

IN THE SUPREME COURT OF MISSISSIPPI

SHERYL STEVISON

APPELLANT

VERSUS

CAUSE NO. 2006-SA-00841-SCT

**PUBLIC EMPLOYEES' RETIREMENT
SYSTEM OF MISSISSIPPI (PERS)**

APPELLEE

SUPPLEMENTAL BRIEF OF THE APPELLEE

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PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI (PERS)

APPELLEE

SUPPLEMENTAL BRIEF

COMES NOW, the Appellee, the Public Employees' Retirement System (hereinafter PERS) and files this its supplemental brief following this Court's granting PERS' Petition for Writ of Certiorari.

I.

MS. STEVISON IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF INTEREST WHEN SHE ASKED THE COURT OF APPEALS TO AMEND THE MANDATE AS IT WAS NOT RAISED AT THE HEARING BEFORE THE DISABILITY APPEALS COMMITTEE AND WAS NOT ARGUED BEFORE THE CIRCUIT COURT OR THE COURT OF APPEALS.

In *Public Employees' Retirement System v. Freeman*, 868 So.2d 327,330 (Miss. 2004), this Court stated that it has repeatedly held that an "issue not raised before the lower court is deemed waived and procedurally barred." Also See: *Davis v. State*, 684 So. 2d 643, 658 (Miss. 1996); *Cole v. State*, 525 So.2d 365,369 (Miss. 1989). The Court of Appeals in its Order granting the Motion to Amend the Mandate notes that PERS argued in its response to the motion that it should be denied as the only mention of interest is in the Notice of Appeal filed in the

Circuit Court and that it was not argued before any Court. The Court of Appeals, however, does not state why this position taken by PERS is not valid. The issue with regard to interest was not raised at the hearing before the Disability Appeals Committee which heard Ms. Stevison's appeal of the denial of disability benefits by the PERS Medical Board. This Court specifically held in *Freeman*, 868 So.2d at 331 that "[B]ecause he failed to raise the issue of interest in the proceedings before PERS and the court below, Freeman's claim for interest is procedurally barred." The issue of interest was not asserted at the administrative level nor was it argued before the Circuit Court nor the Court of Appeals and, thus, it should be procedurally barred from being raised in a motion to amend the mandate. The Court of Appeals also states that both PERS and Ms. Stevison argue that the *Freeman* case applies, but, again, does not state whether the Court relied on this Court's holding in *Freeman* or not, or, if it did, how was the *Freeman* decision applied when the Court of Appeals amended the mandate.

In the Notice of Appeal filed in the Circuit Court counsel for Ms. Stevison merely stated that the Court "should reverse and render such decision and order back due benefits to be paid with interest." Interest was not argued or asserted in any of the issues addressed by counsel for Ms. Stevison in the brief filed on her behalf. In fact, in the conclusion to Ms. Stevison's brief filed in the Circuit Court counsel asked the Court to reverse and render the decision of PERS or alternatively remand the case for a new hearing with no mention of interest. The same conclusion is found in the brief filed before the Court of Appeals with no mention of the payment of interest.

In *Douglas v. Blackmon*, 759 So.2d 1217,1220 (Miss. 2000), this Court held that the "motorist was procedurally barred from raising the issue of whether the school district should be estopped... because the issue was not first raised at the trial level." Also, in *Harris v. Lewis*, 755

So.2d 1199 (Miss. App. 1999), the Mississippi Court of Appeals held that “issues not raised at trial could not be raised on appeal.” The mere fact that the issue was not argued at the administrative hearing level prior to being appealed to the Circuit Court should bar Ms. Stevison from raising the issue at this late date. See: *Jackson v. State*, 845 So. 2d 727 (Miss. App. 2003) The mere fact that in the Notice of Appeal filed in Circuit Court counsel asked benefits be paid, “with interest” does not overcome the fact that previously the Courts have not granted interest in such cases. This Court’s decision in *Freeman* also supports the position that an issue not raised at the lower level is waived for purposes of appeal. Also See: *Matson v. State*, 750 So.2d 1234, 1237 (Miss. 1999). The Court of Appeals, by amending, the mandate went beyond the holding of this Court in *Freeman*.

II.

THIS MATTER IS PURELY AN APPEAL OF AN ADMINISTRATIVE DECISION AND NOT A CIVIL SUIT WHEREIN A MONEY JUDGMENT WAS ENTERED WHICH MAY CALL FOR THE ENTRY OF PREJUDGMENT INTEREST PURSUANT TO STATUTORY AUTHORITY, THUS, PREJUDGMENT INTEREST SHOULD NOT BE AWARDED.

This matter is purely an appeal of an administrative decision and not a civil suit wherein a money judgment was entered which may call for the entry of prejudgment interest pursuant to statutory authority i.e., Miss. Code Ann. Section 75-17-7(Rev. 2000). Interest has never been allowed in any case similar to this wherein the basis for the appeal was whether the administrative decision to deny disability benefits was premised on substantial evidence or was arbitrary and capricious. In a somewhat similar argument in a request for an Attorney General’s Opinion, the Office of the Attorney General has opined that “A county can pay interest only when it has been authorized by statute.” MS AG Op., Stroud (November 1, 1989) PERS cites

this only as persuasive authority realizing it is not binding on this Court. In *Coleman v. Reamser's Examiner*, 36 S.W.2d 22,24 (Ky. App. 1931), the Court held that unless authorized by statute interest is not collectible... nor is a county liable for interest except in cases of contract or statute allowing it to do so. Also, in *Weber v. Board of Retirement of Los Angeles County Retirement Association*, 62 Cal.App.4th 1440, 1446 (Cal. App. 1998) the Court stated that "administrative law judges may not award interest where the enabling statute does not authorize an award of interest."

In a somewhat analogous case from another jurisdiction in *Indiana Department of Public Welfare v. Chair Lance Service, Inc.*, 523 N.E. 2d 1373, 1379 (Ind. 1988) the Court stated that the "State is not liable for interest on payments due unless it binds itself by contract or statute to pay interest." In *Hollstein v. Contributory Retirement Appeal Board*, 710 N.E. 2d 1041, 1044 (Mass. App. Ct. 1999) the issue was whether certain members of the Contributory Retirement Appeal Board were obligated to pay interest on pension contributions that were improperly deducted from the wages of certain employees of the school committee. The Court recognized that "A requirement to pay interest on excessive pension deductions should not be read into the statute where the Legislature did not provide for it." The Court found that even though a member of a retirement system had an expectation of retirement benefits at some point that "falls short of a contractual relationship." The Court found that there was neither statutory authority nor contractual basis to award interest.

There is no provision in the law governing the administration of the Mississippi Public Employees' Retirement System which provides for the payment of interest in such appeals. Interest was sought in *Hayes v. Public Employees' Retirement System*, 960 So.2d 471 (Miss. 2007) Although, the issue was asserted and argued, this Court did not award interest in *Hayes*

and distinguished *Public Employees' Retirement System v. Langham* 812 So.2d 969 (Miss. 2002), relied upon by Mr. Hayes, by stating that it was a civil action and not an appeal of an administrative decision. *Langham* involved a civil action being filed to collect certain death benefits under the Highway Safety Patrol Retirement System. If interest were to be paid on cases such as the instant action, legislative action would be necessary. The Court of Appeals does not expound on why the cases cited by PERS do not apply or why prejudgment interest should be allowed in such cases where it has never been applied in any other case involving a claim for disability benefits from the Public Employees' Retirement System.

This clearly is not a civil lawsuit filed against the Retirement System where monetary damages were awarded, but was merely an appeal of an administrative decision. The question on appeal was whether the decision to deny disability benefits was supported by substantial evidence. Miss. Code Ann. Section 25-11-120 (Rev. 2006) provides the manner in which an administrative decision of the Board of Trustees can be appealed to Court. In *Freeman*, 868 So.2d at 330, this Court held that the case of *Public Employees' Retirement System v. Langham*, 825 So.2d 969 (Miss. 2002) which held that the award of interest was proper, was "distinguishable from *Freeman* because *Langham* was a civil action and *Freeman* is an appeal of an administrative decision." The same is true for Ms. Stevison's case, which is an appeal of an administrative decision, **not** a civil action.

The issue before the Court of Appeals was not the monetary extent of recovery, but rather whether the member is entitled to a retirement benefit. If the decision is to award benefits, the calculation is made at the administrative level. The issue addressed by the Court of Appeals was whether PERS decision was upheld by substantial evidence. In *Mills v. Jones' Estate*, 57 So. 2d 496 (Miss. 1952) there was a motion to add interest on the judgment that was entered and

this Court noted that the lower Court did not enter a monetary judgment, rather the judgment “simply adjudicated that the death was compensable without undertaking to fix the amount of such compensation. We cannot fix the amount here. That will be a matter for the Commission on remand.” The case was originally before the Workers’ Compensation Commission. The motion was overruled. The facts are very similar to those in this matter.

The legislature did not provide for the payment of interest in the laws governing the administration of the Retirement System. If individuals are allowed to collect interest following an appeal to Court, it would appear that they would then be entitled to appeal to Court to also collect interest when awarded a benefit following any appeal before the Disability Appeals Committee regarding the denial of benefits by the PERS Medical Board. There is no statutory authority to pay interest if a member is denied disability benefits and then is successful on appeal to the Disability Appeals Committee. Again legislation would need to be enacted which would provide for interest on disability benefits. There is no statutory authority which would entitle an individual to receive interest even though they did not go through the entire appellate process and through the Courts to secure a benefit. The Board of Trustees can not award interest without the statutory authority to do so.

Although this matter clearly does not fall within the parameters of the Employee Retirement Income Security Act of 1974 (ERISA), the case of *Jackson v. Fortis Benefits Insurance Company*, 245 F. 3d 748 (8th Cir. 2001) provides guidance. In *Fortis* the United States Court of Appeals for the Eighth District noted that ERISA does not provide for an award of interest on back payments. The plaintiffs, alleging a breach of fiduciary duty and unjust enrichment, sought interest on an award of back benefits under long term disability the

payments for which were allegedly delayed for three (3) years. The Court concluded that without showing the plan had breached its fiduciary duty there was no authority to pay interest.

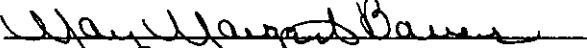
In the recent case of *Green v. Holland*, 480 F.3d 1216 (11th Cir. 2007), although brought under ERISA, it also gives guidance on the issue of the imposition of interest in disability cases. The plaintiff, Green, filed suit seeking to recover accrued interest on disability benefits that were delayed but eventually paid under his pension plan. Summary judgment was granted to the Trustees of the Plan, the pension Trust and the Plan itself. Green then appealed to the United States Court of Appeals for the Eleventh Circuit. Green was finally awarded retroactive disability benefits and paid a lump sum benefit covering an eight year period of time. He was also advised that he would receive future disability benefits on the first of each month. Green inquired as to whether he would receive interest on the retroactive payment. The Trustees informed Green that there was no provision in the Plan allowing for interest, thus, he would not receive interest. Thereafter, Green brought the instant action. Green filed suit for himself and all others similarly situated who had received retroactive benefit payments under the Plan but no interest. Regarding the claim for interest, the Court held that the Pension Plan did not provide for the payment of interest on retroactive benefits, thus, the payment of interest as a benefit was properly disallowed.


PERS is not asking this Court to review the decision of the Court of Appeals awarding disability benefits to Ms. Stevison, but, asks this Court to review the action of the Court of Appeals in issuing an amended mandate with an award of interest when the issue to grant interest was not argued at either the administrative level or in Court, and, further, the issuance of the mandate including interest is contrary to existing statutory and case law.

WHEREFORE, PREMISES CONSIDERED, the Appellee, the Public Employees' Retirement System, asserts that the Order granting the Motion to Amend the Mandate granting prejudgment interest entered December 10, 2007, and the denial of the Motion for Rehearing entered April 15, 2008, contain error of law and requests this Court enter a decision in favor of Public Employees' Retirement System.

RESPECTFULLY submitted on this the 30 day of June 2008.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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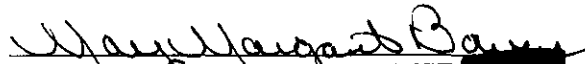
CERTIFICATE OF SERVICE

I, Mary Margaret Bowers, Attorney for the Appellee, Board of Trustees of the Public Employees' Retirement System, do hereby certify that a true and correct copy of the above and foregoing *Supplemental Brief* has been mailed, postage pre-paid, to:

Honorable George S. Luter, Jr.
P. O. Box 3656
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Honorable Bobby DeLaughter
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

So certified, this the 30 day of June 2008.


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