miss. Code Ann. § 71-3-37.....7

Miss. Code Ann. § 71-3-67.....12, 13

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STATEMENT OF ISSUES

- I. Whether Employer/Carrier is required to file a First Report of Injury (Form B-3) for Appellant's injury, and if so, does a failure to file toll the two-year statute of limitations set forth in Miss. Code Ann. § 71-3-35;
- II. When the 2 year Statute of Limitations begins to run; and
- III. Whether a latent injury/medical misdiagnosis would toll the running of the two-year statute of limitations in this claim.

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

Claimant is a 66-year-old female who was employed with Ingalls Shipbuilding as a logistics analyst when she slipped and fell while in the course and scope of her employment on April 7, 1999. Employer/Carrier treated this claim as compensable and provided only medical benefits associated therewith.

On August 2, 2006, over seven years after her initial injury, Claimant filed a Petition to Controvert. Employer/Carrier filed an Answer and Affirmative Defenses on February 7, 2007, admitting the occurrence of an April 7, 1999, work-related accident, but disputing continued compensability based upon the running of the two-year statute of limitations set forth in Miss. Code Ann. § 71-3-37 limiting the time to make a claim under the Mississippi Workers' Compensation Act. A Form B-52 was simultaneously filed with the Mississippi Workers' Compensation Commission (hereinafter referred to as "MWCC" or "Commission") on February 7, 2007, as further evidence of the Employer/Carrier's position regarding non-compensability.

Employer/Carrier filed its Motion to Dismiss Based Upon Two-Year Statute of Limitations on March 14, 2007. A ruling was withheld at the initial hearing of the motion in order to fully

develop the record with medical records and depositions. The Motion to Dismiss was re-noticed for September 18, 2007. Judge Homer Best dismissed this claim as being time-barred based upon the two-year statute of limitations.

Claimant appealed the ruling of Judge Best to the full Commission on or about February 11, 2008. On April 10, 2008, the full Commission affirmed his ruling. On April 15, 2008, Claimant appealed the affirmation of the MWCC to the Circuit Court of Jackson County, Mississippi. On June 29, 2009, Circuit Court Judge Kathy Jackson affirmed the decision of the MWCC.

STATEMENT OF FACTS

Claimant sustained an admittedly compensable injury while in the course and scope of her employment on April 7, 1999, when she slipped on carpet glue which caused her to fall, striking her head. Claimant's Petition to Controvert states, "Head was the injured part and whole body bruised and sore."

Claimant was examined at her employer's on-site medical clinic and by her family physician, Dr. Gary Groff. Pursuant to Section 5 (a) of claimant's Petition to Controvert, she was allowed to return to work and only missed a total of four hours from her employment as a result of this injury. This was confirmed in Claimant's deposition testimony¹. *R. at 47*

Claimant later came under the care of Dr. Terry Millette and Dr. Kent Ozon in 2004 as a result of this injury. She presented to Dr. Terry Millette on May 18, 2004, and provided a history

¹In her deposition, the Claimant appeared somewhat confused as to the amount of time she may have missed from work, however she claims she did not miss more than a week and her Petition to Controvert clearly states "only 4 hours." Claimant admits missing only 4 hours of work in her appellant's brief.

of a fall at work, which resulted in a diagnosis of occipital trauma and cerebral hematoma. Dr. Millette further diagnosed her as suffering from central disequilibrium and tension type headaches with a prior history of a closed head trauma. R 56-59.

Claimant saw Dr. Kent Ozon on June 18, 2004. She provided a history of a fall five years prior and complained of dizziness and vertigo. She also provided a history of suffering a "brainstem contusion." Dr. Ozon diagnosed her with central disequilibrium syndrome with vertigo. She again treated with Dr. Ozon on July 19, 2004, with similar complaints and diagnoses. R 61-85.

No indemnity or other compensation benefits were ever paid or owed as a result of this work-related injury. No application for benefits was filed with the MWCC until Claimant filed a Petition to Controvert on August 2, 2006. Based upon Miss. Code Ann. § 71-3-35, Carrier/Employer filed a Motion to Dismiss this claim based upon the two-year statute of limitations, and said motion was granted.

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SUMMARY OF THE ARGUMENT

Miss. Code Ann. § 71-3-35 reads, in pertinent part, “regardless of whether notice was received, 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 the injury or death, the right to compensation therefor shall be barred.” Claimant was injured on April 7, 1999. She sought medical treatment for this condition. No indemnity benefits were ever paid or owed. She did not file an application for benefits until August 2, 2006. Accordingly, the two-year statute of limitations should apply and her claim should be dismissed. Even assuming *arguendo* she did not realize the cause or gravity of her condition until May or June 2004, more than two years elapsed from that realization of the cause of her injury and the filing of a Petition to Controvert on August 2, 2006.

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ARGUMENT

STANDARD OF REVIEW

An Appellate Court's scope of review is limited to whether there is substantial evidence to support a finding of the Workers' Compensation Commission. The findings of the Commission will be reversed by an Appellate Court only if the findings are clearly erroneous and contrary to the overwhelming weight of evidence. If the findings are supported by substantial evidence², then they are beyond the power of the court to disturb. *Hardins Bakery v. Taylor*, 631 So. 2d 201 (Miss. 1994). See also *Sealed Power Corp. v. Young*, 744 So. 2d 813 (Miss. Ct. App. 1999). This Court "must affirmed the decision of the Commission where substantial credible evidence supports the Commission's order." *Barber Seafood, Inc. v. Smith*, 911 So. 2d 454, 461 (Miss. 2005), referring to *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1123-4 (Miss. 1992).

Questions of law are to be reviewed *de novo*. See e.g. *Clements v. Welling Truck Service, Inc.*, 739 So. 2d 476 (Miss. Ct. App. 1999).

²Multiple decisions have discussed "substantial evidence," including: *Attala County Nursing Center v. Moore* 760 So. 2d 784, 788 (Miss. Ct. App. 2000) ("Substantial evidence, though not easily defined, means something more than just a 'mere scintilla' of evidence, [yet] it does not rise to the level of a 'preponderance of the evidence.'" quoting *Delta CMI v. Speck*, 586 So. 2d 768, 773 (Miss. 1991)).

ARGUMENT

I. Appellant not required to file First Report of Injury (Form B-3).

Claimant alleges the failure of the Employer/Carrier to file a First Report of Injury (Form B-3) should automatically toll any statute of limitation.

To the contrary, Procedural Rule 1 of the MWCC specifically dictates, "employers shall report all on-the-job deaths of and injuries to their employees to the Mississippi Workers' Compensation Commission as provided for in § 71-3-67 of the Law and on forms prescribed by the Commission."

Miss. Code Ann. § 71-3-67 (1) provides, in pertinent part,

In the event of an injury which shall cause loss of time in excess of the waiting period prescribed in § 71-3-11 [five days], a report thereof shall be filed with the commission by the employer or carrier on a form approved by the commission for this purpose within ten (10) days after the prescribed waiting period has been satisfied. Within ten (10) days after the employer or carrier knows, or reasonably should know, that an injury has resulted, or likely will result, in permanent disability or serious head or facial disfigurement, but which does not cause a loss of time in excess of the prescribed waiting period, a report thereof shall be filed with the commission on a form approved by the commission for this purpose.

Furthermore, § 71-3-67 (2) states,

Injuries not otherwise provided for in this section, and for which only medical benefits are due, are not required to be reported to the commission. Records of such injury shall be maintained by the employer...

As set forth in the foregoing statute excerpts, and contrary to the allegations of Claimant, no duty to file a First Report of Injury ever arose on the part of the Employer/Carrier. Claimant has admitted she lost only four hours of work. Therefore, she has not missed time in excess of the

5 day waiting period prescribed in Miss. Code Ann. § 71-3-11. Claimant's injury did not result in permanent disability or serious head or facial disfigurement. Instead, this was a claim as contemplated by M.C.A. § 71-3-67 (2) "for which only medical benefits are due" and therefore one "not required to be reported to the commission."

Despite no statute or procedural rule requiring a First Report of Injury to be filed in conjunction with a medical only claim, Claimant does cite *Holbrook v. Albright*, 703 So.2d 842 (Miss.1997). However, in *Holbrook*, the employer/carrier had an affirmative duty to file a First Report of Injury due to the nature of the claimant's injuries. Due to the above cited authority, Employer/Carrier in the present case had no such duty, therefore the absence of such a filing would not toll the statute of limitations.

The Claimant also cites *Prentice v. Schindler Elevator Co.*, 14 So. 3d 59, 60 (Miss. Ct. App. 2008). In *Prentice*, the claimant fell and was injured, missing the requisite five days of work. His employer told him they had reported the case to their home office and that the claimant's bills would be taken care of. However, the employer neither reported the incident to the Mississippi Worker's Compensation Committee, nor did they pay the claimant's medical bills. The claimant filed a notice to controvert, which was met with a motion to dismiss for filing the petition after the 2 year statute of limitations had run. This Court held the employer was estopped from arguing the statute of limitations as it had failed to comply with the reporting requirements. *Id.* at 62. Again, the facts are different in *Prentice* than in the case *sub judice* in that in *Prentice*, the employer had a duty to report the injury.

Appellant additionally cites Appellees' failure to file a Form B-31 in this claim as some evidence of wrongdoing. However, where no indemnity benefits are paid or owed, the filing of a

Form B-31 is not necessary.

II. The 2 year statute of limitations began to run when the compensable injury becomes readily apparent, not when Claimant misses five working days

Claimant raises the novel issue in her appeal to this Court that the 2 year statute of limitations began to run after the Claimant missed five days of work due to her work related injury, sometime after August 2, 2006. However, case law clearly indicates the 2 year statute of limitations begins to run once a compensable injury becomes readily apparent.

“Regardless of whether notice was received, 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 the injury or death, the right to compensation therefor shall be barred.” Miss. Code Ann. 71-3-35(1).

In the workers' compensation context, the two-year statute of limitations can be tolled in instances where a claimant sustains a latent injury or a progressive injury. A latent injury is an injury that a person would not be aware of at the moment it was sustained. **The statute of limitations begins to run when the claimant is or reasonably should be aware of having sustained a compensable injury**, but the statute is deemed not to have begun running if the claimant's reasonably diligent efforts to obtain treatment yield no medical confirmation of compensable injury. A progressive injury occurs when the claimant was aware that he acquired an injury that was work related. The statute of limitations for a progressive injury begins to run when a reasonable person would recognize the seriousness and probable compensable nature of the injury.

Baker v. IGA Super Valu Food Store, 990 So. 2d 254, 260 (Miss. Ct. App. 2008) (*emphasis added, internal citations omitted*); also see *Cooper v. Miss. Dep't of Rehab. Servs.*, 937 So. 2d 51 (Miss. Ct. App. 2006).

Claimant admits she was diagnosed with a latent injury on May 18, 2004. Therefore, pursuant to her own admission, the statute period began to run no later than May 18, 2004 and ended two years later. She failed to file a Petition to Controvert until August 2, 2006. She cannot re-start her 2 year statute of limitation period on her Petition to Controvert simply by

missing 5 days of work. She admitted to missing only four (4) hours of work due to her injury between April 7, 1999 and August 2, 2006. The Claimant is asking this Court to allow an out-of-time filing of a Petition to Controvert because she missed 5 days of work over seven years after her injury and over two years after the diagnosis of the alleged latent injury.

This issue was first brought up in this appeal. Appellate courts “will not address an issue first raised on appeal.” *Myers v. State*, 832 So. 2d 540, 543 (Miss. Ct. App. 2002) (Emphasis in original) citing *Holland v. State*, 705 So. 2d 307, 352 (Miss. 1997); see also *Wilburn v. Wilburn*, 991 So. 2d 1185, 1192 (Miss. 2008). As the date the 2 year statute begins to run has not been raised previously, this Court is procedurally barred from considering the Claimant’s novel issue.

III. Regardless of whether the statute began to run on the date of injury or the date of later diagnoses, the statute of limitations has still expired

Claimant argues there is “no duty to file her Petition to Controvert for an injury which was misdiagnosed.” However, Appellant admits that her “duty to file her Petition to Controvert did not arise until [after her evaluations] by Drs. Millette and Ozon.. .”

First, no evidence has been provided to show that a medical misdiagnosis has occurred. Claimant received medical treatment by her family physician, Dr. Groff, and her employer’s on-site medical clinic immediately following this incident. There is no evidence in the record that any initial medical analysis was actually a misdiagnosis.

Second, Claimant states that “she had no duty to file her Petition to Controvert prior to August 2, 2006.” She also alleges her “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,” which occurred in May and June of 2004. The record indicates no new diagnosis of any injury since May or June of 2004. Even if the latter date is the date on which the statute of

limitations begins to run, the two year statute has still run. Taking the June 18, 2004, date as the “discovery date” of the injury in question, Claimant waited until August 2, 2006, to file an application for benefits. This was outside the two-year statute of limitations; therefore, this claim is time-barred.

Claimant has also alleged that her brain contusion was “discreet.” Accordingly, she argues that her obligation to file her Petition to Controvert could not have begun until after she had been evaluated by Drs. Millette and Ozon and suffered lost time from work. Again, the evaluations by Drs. Millette and Ozon occurred in May and June of 2004 and Appellant did not file her Petition to Controvert/application for benefits with the Commission until August 2, 2006, which is outside of the two-year statute time period. Accordingly, Appellant’s claim should be time-barred.

In support of Appellant’s latent injury position, *Struthers v. Bradford*, 304 So.2d 645 (Miss. 1974) is cited. The *Struthers* decision involves a spider bite to an ankle. The claimant did not immediately understand the gravity of her injury until it later became reasonably discoverable that she had sustained a compensable injury and resultant disability. The court in *Struthers*, held “the statute of limitations does not begin to run until by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained.” *Id* at 649. “The claim period runs from the time compensable injury becomes reasonably apparent.” *Id* (citing *Tabor Motor Co. v. Garrard*, 233 So. 2d 811 (Miss. 1970)). Employer/Carrier agrees with this determination of the commencement of the statute of limitations, and would further show that the statute of limitations in the case at hand should have begun, at the latest, when Drs. Millette and Ozon made their diagnoses in May and June of 2004, which would mean the statute would

have run months before the August 2, 2006, Petition to Controvert was filed.

CONCLUSION

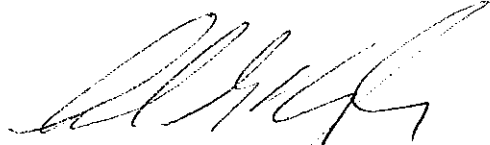
Appellant sought medical treatment immediately after her injury and did not elect to file a Petition to Controvert for seven years post-injury and for over two years after the new diagnoses by Drs. Millette and Ozon.

Furthermore, regardless of whether there was a misdiagnosis or a latent injury, the Appellant admits the true nature of the alleged injury was known to her by May or June of 2004. Even if the statute of limitations does not begin to run until this date, she still missed the statute of limitation when she filed her Petition in August of 2006.

As a result, the Appellant's claim is time-barred under the two year statute of limitations as set forth in Miss. Code Ann. §71-3-35.

Respectfully submitted,

INGALLS SHIPBUILDING/NGSS and
CONTINENTAL CASUALTY COMPANY



Andrew G. McCullough

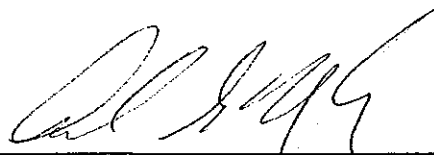
Andrew G. McCullough, MSB # [REDACTED]
MARKOW WALKER, P.A.
P. O. Box 13669
Jackson, MS 39236-3669
(601) 853-1911
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Memorandum Brief to:

Tommy Dulin, Esq.
P.O. Box 820
Gulfport, MS 39502-0820,
Attorney for Appellant

This the 4 day of January, 2010.



Andrew G. McCullough