

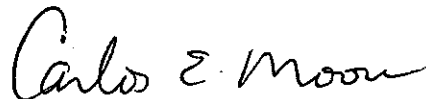
CERTIFICATE OF INTERESTED PERSONS

Anthony Thadison v. Universal Lighting Technologies, Inc., 2010-WC-01563-COA

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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 and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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STATEMENT OF THE ISSUE

I. Issue

Whether the Circuit Court erred in granting the Appellees' Motion to Dismiss due to filing an untimely brief when the Appellees failed to renew the motion before the Court heard and ruled on the merits of the case.

II. Issue

Whether the Circuit Court erred in affirming the Full Commission's decision, which held Appellant's work-related injuries were noncompensable, due to a lack of medical testimony.

STATEMENT OF THE CASE

This is a Workers' Compensation Case on appeal from an Order of the Circuit Court of Lincoln County, erroneously affirming the Full Commission Order, which affirmed the Administrative Judge's holding that Appellant Anthony Thadison (hereinafter Appellant Thadison) failed to report his injury to his employer, and failed to prove causation of his injuries to any work related activity, to a reasonable degree of medical probability, and; therefore, denied the claim.

On or about October 1, 2006, Appellant Thadison sustained injury while employed with Universal Lighting Tech, which aggravated the pain in his neck that he had been suffering from since 2005 as a result of his job duties with Universal Lighting Tech. (Rec. 3). The aggravation of the pain resulted from Appellant Thadison's driving of a forklift, which requires an excessive amount of turning and straining of the neck and spine. (Rec. 3). Appellant had a weekly wage of \$311.58. As a result of the foregoing, Appellant Thadison filed his Petition to Controvert on or about February 20, 2008. (Rec. 3).

On March 23, 2009 a hearing on compensability was held at the Mississippi Workers' Compensation Commission in Jackson, Mississippi. After hearing evidence from both parties, reviewing the medical records, and hearing Appellant Thadison's testimony, the Administrative Judge erroneously determined that Appellant Thadison had "failed to meet his burden of proof on the threshold issue of compensability," and; therefore, denied and dismissed his claim. The Administrative Judge erroneously based his opinion on Appellant Thadison allegedly not reporting his "work injury" to any doctors, or Universal Lighting, and because he allegedly "failed to provide proof of causation to reasonable degree of medical probability." The

Administrative Judge, Judge Best, signed the Order dismissing the claim as non-compensable on August 20, 2009.

After the Administrative Judge erroneously ruled in this matter, Appellant Thadison timely filed a Petition for Review of the Administrative Judge's ruling by Full Commission on August 26, 2009. Shortly thereafter, Appellant Thadison filed a Motion to Supplement Record with Additional Medical Evidence on September 11, 2009. In said motion, it was noted that during Appellant Thadison's compensability hearing, he testified that although he did receive treatment from Dr. Senter, who was also deposed before the compensability hearing, it was actually Dr. J. Patrick Barrett, Dr. Senter's partner, who actually connected Appellant Thadison's current injuries to his former job at Universal Lighting Technologies. The undersigned counsel was not able to converse with Dr. Barrett for the first time until April 27, 2009, (after the compensability hearing) during which Dr. Barrett confirmed Appellant Thadison's sworn testimony that he had connected Appellant Thadison's injuries to his former job at Universal Lighting

The hearing before the Full Commission was held December 14, 2009. The Full Commission affirmed the ruling of the Administrative Judge, and granted Appellant Thadison's Motion Supplement Record with Additional Medical Evidence. The Order was entered December 18, 2009. The Claimant then file a Notice of Appeal to the Circuit Court. The hearing before the Circuit Court of Lincoln County was held August 16, 2010. The Circuit Court heard the case on the merits and then affirmed the ruling of the Full Commission. After the Circuit Court heard the case on the merits and ruled in favor of the Appellee, the Court then granted Appellee's Motion to Dismiss due to Appellant's filing an untimely brief. The Appellee in this

case failed to renew its Motion to Dismiss before the Circuit Court Judge heard and made his ruling based on the merits of the case. The Order was entered on August 24, 2010.

SUMMARY OF THE ARGUMENT

The Appellant Thadison sustained a compensable aggravation of a work injury as defined by Mississippi Code Annotated (MCA) § 71-3-7. Appellant Thadison succeeded in proving by a preponderance of evidence, that he suffered permanent partial disability or loss of wage earning capacity as a result of his injury. Appellant Thadison's claim is supported by medical evidence and testimony. Appellant Thadison's medical records substantiate that Appellant Thadison informed his doctors that his job duties aggravated his work injury. Further, the additional medical evidence from Dr. J. Patrick Barrett proves that Appellant Thadison's job duties aggravated the pains in Appellant Thadison's neck and spine.

The Circuit Court heard the merits of the case and erroneously ruled in favor of the Appellee. Thereafter, the Court erred in granting Appellee's Motion to dismiss due to Appellant filing an untimely brief because the court had already heard the merits of the case. Alternatively, the Court erred in granting Appellee's Motion to dismiss due to Appellee's failure to renew or timely bring forth its Motion to Dismiss before the Court heard the case on the merits constituting a procedural defect or waiver of Appellee's motion to dismiss.

ARGUMENT

"In reviewing the decision of a chancery or circuit court regarding an agency action, this Court applies the same standard employed by the lower court. [The] Court will not disturb an agency's ruling unless the decision of the administrative agency "(1) was unsupported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the administrative agency to make; or (4) violated some statutory or constitutional right of the complaining party."" *Parchman v. Amwood Products, Inc.*, 988 So.2d 346, 356 (Miss. 2008) (citing *Mississippi Sierra Club v. Mississippi Dep't of Env'tl. Quality*, 819 So.2d 515, 519 (Miss.2002)).

"[The] Court will overturn a Commission's decision for an error of law, *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss.1991); *Mississippi Workmen's Compensation* § 272 (3d ed. 1982), or an unsupportable finding of fact. *Metal Trims Industries v. Stovall*, 562 So.2d 1293, 1297 (Miss.1990)." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991).

I. Whether the Circuit Court erred in granting the Appellee's Motion to Dismiss due to filing an untimely brief when the Appellee failed to raise the motion before the Court heard the case and ruled on the merits of the case.

Issues not raised on direct appeal or at trial court are procedurally barred and not subject to further review by court; additionally, claims which were available, but not previously asserted on direct appeal, are waived. *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987). No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of

the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660 (1944).

The Appellee made a Motion to Dismiss argument before the Circuit Court on the grounds that the Appellant's brief was filed untimely under Mississippi Rules of Appellate Procedure 282. The Appellee in this case failed to renew its motion to the Circuit Court Judge on the Appellee's Motion to Dismiss claim before the Circuit Court heard and made its ruling based on the merits of the case. Appellee's failure to renew its Motion to Dismiss, served as a procedural waiver to the claim.

II. The Circuit Court erred in affirming the Full Commission's decision, which held Appellant's work-related injuries were noncompensable, due to a lack of medical testimony

While the substantial evidence rule serves as basis for appellate review of Workers' Compensation Commission's order, it is not an impossible burden to meet. The rule is not so inflexible as to prevent the court from checking any fundamentally erroneous exercise of administrative power, either as to findings of fact or application of fact; rather, the ultimate goal on review is to ascertain whether or not the beneficent purpose of Workmen's Compensation Law has been carried out. *Riverside of Marks v. Russell*, 324 So.2d 759 (Miss. 1975). One of the primary bases for Judge Best's decision to deny Appellant Thadison's claim was Appellant Thadison's alleged failure to report his injury to his doctors. However, there are several mentions of Appellant Thadison's occupation in his medical records. Perhaps most significantly, Dr. J. Patrick Barrett, one of Appellant Thadison's treating physicians, confirmed that it is

probable that Appellant Thadison's job duties aggravated his condition, and "contributed to his need for anterior cervical fusion."

To recover, a workers' compensation Appellant Thadison must prove: (1) an accidental injury, (2) which arises from the course and scope of employment, and (3) there must be a causal relationship between the injury and the alleged disability. *Spencer v. Tyson Foods*, 869 So.2d 1069 (Miss. App. 2004)(reversed circuit court's favorable ruling of employer/carrier's appeal and reinstated order of Commission, holding substantial evidence supported Workers' Compensation Commission's conclusion that Appellant Thadison's injury met the definition of an accidental injury).

In *Spencer*, the claimant, Delores Spencer, was employed as a breast puller. *Id.* at 1071. On April 20, 2000, Spencer was pulling a chicken breast when she suddenly felt pain in her neck, right shoulder, arm and hand. Spencer claims that she immediately informed her supervisor, Tommie Sanders, that her hand had gone numb. *Id.* Spencer was treated by her family physician, Dr. L.C. Tennin, who opined that Spencer's condition resulted from the cumulative effects of repetitive work motions which exacerbated an underlying condition, cervical spondylosis. *Id.* Spencer was then referred to a neurologist, who opined there was no question work activities could exacerbate pre-existing spondylosis. *Id.* When the Court of Appeals of Mississippi reviewed this case, they considered the three elements Spencer was required to prove: (1) an accidental injury, (2) which arises from the course and scope of employment, and (3) there must be a causal relationship between the injury and the alleged disability. The *Spencer* Court held that under the Mississippi Workers' Compensation Act, "an injury may be accidental although it occurs in the usual course of employment and involves only the usual exertion." Vardaman S. Dunn, Mississippi Workers' Compensation § 148 (3d ed.1982 and Supp.1990). *Id.* The Act's

definition of injury also includes the aggravation of pre-existing conditions. *Id.* also citing *Hedge v. Leggett & Platt, Inc.* 641 So.2d 9 (Miss. 1994). The Court also held that because Spencer was a “breast puller,” and her numbness occurred while she was pulling a chicken breast, she was in the course and scope of her employment. *Id.* at 1074. Regarding the causal relationship between the injury and the disability, the *Spencer* Court held that there was substantial evidence to prove she had a compensable injury. *Id.* The instant case is certainly analogous to *Spencer*.

Appellant Thadison’s injury in the instant case, as in *Spencer*, was an accidental injury and the result of aggravation of the pain in Appellant Thadison’s neck when he began working as forklift driver at Universal. Appellant Thadison was certainly in the course and scope of his employment, as the injuries occurred while turning and straining his neck and spine while operating the forklift, just as Spencer’s numbness occurred while pulling chicken breasts. Further, Appellant Thadison’s medical records provide substantial evidence of the causal relationship between Appellant Thadison’s injury and his disability, as Appellant Thadison’s complaints of neck pain began in July of 2005, when he had begun working as a forklift driver.

The Administrative Judge places emphasis on Appellant Thadison allegedly not reporting the incident that occurred in 2006 when he hit a bump while operating the forklift, and “felt a jar” to his body; and sometime subsequent to that incident, Appellant Thadison “felt a pop” in his neck when he looked up, while operating the forklift. However, during Appellant Thadison’s sworn deposition testimony, he stated that he told John Flowers, the supervisor, of the pain in his neck. Therefore, not only did Appellant Thadison’s supervisor have knowledge of his pains relating to his job duties, but so did Appellant Thadison’s treating physicians according to the medical records. The mere fact that Appellant Thadison did not report the incidents in 2006

regarding the “jar” to this body, or the “pop” in his neck, should not be misconstrued as Appellant Thadison failing to show causation. Appellant Thadison’s aggravation of his neck pain is fully compensable under the Mississippi Workers’ Compensation Act, and his claim should not have been denied.


In addition, the thirty-day notice requirement to report work related injuries is inapplicable in this case. The Mississippi Supreme Court specifically states that “No notice is required until there is a disability where the injury is progressive and cannot, with reasonable certainty, be first recognized as compensable.” *Pope v. Wells*, 92 So.2d 370 (Miss. 1957). In *Pope*, the claimant sustained an injury in 1954 but did not give notice to the employer until 1955. The Court held that “failure to make claim upon an employer for workmen's compensation within the prescribed period is not a defense if the accidental injury is latent and progressive and cannot with reasonable certainty be recognized at first as compensable.” *Id.* Furthermore, the court held that because the claimant’s injury was a progressive injury, “The employer could not plead the statute requirement of filing a claim within thirty days after the injury as a bar to a claim.” *Id.* Similar to the *Pope* case, Appellant Thadison’s injury is a progressive injury whereas the complaints of pain and the symptoms consistently worsen over time.

On or about October 1, 2006 Appellant Thadison sustained an injury while working for Universal Lightning Technologies. His neck pains did not start until he began work as a forklift operator in 2005. He was treated for neck problems in July of 2005 and again in August and October of 2005. The complaints of pain continued and the symptoms progressively worsen with time. In July 2005, he began treatment with a physician, Dr. Liverman, and again in August of 2005. Appellant Thadison received an MRI on his cervical spine in October of 2005 and subsequently surgery in 2006.

CONCLUSION

For the foregoing reasons, the Appellant, Anthony Thadison, is asking this Honorable Court to reverse the decision of the Lincoln County Circuit Court and render a decision granting workers' compensation benefits to the Appellant.

Respectfully submitted, this the 6th day of April, 2011.


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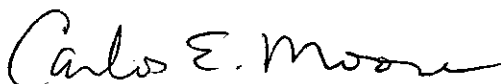
CERTIFICATE OF SERVICE

I, Carlos E. Moore, Appellant's attorney, 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 document to the following:

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Judge Michael M. Taylor
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Circuit Court Judge

THIS, the 6th day of April, 2011.



Carlos E. Moore, Esq.
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