IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CC-00739 COA

FRITO-LAY, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY

APPELLANTS

v.

LILLIE L. DIXON A/K/A LILLIE LOU DIXON

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES GRAVES

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT (1ST DIST.)

ATTORNEYS FOR APPELLANTS:

KEITH R. RAULSTON

J. RANDALL PATTERSON

ATTORNEY FOR APPELLEE:

JAMES E. ROSS, JR.

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: CIRCUIT COURT REVERSED MWCC

EN BANC:

DIAZ, J., FOR THE COURT:

The Mississippi Workers' Compensation Commission denied benefits to Lillie Dixon. It found that Dixon knew of her work-related injury for more than two years prior to filing for benefits, which meant that the claim was barred by the statute of limitations. Miss. Code Ann. § 71-3-35 (1972). The circuit court reversed, holding that the decision was not supported by substantial evidence. We agree with the circuit court and affirm.

FACTS

Dixon began working at Frito-Lay as a potato chip packer in 1978. On November 10, 1989, Dixon filed a workers' compensation claim, alleging that she had developed pain in her hands. She first sought medical treatment for the pain in 1981. Dixon lost several weeks of work and then returned to Frito-Lay. The problem with her hands recurred, and she continued to miss several days of work every few months due to the pain. In 1988, the pain became intolerable, and Dixon sought further medical treatment. She was diagnosed with carpal tunnel syndrome, a repetitive motion injury. Dixon claims this diagnosis began the running of the statute of limitations despite that the problem originally occurred in 1981.

The record does not contain any medical evidence that Dixon was informed that her physical problems were work-related prior to 1988. Although Dixon believed her problems were possibly work related as early as 1981, no physician made the connection.

The commission concluded that Dixon knew or should have known in 1981 that she suffered an employment injury. The circuit court reversed the commission's decision because Dixon was not diagnosed with carpal tunnel syndrome until 1988 and thus, did not know and should not have known of her injury prior to 1988.

DISCUSSION

We will overturn a decision of the commission only for an error of law or a finding of fact unsupported by substantial evidence. *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991). The decisive issue before this Court is whether the commission erred by allowing the two-year statute of limitations to be invoked when the employee believed she had a work-related injury in 1981, but did not discover the compensable nature of the injury until 1988. *See* Miss. Code Ann. § 71-3-35(1) (1972). The general rule in Mississippi for latent discovery of work-related injuries is that the claim period begins when a compensable injury becomes reasonably apparent. *Tabor Motor Co. v. Garrard*, 233 So. 2d 811, 817 (Miss. 1970). The statute of limitations is tolled until the claimant has reason to know the likelihood of a compensable injury "from which incapacity and its extent can reasonably be ascertained by medical evidence." *Struthers Wells-Gulfport, Inc. v. Bradford*, 304 So. 2d 645, 649 (Miss. 1974).

The commission finds the pain Ms. Dixon experienced in 1981 was a compensable injury because she "knew or as a reasonable person should have known that the swelling of her hand was work connected." This is despite the fact that in 1981 Ms. Dixon did not have an injury for which she was entitled to compensation. To hold that Ms. Dixon's claim is barred by the statute of limitations is contrary to this State's workers' compensation laws. Additionally, the commission found that Ms. Dixon knew that she had a compensable injury for more than two years prior to the filing of her claim. This is absolutely incorrect. To hold that Ms. Dixon had a compensable injury as early as 1981

shocks the conscience and is a gross misapplication of the facts of this case to the law.

This case is analogous to *Bolivar County Gravel Co. v. Dial*, where the court rejected the time-bar argument when the disability was gradual and the result of cumulative exposure, rather than from one particular event. *Bolivar County Gravel Co. v. Dial*, 634 So. 2d 99, 104 (Miss. 1994). In that case, the claimant worked for a gravel company from 1959 to 1987. Throughout the years, he visited doctors complaining of coughing, shortness of breath, and dizziness, among other complaints. Following a recovery period, the claimant would always return to work. *Dial*, 634 So. 2d at 104. In *Dial*, the claimant's disability did not fully manifest itself until 1987, when he could no longer perform his duties at work. *Id.* The court stated that although the claimant was affected by and treated for exposure to welding smoke long before 1987, there was no occupational disability that would have caused him to file for workers' compensation benefits until he could no longer perform his duties for his employer. *Id.*

The present case is comparable to *Dial* for several reasons. First, although Ms. Dixon noticed pain as early as 1981, she also would return to work after a brief recovery period. The problem never caused her any loss of wage earning capacity. At one point, a doctor diagnosed the problem as arthritis. Second, Dixon's injury was the result of the "cumulative effect" of repeatedly operating the machine at Frito-Lay; it gradually worsened over time. *See Jenkins v. Ogletree Farm Supply*, 291 So. 2d 560, 563 (Miss. 1974). Her carpal tunnel syndrome did not fully manifest itself until 1988 when her pain was "intolerable" and the doctor finally diagnosed this condition. This is when Dixon's occupational disability for which she could seek compensation arose, and this is when she properly filed her claim.

The basic rule for latent discovery in workers' compensation cases states that 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 a treatment yield no medical confirmation of compensable injury." *Taplin*, 586 So. 2d at 827 . "This state's laws do not penalize workers when they, with their physicians' assistance, cannot confirm that their injuries are compensable." *Id.*

The commission found that the statute of limitations began to run when Lillie Dixon was first bothered by the pain in her hands and wrists. Under this analysis, there need not even be an injury for which compensation is payable in order for the statute of limitations to begin to run, there only need be some minor pain or discomfort associated with one's employment to commence the running of the statute. This is an incorrect interpretation of our worker's compensation law.

To hold that Ms. Dixon's claim is barred because she did not file a claim in 1981 (before she knew that she suffered from carpal tunnel syndrome) is unjust. It not only encourages but mandates the filing of workers' compensation claims prematurely or before a compensable injury has actually occurred. Under this rationale employees would be required to file claims immediately upon the slightest injury, pain, or discomfort, which they think might be work-related, or risk having the claims barred by the statute of limitations. In short, the commission's interpretation penalizes employees who attempt to continue to perform their work responsibilities and punishes those who attempt to avoid litigation. At the same time, the commission's holding encourages the filing of claims and legal action regardless of whether the claim or action is ripe for adjudication. This interpretation would actively encourage the filing of frivolous claims.

In the instant case, had Ms. Dixon filed a claim in 1981, to what type of benefits would she have been entitled? She did not have a permanent disability and therefore was not eligible for permanent benefits. Nor did she qualify for temporary benefits, as she returned to work after a very brief period of recuperation. The act does not provide for any other type of remedy or benefit. The fact is that in 1981 Ms. Dixon did not have an injury for which she was entitled to compensation. Ms. Dixon had pain in 1981 and that pain did not become an injury for which she was entitled to compensation until 1988. Therefore, Ms. Dixon had a compensable injury in 1988, not 1981. As to Ms. Dixon's claim, the statute of limitations did not begin to run until 1988. This is when she was diagnosed with and knew that she had a compensable injury. This is when she filed her claim. Consequently, her compensation claim is not time-barred. To hold otherwise would be a distortion of the workers' compensation act.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, AND PAYNE, JJ., CONCUR.

SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., AND MCMILLIN, J.

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SOUTHWICK, J., dissenting

The majority holds Dixon had no compensable injury until 1988. Were that true, the majority's result would be valid, and I would join it. However, there is substantial evidence to support the commission's contrary conclusion. I dissent.

The majority's view is expressed in several different ways, but two principal arguments are used. One argument is that until 1987 we do not know what any physician diagnosed Dixon's problem to be. The other argument is that factually Dixon was not industrially disabled -- there was only pain, and not disability, until 1988. Neither argument recognizes as important the date that Dixon knew she had suffered a work-related injury.

First, we should acknowledge the unrebutted evidence. The claimant herself testified that she knew she suffered a work-related injury in 1981, and that after seeing a doctor she remained unable to work for about two weeks. Thereafter, on a recurring basis she would every two months or so have a flare-up of the same injury and have to get help from other workers. The pain became "intolerable" in 1989, but it existed and interfered with her work the whole time. This is what the claimant said in a deposition:

> Q. When did you first start experiencing pain in your hands?
>
> A. Probably about the middle of '80 or '81.
>
> Q. Did you ever experience hand pain similar to that pain before?
>
> A. No.
>
> . . . .
>
> Q. What type of pain . . . were you experiencing in mid[-]'80, '81?
>
> > A. My hand would swell, and I would have [throbbing] pain that would run through my hand and fingers.

When asked what happened after she reported her symptoms, Dixon testified that she told her supervisor "that my hand was swollen, told him that it was hurting and he let me [go] home and I went to the doctor."

Q. At that time did you think it was your work that was making your hands swell and hurt?

A. Yes, sir.

. . . .

Q. [At that time did your doctor] tell you to stay off work?

A. Yes, sir. I stayed off about two weeks.

. . . .

Q. When you went back to work, did the pain persist?

A. I was having a little pain but it wasn't as bad [because I was taking pain medication].

. . . .

Q. . . . . How long did you work after [your physician in 1981] released you?

A. About a month or two months.

Q. Then you got to where you couldn't work?

A. No. I would still go to work but they would put me on something light to do or something like that.

Q. Did your plain flare back up?

A. Yes, off and on.

Q. Was it the same type of pain?

A. Yes, sir.

. . . .

Q. Let me get this straight. While you were working packing during these months or two-month period, you would still have the pain but you could control it with your medication, right?

A. No. Just like I had the pain sometimes, you know, I would be working and some of my friends would change with me. Just like if I'm doing big bags, they would just let me work on the little bags; or the slowest line that was going, I could switch over with that person or something like that.

Q. So, this is even when you weren't on light duty you would still switch around with your friends?

A. Yes, sir.

This case is in one sense a hard case, which sometimes results in bad law, as a person who seems beyond contest to be industrially disabled may be barred from benefits due to her own inaction. However, there is a statute of limitations in the workers' compensation scheme. Whether a statutory program for compensating workers has to have a limitations statute may raise interesting and novel legal questions, but those questions should be academic here. The point is Mississippi has a two-year statute of limitations for workers to file claims.

The first problem the majority sees is that there is no evidence of what any physician believed Dixon's problem to be until a diagnosis in 1987. However, since 1981 Dixon believed her wrist and hand problems were due to a work-related injury suffered that year. The limitations statute has been interpreted by the court that is superior to this one, to commence running when the employee knew of her injury and that it was work-related. *Georgia Pac. Corp. v. Taplin,* 586 So. 2d 823, 827 (Miss. 1991). The majority on this intermediate court now adds a new requirement, that besides the claimant's knowledge, there must be "efforts to obtain medical treatment" that confirm the compensability. *Taplin* is cited for that proposition, but the referenced section of the opinion is discussing latent injuries. *Taplin,* 586 So. 2d at 827. The "latent injury" principles only apply when a claimant's injuries from a work-related accident do not become noticeable until long after the accident. *See, e.g., Pepsi Cola Bottling Co. v. Long,* 362 So. 2d 182, 183-84 (Miss. 1978). In such a case there is no obligation to file a claim until the symptoms of the injury begin to surface. *Taplin* logically allows delaying the commencement of the limitations period until a medical opinion confirms compensability of the disability. The injury may have been so subtle or so long ago that the claimant now cannot relate his condition to that event. The medical confirmation does that for him. However the rule has no application where, as here, the injury is not latent and the disability immediate. With all respect for the majority, how is an injury that causes the claimant repeatedly to miss work since 1981 a latent injury until 1988? The citation to *Taplin* is to an irrelevant doctrine.

The evidence as found by the commission could be placed on a time line. The only evidence shows that from 1981 until 1986 the same industrially disabling injury that continued to 1989 was considered by the claimant to be work-related. We do not know what a doctor thought prior to 1987. The supreme court does not require a physician's confirmation for the limitations statute to commence. Thus, the claim was barred by 1983.

At its heart, the issue can be boiled down to a conflict in the testimony of two of Dixon's treating physicians—a general practitioner and a carpal tunnel syndrome specialist. The commission chose to believe the testimony of the specialist. On the one hand, the general practitioner diagnosed Dixon's carpal tunnel syndrome for the first time in December 1988. He said the ailment was unrelated to the osteoarthritis he diagnosed in 1986. Were this the only proof under the majority's new rule requiring medical confirmation of the precise condition, Dixon's claim would not be barred. However, this is not the only proof on the issue. There is the testimony to consider of the specialist who subsequently treated Dixon. That specialist testified that Dixon's carpal tunnel syndrome developed over a long period of time, probably beginning around 1981. Thus he presented evidence that could be relied upon by the commission that Dixon's long-running, frequently incapacitating ailment was the same

carpal tunnel problem from the beginning. "[W]here medical expert testimony is concerned, this Court has held that wherever the expert evidence is conflicting, the court will affirm the commission whether the award is for or against the claimant." *Reichhold Chem., Inc. v. Sprankle*, 503 So. 2d 799, 801 (Miss. 1987) (citation omitted). The commission was faced with a fact issue that Mississippi workers' compensation law gives it the authority to resolve by weighing the evidence. It is not the role of this Court to reweigh the evidence and determine how it would have decided the case were it the fact finder. This is a case of conflicting medical expert evidence, and the commission was entitled to accept the testimony of one doctor as more persuasive on the issue of when Dixon's injury occurred.

The majority also erroneously relies on a case that says no limitations problem arises if, as described by the majority here, the injury is "gradual and the result of cumulative exposure." *Bolivar County Gravel Co. v. Dial,* 634 So. 2d 99, 104 (Miss. 1994). There are many distinguishing features of that case, which dealt with a worker's exposure to welding fumes. The most important for our purposes is that even though the worker had two previous episodes of breathing problems in 1980 and 1983, the doctor's testimony as relied upon by the supreme court was that the claimant had recovered and his breathing "seemed as good after he had recovered from that as it was before." *Dial,* 634 So. 2d at 104. Thus the specific work injury in 1986 was found to start a new statute of limitation. Here Dixon never recovered from her wrist injury, and was only able with frequent absences from work to manage her disability. Dixon's own description of her ailment proved it was a constant throughout the 1980's, with the variations coming in whether the pain was such as to cause her to miss work for several weeks, or whether she could work despite the problem. There is ample testimony that, while the claimant may have returned to her work site after her 1981 injury, she did not return to full performance of her work. Coworkers frequently helped her. Dixon took lighter tasks from others. Dixon did not fully recover or resume her full workload.

Similar facts arose in *Benoist Elevator Co. v. Mitchell,* 485 So. 2d 1068 (Miss. 1986). There the claimant had suffered a finger injury in 1959. In the intervening years the "finger did not function properly and there was recurring pain; but, he did not seek medical attention until the pain became so severe he could not sleep or work. . . ." *Benoist,* 485 So. 2d at 1069. The court then discussed another precedent:

> The facts of the instant case are closely kin to those found in *Quaker Oats Co. v. Miller,* 370 So. 2d 1363 (Miss. 1979). Therein the claimant suffered from a progressive disease of which he was aware. He had been in consultation with medical doctors who informed him of the nature and seriousness of his illness. Miller left his work on advice of his doctor for a four month sick leave and later retired. Miller did not know his disability entitled him to payment but regardless, the two year limitation on the claim was held to begin to run on the date he left work for sick leave. Miller knew the source of his illness and that the work he performed aggravated the condition. . . . The record before this Court clearly indicates Mitchell [the *Benoist* claimant] knew his hand had been injured since 1959 and he had suffered with pain and stiffness throughout the years.

Id. at 1069. The court found the claim barred by the statute of limitations. *Benoist* mandates that

when a claimant suffers an injury that he relates to his employment and continues to suffer pain and some disability following that injury, he has an obligation to seek compensation within two years of his injury. Otherwise, his claim is barred. In these circumstances, waiting until the consequences of the injury become completely debilitating carries with it the risk that the limitations period will have expired.

Since the majority does not concern itself with 1981-1986, its position necessarily implies that the time period is irrelevant unless the employer presents evidence that no doctor ever told Dixon, prior to the running of the limitations period in 1983, that her condition was not work-related. This double negative, confusing as it is, is the only possible bar to the limitations period running since the supreme court has never required that a doctor confirm an employee's reasonable belief of work-relatedness of an injury. I agree that if a doctor told Dixon prior to the running of the statute that the injury was in fact not work-related, i.e., not compensable, she need not bring suit. The question is whose burden it is to show a doctor disabused her of the notion that the injury was work-related. Implicitly the majority is saying it is the employer's. It cannot be the employer's burden to prove a negative -- contact all doctors it was physically possible for Dixon to have seen, and show no one diagnosed her as having a compensable injury. It must be Dixon's burden to come forward and show that despite her own knowledge -- which proved accurate -- a medical professional informed her before the limitations period ran that she did not have a compensable claim. Dixon put on no proof that anything of the sort occurred here. What did occur is that six years after the injury that she had always thought was work-related, a diagnosis was made that this apparently was not a compensable injury. If a claim brought between 1983 and 1986 would have been found time-barred -- and this one would have been -- what a doctor says in 1987 cannot revive it.

The majority makes the factual assertion that the "problem never caused her any loss of wage-earning capacity." Later the majority distinguishes *Quaker Oats v. Miller* by saying "Dixon's injuries did not become disabling until 1988." Were those assertions so, I would join the majority. However, this injury was not a mere irritant that did not become industrially disabling until years after its symptoms first arose. Dixon from the first was partially disabled on a regular basis. She was temporarily totally disabled from her injury for two weeks in 1981, suffering an *actual* loss of wages. After that period of temporary total disability, she was unable to return to performing all of her regular duties and was indeed under medical restrictions for much of her remaining tenure at Frito-Lay. Here she suffered a loss of wage earning *capacity* and was partially disabled. Arguably she did not become totally disabled until 1988-89, but there is not a separate statute of limitations that begins with total disability and which cancels out a previous limitations statute on partial disability. Her problems were industrially disabling, and that starts the limitations clock.

The majority's new rule, for all of its expediency in the present case, actually results in harming claimants. If the statute of limitations was not running until 1988, the majority must also conclude there was no right to seek compensation until 1988. In other words, despite Dixon's frequent problems in 1981, 1982, 1983, etc., she was not entitled to seek disability benefits. That is simply not the law, and it is contrary to the purpose of workers' compensation law to rehabilitate injured workers and to stave off risks to their ability to earn a living. I assume the majority agrees that is not the law, but such agreement would not change what they have done. Dixon was leaving work because of her injury, for periods of apparently two weeks or so. Is that not a temporary disability by definition? As one reviewer of the case law has said, "there may be successive periods of temporary

total disability arising from a single injury and if so, each period is compensable." Vardaman Dunn, *Mississippi Workmen's Compensation* § 75, at 89 (1990). If the majority admits Dixon could have sought benefits for her recurring disability, a disability she knew was work-related, then Dixon is barred now because she waited eight years until her disability became total. Otherwise, Dixon is faced with a denial of medical and wage benefits during her periods of temporary total disability because, according to the majority, her claim for benefits would not be ripe.

The majority also sidesteps the limitations problem based on a discussion in *Dial* of *Jenkins v. Ogletree Farm Supply*, 291 So. 2d 560, 562 (Miss. 1974). The *Dial* court says that the limitations statute was rejected in lower court proceedings in *Jenkins* because:

> [t]he claimant's condition gradually worsened and he filed within two years after terminating his employment. As in the present case the disability was gradual and the result of cumulative exposure rather than from a single event. *That case was different in that there was no appeal from the ruling [by the employer], and this Court was bound by the order of the Commission.*

Dial, 634 So. 2d at 104-05 (emphasis added). The majority would make this a holding that if there is a gradual worsening of a condition that is partially disabling, so long as a claim is filed within two years of quitting work it is not time-barred. Finding a stray remark and making it the law of the State of Mississippi only makes sense if it is consistent with the precedents that exist. As *Dial* noted, this issue was not even before the *Jenkins* court.

There is nothing in precedents or public policy to suggest that if an injury is disabling, no statute of limitations is running if each successive day it is more disabling than the previous day. The starting point for the limitations statute is a compensable injury -- regardless of whether the injury worsens the more the claimant works. For a latent injury, the date it becomes disabling is later than the date of the injury itself. Still, at some date its disabling effects become obvious and the time limit to file a claim starts running. Otherwise, no matter how apparent and serious an injury, a claimant could avoid the limitations statute by proving he was in a worse condition months or years after the injury than he was when the injury began.

If the majority is only making de novo factual conclusions, and finding no disabling injury occurred until 1988, in the scheme of appellate review that is probably better than overruling supreme court case law on when the statute of limitation begins. Neither approach is justified.

I have no desire in the abstract or concretely as to this claimant to deny coverage when it is permitted by statute and case law. My dissent is based on the legal conclusion that coverage is barred here for about as clear as reason as ever occurs. The claimant said she suffered the work-related injury that began her physical problems in 1981, and did not bring her claim within two years. We can assume the workers' compensation laws are not intended to discourage workers who keep minor aches and pains from interfering with their work. However, the effect of the limitations statute may suggest one of the goals is to discourage workers from ignoring physical ailments that are in fact industrially disabling, i.e., an ailment that frequently keeps them from being able the perform their duties, until the problems become totally disabling. The majority has assured that purpose of the

statute cannot operate. That is not the role I envision for courts. Neither do I think this result is in employees' long-term interests -- even if Lillie Dixon is benefitted this time.

I would affirm the commission.

FRAISER, C.J., AND MCMILLIN, J., JOIN THIS DISSENT.