

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CC-00930 COA**

**AMSERV AND COMMERCIAL UNION
INSURANCE COMPANY**

APPELLANTS

v.

EDWARD E. DEASON, JR.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	07/24/95
TRIAL JUDGE:	HON. BILL JONES
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	TIMOTHY W. LINDSAY
ATTORNEY FOR APPELLEE:	DAVID ELIAS KIHYET
NATURE OF THE CASE:	CIVIL - WORKER'S COMPENSATION
TRIAL COURT DISPOSITION:	BENEFITS AWARDED
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

HERRING, J., FOR THE COURT:

This is a workers' compensation case that was appealed by the employer/carrier to this Court from a decision of the Circuit Court of Jackson County, Mississippi. The circuit court reversed a decision of the Mississippi Workers' Compensation Commission which denied benefits to Edward E. Deason, Jr. The Commission ruled that Deason's claim was barred by the two year statute of limitations for workers' compensation claims. As stated, the circuit court disagreed and reversed. The employer/carrier now appeals that decision and re-asserts its position that Deason's claim is time barred. We disagree and affirm the decision of the of the circuit court.

A. THE FACTS

Edward E. Deason, Jr. was employed on November 25, 1989, by Amserv, an ambulance service for Harrison and Jackson Counties as a paramedic. On that day, Deason and his partner responded to a call at a TG&Y store in Jackson County. Upon arrival at the scene, Deason found a woman seated in a chair being treated by a sheriff's deputy who was sitting on a wooden box. When the deputy saw Deason, he said "Ed, take this seat." However, as Deason was in the process of sitting down on the box so that he could attend the patient, a manager of the TG&Y store removed the box, and Deason fell to the ground. As a result, he was knocked unconscious for approximately fifteen seconds and was later taken to the Singing River Hospital Emergency Room for treatment. He was treated and x-rayed at the emergency room by Dr. Wayne Cockrell and then released. Thereafter, he returned to work at Amserv. On March 9, 1990, several months later, Deason returned to the emergency room reporting severe back pain. According to his testimony, Deason received no medication as a result of the November 25, 1989, accident and was told that his x-ray revealed no fracture. He continued working although, according to his medical records, he was having some "difficulty." However, on the night prior to his return to the emergency room, Deason awoke and could not move due to pain in his back and upper leg.

Deason was seen on March 9, 1990, by Dr. John Cope, an orthopedic surgeon. Dr. Cope treated Deason for a period of approximately one year in an attempt to diagnose Deason's back problems. Dr. Cope's records refer to Deason's work-related accident which occurred on November 25, 1989, but clearly indicated that the cause of Deason's condition on March 9, 1990, was not determined until Dr. John McClosky, to whom Deason was referred in May, 1991, performed a myelogram on Deason in September, 1991. The myelogram, a test in which dye is injected into the areas surrounding the spinal column, revealed for the first time that Deason suffered from a herniated or ruptured disc. Dr. McCloskey recommended that Deason undergo surgery to correct this back problem. While Cope had previously indicated that back surgery might be necessary, he was not able to positively recommend surgery because the problem to be corrected had not been located until the myelogram was performed. After the myelogram, Dr. McCloskey recommended that Deason undergo surgery to correct his back problem.

Surgery was performed by Dr. McCloskey in August, 1992. According to the testimony, the delay in surgery resulted from Deason's personal problems, and not because of any medical necessity. Deason's recovery from the surgery lasted approximately three months, after which he returned to work at J & R Ambulance Service where began working in January, 1992. Prior to that date, he had worked for Amserv for fourteen years.

The record reveals that Deason did not file a petition to controvert with the Mississippi Workers' Compensation Commission until March 15, 1993, although the accident in question occurred on November 25, 1989. The administrative law judge and the Commission simply held that Deason's claim was time barred because he did not file a claim within two years of his accident. The circuit court, on the other hand, ruled that the statute of limitations was tolled until September, 1991, because until that time, Deason had no reason to foresee or ascertain the likelihood that he had a compensable injury. In other words, it was not until September, 1991, that Dr. McClosky determined from the myelogram that Deason was suffering defects from spondylolysis or an herniated disc. Thus, since Deason had no reason to ascertain that he had a compensable injury until September, 1991, the circuit court ruled that his claim was not time barred when he filed his claim on March 15, 1993.

B. THE ISSUE

DID THE CIRCUIT COURT ERR IN RULING THAT THE FINDINGS AND ORDERS OF THE ADMINISTRATIVE JUDGE AND FULL COMMISSION WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THAT THE CLAIMANT/APPELLEE'S CLAIM WAS NOT BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS?

C. ANALYSIS

It is well settled in Mississippi that in workers' compensation cases, the Workers' Compensation Commission is the ultimate finder of fact, and its findings are subject to normal deferential standards of review. *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993). The findings of fact of the Workers' Compensation Commission will only be reversed by an appellate court where such findings are clearly erroneous and contrary to the overwhelming weight of the evidence. *Ray v. Mississippi State Bd. of Health*, 598 So. 2d 760, 764 (Miss. 1992). "If the findings are supported by substantial evidence, then they are beyond the power of this Court to disturb." *Id.*

Statutory law as shown in **Section 71-3-51 of the Mississippi Code of 1972 (Rev. 1995)** addresses the matter of judicial review of the findings of the Commission by the circuit court. Section 71-3-51 states:

The circuit court shall review all questions of law and fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the commission should have entered.

Additionally, in *Walker Mfg. Co. v. Cantrell*, 577 So. 2d 1243, 1247 (Miss. 1991), the Mississippi Supreme Court stated:

We have repeatedly read this statute to establish the Circuit Court's function as that of an intermediate court of appeals. More to the point, we have held repeatedly that the Circuit Courts must defer in their review to the findings of the Commission.

In a very real sense, all of this is nothing other than a workers' compensation variant on accepted limitations upon the scope of judicial review of administrative agency decisions, i.e., that the courts may interfere only where the agency action is seen as arbitrary or capricious. Arbitrariness and caprice are in substantial part a function of the presence *vel non* of credible evidence supporting the agency decision. Where we find such evidence, we have no more authority to interfere with the decisions of the Commission than we do in a case of any other administrative body.

(citations omitted).

However, where the Commission has applied an incorrect legal standard, "it is proper for this Court to conduct a de novo review of the Commission's findings of fact in light of the applicable law." *Hale v. Ruleville Health Care Cntr.*, 687 So.2d 1221, 1227 (Miss. 1997). Even so, we are still to accord

the interpretation of the Commission great weight and deference. *Natchez Equip. Co.*, 623 So. 2d at 273.

Applying the above standards to the case *sub judice*, we rule that the Commission misapplied the law in Mississippi in regard to latent injuries as it relates to the state's workers' compensation statute of limitations. Thus, we will review this issue de novo.

Section 71-3-35 of the Mississippi Code Annotated (1972), as amended, states, in pertinent part:

(1) No claim for compensation shall be maintained unless, within thirty (30) days after the occurrence of the injury, actual notice was received by the employer or by an officer, manager, or designated representative of an employer. If no representative has been designated by posters placed in one or more conspicuous places, then notice received by any superior shall be sufficient. Absence of notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice.

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.*

(emphasis added). There is no question that timely notice of Deason's injury was received by the employer or that Deason's injury was work-related. However, the appellants contend that the statute of limitations began to run once the claimant is aware that his disabling injury was work-related in this case, on November 25, 1989. However, Section 73-3-35 has been interpreted by the Mississippi Supreme Court to mean that "[t]he claim period begins to run from the time compensable injury becomes reasonably apparent." *Georgia Pacific Corp. v. Taplin*, 586 So. 2d 823, 827 (Miss. 1991) (quoting *Tabor Motor Co. v. Garrard*, 233 So. 2d 811, 817 (Miss. 1970)). Furthermore, "the statute is tolled until the claimant has 'reason to foresee or ascertain' the likelihood of compensable injury 'from which incapacity and its extent can reasonably be ascertained by medical evidence.'" *Id.* The question for the Court is whether Deason could have reasonably concluded that he had a compensable injury on November 25, 1989, as claimed by the Commission, or whether he could only have reasonably come to that conclusion at a later date, and if so, when?

In the case *sub judice*, it is clear that Deason knew that he sustained some type of back injury while working for Amserv on November 25, 1989. Also, it seems likely that he mentally connected the 1989 injury to the back problems which he encountered in March, 1990, when he returned immobilized to the hospital emergency room. However, this likelihood does not mean that the statute of limitations began running in March, 1990. The Mississippi Supreme Court has held that before the statute begins to run the claimant's awareness must rise to the level of "recognizing the 'nature, seriousness, and probable compensable character' of the injury." *Taplin*, 586 So. 2d at 827. Thus, the statute began running only when Deason was aware, or should have been aware, that he had suffered a temporary or total disability and, thus, a compensable injury.

In attempting to resolve the issue before us, we are guided once again by the *Taplin* decision. In *Taplin*, the court held that "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." *Id.* The *Taplin* court went on to hold that "[t]his state's laws do not penalize workers when they, with their physicians' assistance, cannot confirm that their injuries are compensable." *Id.*

In the case before us, we rule that Deason acted diligently in seeking medical assistance throughout his ordeal. He immediately sought care after the initial fall, but the medical evidence obtained during this initial visit to the emergency room alerted him to no compensable disabling injury. Further, when Deason returned to the emergency room in March, 1990, Dr. Cope began a course of medical investigation that did not yield results until over one year later when Dr. McCloskey discovered that Deason suffered from a ruptured disc. Only then did Deason possess the medical evidence needed to reasonably ascertain the extent of his incapacity as required by *Taplin*, 586 So. 2d at 827. If Dr. Cope did not realize until September, 1991, that Deason suffered from a compensable injury even after a battery of medical tests that were performed upon the patient, then how can we say that Deason knew that he suffered from such an injury until he was finally informed that he needed incapacitating back surgery? In all fairness, we cannot do so.

Based on the facts before us, we rule that the Workers' Compensation Commission committed error by misinterpreting Section 71-3-35 and in misconstruing the correct date in the case *sub judice* upon which the statute of limitations began running. In addition, we rule that the Commission's decision that the statute of limitations began running on November 25, 1989, is not supported by substantial evidence and is clearly erroneous. Therefore, we affirm the decision of the circuit court.

**THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY IS AFFIRMED.
ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN,
KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**