

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**AMFED COMPANIES, LLC AND
AMERICAN FEDERATED
INSURANCE COMPANY**

APPELLANTS

VS.

CAUSE NO. 2007-CA-01422

JENNIFER BROWN JORDAN

APPELLEE

**APPEAL FROM THE CIRCUIT COURT
OF JONES COUNTY, MISSISSIPPI**

APPELLEE'S BRIEF

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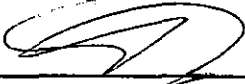
JENNIFER BROWN JORDAN

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CERTIFICATE OF INTERESTED PERSONS

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 disqualification or recusal.

1. Jennifer Brown Jordan
2. Justin Matthew Brown (a minor)
3. Laura Elizabeth Brown (a minor)
4. Amfed Companies, LLC
5. American Federated Insurance Company
6. William Harold Jones, Esq.
7. David Shoemaker, Esq.
8. Robert P. Thompson, Esq.
9. T. Tucker Buchanan, Esq.
10. Lori Jordan Graham, Esq.
11. Caryn Anlage Milner, Esq.



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STATEMENT OF THE ISSUES

1. Under the facts of this case did Amfed have a legitimate or arguable reason for failing and refusing to notify Jennifer Jordan for a period of two and a half (2½) months that her claim to lump sum widows benefits under the order of the Mississippi Workers' Compensation Commission dated June 5, 2001, was valid and would be paid.
2. Did Amfed commit bad faith in notifying Jennifer Jordan that her widows benefits would be terminated without conducting any investigation as to the validity and effect of her June 5, 2001, Workers' Compensation Commission Lump Sum Order.
3. Did Amfed commit bad faith by not immediately tendering on May 16, 2003, those unpaid portions of the weekly benefits owed both to the widow and children, it discovered had not been paid for the previous two years.
4. Did Amfed have a legitimate or arguable reason for failing and refusing to tender unto Jennifer Jordan, for a period of over three months, statutory penalty owed for failure to make timely payment of benefits under the Mississippi Workers' Compensation Act.
5. Has Amfed committed bad faith by refusing to pay the minor children, the statutory penalty for unpaid survivors benefits it learned had not been paid for a period of two years.

A. APPELLEE'S STATEMENT OF THE CASE

I. Statement of the Facts

On April 11, 2003, Jennifer Brown Jordan, widow of James H. Brown, contacted Amfed Adjuster, Nita Cox about the nonpayment of her Widows Lump Sum Benefit. On her own she had received a Lump Sum Order June 5, 2001, from the Commission(MWCC), that had remained unpaid. Her husband, James H. Brown, III, had been killed in an industrial accident at the Pine Belt Regional Airport in Jones County, Mississippi on May 4, 2001.

Jennifer remarried in August 2002. In early 2003, her new husband's ex-wife was killed in an automobile accident. Jennifer and her new husband were required to assume custody of his children, one of which was severely injured in the accident. Her husband had to quit his job to stay home and take care of this child while Jennifer worked during the day as a nurse. Jennifer took care of the child herself during the evening.

In early April, 2003, Jennifer was notified by Glen White, the attorney pursuing the third party claim for her and her children that the case was futile, and had been dismissed. White reminded her that she had received the widows lump sum benefit. She explained that she had never been paid.

The actions complained of in this litigation began to occur on April 11, 2003, when Jennifer contacted Nita Cox, an adjuster for Amfed to see why she had not gotten the lump sum benefit. Cox denied any knowledge of the existence of the lump sum order but during the conversation Cox learned that Jennifer had remarried. Her file reflects that without any

investigation as to the affect of that order she immediately suspended the weekly widows benefit that was being paid to Jennifer.¹

Not receiving an answer from Cox, Jennifer called her back on April 14, 2003. Cox's notes for that day document Jennifer had two children, age 3 and 5, at home, and that her new husband, Jay Jordan, was unemployed, taking care of a severely injured child due to the death of his ex-wife. Cox's notes also indicate that day, she notified T.G. Bolin, Amfed's attorney, that she had suspended the widows weekly benefits. These notes also acknowledged that Jennifer was very unhappy that her widows benefits were being terminated.

Two days later, April 16, 2003, Bolin wrote Cox a letter confirming in fact that Jennifer Jordan did have a lump sum benefit order from the Mississippi Workers' Compensation Commission dated June 5, 2001. He asked that she review the document and contact him to discuss "our options" as far as a response to the Claimant and to the MWCC. No Form B-18 was filed with the Mississippi Workers' Compensation Commission indicating why Jennifer's benefits had been terminated.

During the next month no one contacted Jennifer about her right to those lump sum benefits, or that Amfed had even discovered the existence of the lump sum order. No one contacted Glen White, her attorney. Amfed's file activity sheets for the entire next month, indicate no effort nor concern that the widow be notified that she would be paid the

¹Ironically, as later discovered the amount paid to Jennifer and her children was also short by one-half (½) the amount actually owed for two years.

balance of the benefits owed under the lump sum order.

One month later, May 16, 2003, Bolin writes to Cox indicating that he had also discovered that the weekly benefits paid to the widow and the children for the previous two years were inaccurate. That the widow and minor children had actually been paid only one-half of the weekly benefits to which they were entitled for the entire two years. Bolin told Cox that the issue would need to be addressed, with penalties as well.

Although Amfed employees had known since April 14, 2003, of the financial hardship Jennifer was having, no one on behalf of Amfed attempted to contact Jennifer Jordan in any fashion to let her know that she as widow, and her children, were indeed entitled to additional benefits. No effort was made to tender to Jennifer and her children the amount of the underpaid weekly benefits that were so easy to compute.

On May 27, 2003 (six weeks later), Cox receives a *draft* letter Bolin intended to send to Ben Barrett Smith, Chairman of the Mississippi Workers' Compensation Commission. That draft letter indicated the employer and carrier did not dispute the widows entitlement to her lump sum; that the carrier stands ready and willing to forward the appropriate lump sum to the widow. No copy of this letter was provided unto Jennifer nor her attorney.

On May 29, 2003, the Commission statistician responded to Bolin's letter providing the amount owed to the children for the two years of underpayment, and a new lump sum figure for payment unto Jennifer under the widows lump sum order. Bolin did not provide

this information to Jennifer. On June 9, 2003,² Cox again Contacted Bolin as to whether or not he had ever anything from the Commission.

The initial Complaint in this proceeding was filed May 29, 2003. Amfed was served with process and a copy of that Complaint on June 3, 2003.

On June 26, 2003, two and a half (2½) months after Amfed had learned that Jennifer's lump sum benefit order had been unpaid for two years; and after this suit was filed Amfed tendered the balance of the lump sum benefits owed, but without the statutory penalty. Amfed's attorney also tendered the underpaid weekly benefits owed to the minor children.

On July 7, 2003, inquiry was made of Bolin as attorney for Amfed requesting payment of the statutory penalty owed to Jennifer Jordan and her children. No response was received.

On July 21, 2003, counsel for Plaintiff again contacted Bolin regarding the unpaid penalty for Mrs. Jordan and the minor children explaining that Mrs. Jordan should not have to litigate further that matter. No response was received.

On August 1, 2003, Bolin was again contacted by attorney for Jennifer Jordan complaining that he had not responded to the letters nor would he return phone calls regarding the statutory penalty.

Bolin responded on August 8, 2003, indicating the carrier had finally agreed to pay

²It was now almost two (2) entire months since Jennifer's widow benefits had been terminated.

the penalty with regard to the unpaid lump sum order benefits but did not mention payment of the penalty for the minor children. On August 13, 2003, Bolin tendered the statutory penalty for the unpaid lump sum benefit that had been owed to Jennifer. No mention was made of payment of the penalty for the minor children.

II. Testimony of Witnesses

A. TESTIMONY OF JENNIFER BROWN JORDAN

Jennifer Brown Jordan (Jennifer) graduated from Jones County Jr. College in 1998. She was married to James Brown. (T. 78) They had two children, Laura Elizabeth Brown born June 26, 1998, and Justin Matthew Brown born October 7, 1999. Her husband was an electrician for A & B Electric. (T.79)

In 2000 she had taken a job at Forrest General Hospital and on May 4, 2001, went to work as usual. Her husband took the kids to the daycare. Around 3:15 or 3:30 p.m., she got a call that her husband had fell off a ladder at work. (T.80) She went to the emergency room to learn that her husband had been killed while working at the Hattiesburg - Laurel Regional Airport. He had been electrocuted. When she received the autopsy report she talked with a lawyer. She had received the OSHA Report. She understood that if she pursued litigation, any Workers' Compensation benefits paid to her because of a right of subrogation would be repaid. (T.88, 89)

After her husbands funeral she was contacted by Stacy Stuart on behalf of AmFed requesting information concerning her husband, birth certificates for the children, and was told she and her children would receive benefits each week. Stacy Stuart did not mention

that Jennifer Jordan could receive a lump sum widows benefit. (T.82)

Jennifer was twenty six (26) years old. Her children were age three (3), and eighteen (18) months. She was told she could draw benefits for nine (9) years.(T.83)

She later received a letter from the Mississippi Workers' Compensation Commission in Jackson, that indicated she was entitled to a lump sum widows award. As a result she traveled to the Commission and filled out a request for the lump sum award because she needed to pay off her house.(T.84, 85)

On June 5, 2001, the Mississippi Workers' Compensation Commission approved her award (T.86, 87) and a copy was to be mailed by the Workers' Compensation Commission to AmFed's office. No payment was made. Jennifer assumed the weekly payment of benefits, and non-payment of the widows lump sum benefit was because of the subrogation right and was appropriate. (T.89)

On August 2, 2002, she remarried Jay Jordan. Her husband had been dead for more than a year. She received weekly benefits in the amount of \$170.00 every two weeks and \$48.00 every two weeks for the minor children. (T.90) She did not know the payments were actually one-half ($\frac{1}{2}$) of the weekly amount she and the children were supposed to be paid. (T.90)

On January 26, 2003, her new husbands ex-wife was killed in an automobile accident. The minor child of her new husband, Tammy, was severely injured with two (2) broken legs and a head injury. Mr. Jordan had worked for a dairy company but after his ex-wife's death assumed custody of both of his children, and of the child with the two broken legs. (T.91)

He stayed home to take care of the injured child during the day and Jennifer would leave work at the hospital and tend to her wounds and bandages in the evening. Jennifer had Mr. Jordan's two (2) children, one severely injured, and her own two (2) children at home. (T.92). She used the Workers' Compensation benefits to pay the tuition for her minor children to attend a Pre-K program at a private school because that's something that she and her deceased husband had discussed. The Workers' Compensation Benefits she did receive were not enough to pay for the Pre-K program and the daycare for her two children (T.93, 94). She worked extra hours at the hospital if she could.(T.92, 93, 94)

On April 11, 2003, she learned from the attorney who was pursuing her third party claim that the lawsuit was pretty much finished and there was nothing else he could do on her behalf. He reminded her that she did have the lump sum benefit award but she told him she had never gotten the money. So she called AmFed Companies to speak with Stacy Stuart. Stuart was not handling the file anymore and referred her to Nita Cox (T.94, 95). She had never talked to Ms. Cox before but related she was inquiring about the lump sum Order could she now receive payment. Cox told her she would look in the file but continued to ask questions. Jennifer related she had gotten remarried. Cox did not ask for a copy of the lump sum order to be faxed to her office but did indicate she would call Jennifer back. (T.96) On April 14, 2003, Jennifer had to call Cox back again inquiring about the lump sum Order.(T.97) Cox said she had not heard from her supervisor but would check with him and call Jennifer back. The two talked again on the afternoon of April 14, 2003, and Cox inquired more about the details of her marriage, and why her attorney who

had pursued the third party claim had not told her she should have let them know when she got remarried.(T.97) She explained to Cox that the attorney did not represent her with regard to the Workers' Compensation claim.(T.97, 98) Cox then informed her that she would suspend her weekly benefits and she would receive no more monies from them.(T.98) Jennifer indicated Cox talked to her like she was a child and she had done something wrong and that Workers' Compensation benefits were not life insurance and she should have notified them when she got remarried. Jennifer told Cox what she had been going through, that her husband was off work, that his daughter was injured, and that while did so she was crying.(T.98)

Jennifer explained to the adjuster how suspension of weekly benefits to her was going to affect her. That her husband was off work, his daughter was injured, and that just what suspending the benefits was going to do to her. She understood that things would be very hard on her because she would have to work more to support herself, and come up with money to make payments for the school and daycare and that she was the only person in the family earning any money.(T.98)

Without determining Jennifer's right to receive her lump sum benefits, Cox did indeed terminate the weekly benefits.(T.99) Jennifer then began to rely upon her mother to take care of her child. This constant babysitting caused the child to begin calling the grandmother Mama. (T.99)

After her last conversation (April 14, 2003) with Cox, she went to see the attorney who had filed the third party claim for her husband's death. He saw her immediately that

day. She was crying and upset and did not know what else to do.(T.99, 100)

That attorney did not represent her in the Workers' Compensation matter, nor did her handle Workers' Compensation claims. He referred her to this another attorney who saw Jennifer a few days later. She wanted to know if there was anything that attorney could do and whether or not they would have to pay the lump sum Order. She was told that surely they would pay the lump sum Order. That she had shown the lump sum Order to Cox and talked with her about it on two different occasion.(T.100, 101) She was told that if she showed Cox the Order, AmFed would pay the Order. That conversation took place around April 16, or 17, 2003. (T.101) The attorney did not do any thing the next week and Jennifer waiting. Jennifer waited for another week and no payment appeared. During the first week and second week of May no payment was made. During the third week no payment was made.(T.101)

On or around May 20, 2003, Jennifer demanded the attorney provide her some help and if he would not she would find another attorney. On May 29, 2003, the initial complaint was filed in this proceeding.(T.102)

Between April 16, 2003, and even into June 2003, no one from AmFed contacted Jennifer to notify her the lump sum Order was valid and she was entitled to those benefits. Further, no one contacted Jennifer during that period of time to tell her that she and her children had been underpaid by one-half (½) of the amount due for weekly benefits for the last two years.(T.102)

Jennifer assumed the weekly payments to her were the correct amount and that

AmFed were paying what they should be paying.(T.111) She did not call AmFed about the lump sum Order because she assumed the third party lawsuit kept her from receiving the lump sum.(T.112) She was contacted by an employee of AmFed in February 2002 who inquired about the well/being of her children.(T.113) At that time there were no problems. The children were fine.(T.114)

Her first conversation with Ms. Cox was courteous. Ms. Cox was going to talk to her supervisor about the lump sum Order because she could not find it.(T.115) Stacy called her a second time which was very short, and then during the third conversation the adjuster Cox was rude, and talked to her like a child wanting to know why she had not reported her marriage. She was very rude and ugly.(T.116) It was the longest conversation she had with Cox and after the event saw a doctor because of the way she was treated.(T.117)

Jennifer again testified that Glen White did not represent her with regard to the Workers' Compensation claim and that when she saw him was referred her to Mr. Jones, who she saw a few days later.(T.118,119)

She had told Cox she had a copy of the Order but Cox did not request that a copy be faxed to her office.(T.119) When she first saw Attorney Jones, he informed her that AmFed would pay the Order. No discussion was made regarding his representation of her for Workers' Compensation benefits.(T.120) Jennifer did not complain about the failure to pay the lump sum Order until after the third party suit had been concluded. There was no reason to complain and no one caught the mistake about the underpayment until after the third party lawsuit was over. She finally received payment after the lawsuit was

filed.(T.121) Her attorney in the third party lawsuit, Glen White, did not handle Workers' Compensation claims nor did he have anything to do with the Workers' Compensation claim. She saw Dr. Vandaloo because she was having anxiety issues, depression, and was having a hard time focusing on work with everything going through her mind. Dr. Vandaloo started her on medication. This all occurred after her last conversation with Ms. Cox .(T.122)

B. TESTIMONY OF NITA COX

Nita Cox was a Senior Claims Adjuster with AmFed and worked solely as a Workers' Compensation Senior Claims Adjuster for ten or twelve years at the time of this trial. She had worked as an adjuster however close to twenty years, solely handling Workers' Compensation claims.(T.169, 170)

She testified she handled Workers' Compensation Law of Mississippi. She did have an adjusters manual or technical procedures manual but at the time she was handling the claim of Jennifer Jordan she had never seen the manual. She did not rely upon the AmFed claims manual with regard to the Jordan claim. Just the Mississippi Workers' Compensation statutes and what she had learned in the twenty previous years. (T.171, 172)

She admitted that the Workers' Compensation Laws place a great deal of importance on the timelessness of payments and that AmFed's claims manual (DA543) mentions payment, and timelessness of payment. Every effort should be made to insure subsequent compensation checks are issued in a timely and expedited manner and that compensation checks are normally the sole source of income for most claimants as they become very

dependant upon them. Cox admitted every effort should be made to issue subsequent compensation checks in a timely and expeditious manner.(T.174, 175)

Cox admitted that a widow was entitled to bi-weekly payment of benefits or a lump sum benefit but that if she remarried receiving bi-weekly payments, those benefits would be terminated(T.175), but if she get remarried AmFed keeps the money.(T.176, 177) That she has never had problems getting questions answered at the Workers' Compensation Commission.(T.179, 180)

When Jennifer Jordan filed a third party lawsuit over the death of her husband, the claim was monitored closely by AmFed employees by Blackledge, Stacy, Becky Hillhouse, Deron Perkins, and TG Bolin.(T.181)

On March 4, 2003, Cox's supervisor asked her to look at indemnity reserves based upon weekly payments (which were one-half of the actual amounts due), they both concluded the reserves could be reduced to \$45,922.00. (T.182) Cox admitted the \$45,000.00 figure was a lot different from the figure on the reserve sheet when the claim was initially set up(T.183), but she did not wonder why such a difference existed between 2001 and 2003.

On September 10, 2003 (Ex.7), AmFed received a letter from the Workers' Compensation Commission indicating AmFed had previously been requested to advise fo the current status of the Jordan claim. The letter indicated that it was a second and final request and that no record of a MWCC Form B-31 had been filed.(T.184) Cox admitted that the Workers' Compensation Commission appeared to believe the claim should have been concluded (T.185). That based upon the evidence, she did not think that there might be a

lump sum Order in the file.(T.186) Cox testified that when she learned Jennifer maintained she had an unpaid lump sum Order on April 11, 2003, she was kind of a little bit in shock. That such was not normal. (T.187) Regardless, she suspended the weekly benefit check to Jennifer Jordan based upon the Mississippi Workers' Compensation Law. She admitted TG Bolen, AmFed's attorney, did not tell her to stop payments. Cox admitted that upon suspension of benefit payments, she is required to file on a form prescribed by the Mississippi Workers' Compensation Commission. She admitted the form was a B-18 but did not remember filing it with regard to the Jordan claim (T. 189), although she had twenty years experience as a claims adjuster. She did not file the form nor send a copy to Jennifer Jordan, but she did terminate the weekly benefits.

Cox admitted that Jennifer Jordan was very upset when she was told by Cox that her benefits would be terminated. She conceded that Jennifer had told her that her husband was unemployed and had no income, that she had a sick child that had been in an accident and the financial pressure she was under. Cox admitted Jennifer was very distraught when she was informed that Cox was suspending her benefits. (T.191, 192)

She did not pick up the phone and call the Workers' Compensation Commission to ask if they had a lump sum Order. She just contacted her attorney. She was not aware that she could access the internet at that time via her computer, only contacted her attorney. (T.194)

Cox admitted she could have called the Commission about the lump sum Order but that was not her standard policy. It was to contact the attorney who was handling the claim

and turn it over to the attorney. She refused to concede that it would have been easy to call the Commission to ask if there was a lump sum Order. (T.195) Cox then admitted that AmFed has a litigation management policy (Ex. 20) and that file abandonment to defense counsel was unacceptable. The file handler (Cox) must stay involved with the claim and keep defense counsel informed. Cox maintained she was merely following up with her attorney. She also conceded that TG Bolin had written her a letter on April 16, 2003 (Ex. 10), that even had the letter been mailed from the Commission with the lump sum Order, addressed to Legion Insurance Company, that he did not see such a technical mistake could prevent an Order, if properly mailed, from eventually getting to the proper AmFed environment. (T.196, 197) Cox admitted that after he told her that she did not call Jennifer to tell her she could stop being distraught, she could stop crying, that the Order had been filed, and that she was going to be paid. (T. 197, 198) She blamed this upon a discovery, that Jennifer Jordan was represented by an attorney. (T. 198)

On May 16, 2003, TG Bolin notified her that the widow and the children had been underpaid by one-half of what they were supposed to be paid and that such would need to be corrected and penalty would have to be paid also. (T. 198, 199) Cox admitted she knew then that the children had been underpaid and that she could have gone into the computer, and corrected the payments to the children starting on May 16, 2003, but did not do that. That after discovering the underpayment, no one told her to call Jennifer, not even her supervisor, Bob Blackledge. On May 16, 2003, no one had contacted the Workers' Compensation Commission about the known lump sum Order that had been unpaid, and

the underpayment to the widow and children for the previous two years.(T. 199) On page 28 of exhibit 10, Cox admitted she had received correspondence from TG Bolin, AmFed's attorney, who indicated to her to please call him to discuss the options so far as the response to the claimant and to the Commission. (T. 200) When asked what her response to the claimant was, she stated she just left a message for TG Bolin, and that she did not have anything else to do with the claim except requesting the checks. (T. 201)

As for a reason to why she did not contact Jennifer's lawyer to notify him of the lump sum Order and the underpaid benefits for two years she simply stated it was her understanding TG Bolin was going to do that. (T. 201, 202)

Cox admitted that while the third party litigation was ongoing, that she knew Jennifer's attorney, Glen White, was contacted by Deron Perkins, ad adjuster for AmFed, and that TG Bolin was involved with the third party claim with Mr. White. Cox admitted she was stunned, and shocked, that for a period of two years the lump sum Order had gone unpaid but because Jennifer Jordan had never called AmFed. (T. 210)

Cox blamed some of the delay because she had remarried herself, and had taken off two weeks right along the time of April 16, 2003.(T. 213) It was not until April 30, 2003, however, she asked TG Bolin to get new calculations from the Workers' Compensation Commission. But he did not. On May 5, 2003, she asked Bolin again about the computation whereupon Bolin said he would send a letter. (T. 215) On May 12, 2003, Cox had to contact Bolin again acquiring whether or not the new computation had arrived. He did not respond until May 16, 2003, indicating only that he had then drafted a letter to the Workers'

Compensation Commission Chairman but wanted to talk to her before it was sent.(T. 217) Bolin notified Jordan that it appeared to him 100 checks had been mailed to the widow and the children, but for only 50 weeks of benefits. It was now May 16, 2003.(T.218) Cox testified that on May 16, 2003, she was telling Bolin to get everything together to make the payments and conceded there was not any reason for the payments not to be made. (T. 219)

Finally on May 28, 2003, Bolin sends a letter to the Commission about the nonpayment of the lump sum Order, and the underpayment of benefits to the widow and the children. (T. 221) A copy of this letter was not mailed to Jennifer Jordan. (Ex. "12)

On June 26, 2003, (Ex. 25), checks were delivered to Jordan's attorney but Cox was responsible for issuing the checks. The checks were dated June 23, 2003. (T. 225) No penalty however, was included for either Jennifer, nor the sums owed to the minor children. A check was mailed for the penalty owed to the widow only on August 13, 2003.

Cox admitted that she had the ability to calculate reserves (T.227) but maintained she could not calculate the lump sum benefit due to Jennifer Jordan, (T. 228). She maintained she had at least two conversations with Jennifer in April, 2003, and told her that her benefits would be cutoff but could not tell her when she found the lump sum Order that she was going to be paid. She maintains she had turned the matter over to her attorney and assumed he would contact Jennifer Jordan and her children. (T. 229) She also admitted that she did not even contact Glen White, the attorney for Ms. Jordan. She turned the matter over to her attorney. (T. 230) She conceded however, that Deron Perkins, another adjuster for AmFed, had indeed talked directly to Mr. White on January 31, 2002, May 2, 2002, May

13, 2002, and July 25, 2002. (T. 230, 231) And that also, her supervisor Bob Blackledge had talked to Mr. White on September 3, 2003. (T. 231) Cox further conceded that AmFed's policy did not prevent her from contacting Jennifer's lawyers. (T. 231) No one called Jennifer about the discovery of the lump sum Order, nor her attorney. (T. 232)

C. TESTIMONY OF JOANN MCDONALD

Joann McDonald testified she was secretary of the Mississippi Workers' Compensation Commission and worked as Commission secretary about five (5) years. (T.155) She indicated that a Form B-31 was notice of a final payment and the a Form B-31 is filed for lump sum settlement payments. That a widows lump sum order would be a final order. (T.160) The Commission records indicate the lump sum Order was mailed to the AmFed environment at P.O. Box 1380, Ridgeland, Mississippi. She admitted that Ex."7" was a Commission letter dated September 10, 2002, asking AmFed, for the second time, to file a B-31 form. (T.161) She admitted that she now works for Marco Walker Legal Firm. (T.162) That at the time her deposition was taken she still worked for the Commission but had since left and knew T.G. Bolin, the attorney who represented AmFed in the matter. (T.167)

D. TESTIMONY OF BOB BLACKLEDGE

Bob Blackledge was a supervisor with AmFed who had been employed there since October 2000. (T.232) He oversaw the work of Nita Cox, and Deron Perkins. (T.234) On February 26, 2003, he asked Nita Cox to look at the reserve for indemnity or payments to Jennifer Jordan to see if they could be adjusted. He stated it was a standard type request

because he wanted to adjusters to be attentive to looking at the numbers. Cox was able to reduce the reserves by one-half.(T.236, 237)

The TG Bolin memo of April 16, 2003 had been forwarded to Nita Cox but she was on vacation. The memo was seen by Bob Blackledge before Cox saw it.(T.238) He left a discussion of the matters up to Cox and Bolin.(T.238)

Blackledge agreed that on May 27, 2003, the issue regarding whether or not Ms. Jordan was entitled to the lump sum benefits had been resolved in her favor. He acknowledged that Bolin's draft letter to the Workers' Compensation Commission, indicated the widow would be paid immediately upon receipt of the new computations.(T.243) Blackledge did not know why it took until June 25, 2003, to tender the benefits that were owed nor why the same had not been paid within fourteen (14) days with penalty.(T.243,244) Blackledge admitted that if he intended to make payment he would certainly want to avoid the penalty. (T.244) Blackledge, as supervisor, further testified that he knew the children had been underpaid about fifty (50) weeks and that would total \$4,800.00. When asked how difficult it would be to write a check for the two children and put it in the mail to their mother acknowledging the underpayment Blackledge admitted that "...if you are talking about degree of difficulty, it's not difficult."(T.246)

Blackledge admitted that it would have been beneficial for Ms. Jordan to know that AmFed had discovered the errors. Blackledge admitted that it would have been real nice to have notified Ms. Jordan. (T.247) He confirmed that it would have been beneficial for her to know so she would have been in the loop. He also admitted that it would have been real

nice to notify Mr. Glen White, but no one did so. (T.248, 249) When asked about whose fault it was that Jordan was not notified within the first thirty (30) days after AmFed had learned about the underpayment to the children and the lump sum order, Blackledge testified he thought it was the responsibility with Ms. Jordan's attorney, and AmFed's attorney. Blackledge admitted that the memorandum of Bolin to the Workers' Compensation Commission regarding the underpayments indicated AmFed stood ready to make immediate payment to the widow upon receipt of the calculations. (T. 250, 251) The calculations were received on May 29, 2003, but immediate payment did not occur until June 25 or 26, 2003.(T.251) When asked if he knew the payments were tended with the statutory penalty Blackledge indicated he did not know that Nita Cox was actually handling the file with T.G. Bolin. She would have been involved in that aspect of it.(T.252) Bolin agreed that penalty was due upon tender of the back benefits owed to the children. He did not know the penalty had not been tendered for the children and could not provide a reason why the penalty had not tendered. When asked if the penalty had not been tendered now (on the day of Trial) when was AmFed going to tender the penalty for the children, he simply stated he could not answer that.(T.253) When asked how AmFed would have ever discovered the existence of the lump sum order he indicated it would not have been discovered unless Ms. Jordan, or the Commission would have brought it to their attention. When asked how AmFed would have ever discovered the underpayment to the children he indicated he did not know and that it was possible it might not have ever been detected.(T.254) When asked whether it was his testimony that the various efforts or emails

from Nita Cox to T.G. Bolin (4-14-05, 5-5-03, 5-12-03) represented an abandonment of the claim file to the defense lawyer, Bolin first indicated no but then said he really didn't know.

E. TESTIMONY OF T.G. BOLIN, JR.

T.G. Bolin, Jr., is an attorney who works with the Marco Walker Firm. He knows Joann McDonald and at the time of Trial she had left the Commission working with the Marco Walker Firm. (T.262, 264) He got involved in the claim only because of AmFed's subrogation claim and interest ten (10) months after the lump sum Order was entered. There was no Workers' Compensation claim to defend and Ms. Jordan did not need a lawyer for the Workers' Compensation claim.(T.265, 266)

On April 26, 2003, he wrote a letter to the adjuster and told the adjuster that he had found the lump sum Order. The memo was addressed to Nita Cox and he told her he did not see how the Order did not make it to the proper AmFed companies.(T.267, 268) He testified he did not recall whether there was a decision to contact Jennifer Jordan about him discovering the lump sum Order. He acknowledged his memorandum (Ex. "10") indicated Jennifer Jordan was represented by Glen White but that she had applied for the lump sum Order prior to his representation.(T.270) That his research showed that the widow and the children had been weekly benefits for one-half of the amount due for a period of 100 weeks and that the underpayment would have to be addressed with statutory penalty as provided for in the Act.(T.271) Bolin admitted that he testified in his deposition that for Jennifer Jordan to learn of the underpayment would be good news for her because she would be entitled to a significant amount of money.(T.272, 273) When asked when he was going to

tell Jennifer Jordan about the underpayment, and her right to receive a significant amount of money he indicated he was not sure that a decision was made that anybody needed to contact her. That he was going to draft a letter to the Commission and the reason he did not send even a copy of that letter to Ms. Jordan or Glen White was an oversight, his mistake. He confirmed that Mr. White or Ms. Jordan should have received a copy of the letter to the Commission.(T.273,274) He told the Commission in his memorandum that AmFed stood ready to afford the appropriate lump sum payment to the widow immediately upon receipt of the Commission figures.(T.275) That he received the Commission figures on May 29, 2003, two days after he finally wrote the letter to the Commission. When asked if he would agree that the issue concerning whether or not Ms. Jordan was entitled to additional benefits had been resolved in her favor, he would not agree with that. He stated "Why can't we be doing two things at one time?"(T.276,277)

Bolin then testified he did not pay the benefits immediately upon receipt of the figures indicating then he didn't have them until June 10, 2003. (T.277) Bolin admitted again he did not immediately forward the widow the lump sum benefits upon the receipt of the Commission figures but waited until he got back from vacation.(T.278) Bolin agreed the payments were finally made on the 26th of June, although the checks were cut on the 20th of June. He did not even call the Plaintiff's attorney on June 20, 2003, to let him know the payments were coming. The payments were tendered without the statutory penalty.(T.279) He did not respond to Plaintiff's attorneys letter of July 7, 2005, concerning the statutory penalty that was unpaid.(T.279, 280) That Bolin did not respond to a second letter of July

21, 2003, regarding the penalty. On August 1, 2003, another letter was sent to him regarding the statutory penalty. On August 8, 2003, the statutory penalty was finally tendered.(T.281)

Bolin testified there was nothing indicating that payment of penalty for the minor children had ever been made at the time of the Trial.(T.312) Between April 14, 2003, and June 29, 2003, Bolin admitted that he did not talk to Glen White about the lump sum payment.(T.212, 213) Bolin then also testified that in his deposition he would not have told Nita Cox to terminate the weekly benefits to the widow. That would not have been his better advise or prudent advise, and that he provided that information because he was there sitting in a deposition.(T.213)

III. Course of Proceedings and Disposition in Jones County Circuit Court

Appellee would only add to Appellant's description of the Lower Court proceedings the following:

After the verdict was received and read, Jordan moved to submit the issue of punitive damages to the jury. Amfed's objection to this motion was overruled, and the trial proceeded. Plaintiff introduced Ex. "27", the annual report of Amfed, and Ex. "28", documents reflecting the net worth of Amfed. (R. 392 -395). The jury retired and returned a punitive damage verdict in the amount of \$200,000.00. (R. 444).

On March 13, 2007, Amfed filed a motion for credit in the amount of \$78,781.53 in benefits, and \$17, 808.35 in late penalties paid prior to the trial. (R. 445). Plaintiff filed a post trail motion for attorney's fees in the amount of \$32,500.00 (R. 448) and stipulated that the amount of the attorney's fees were reasonable, if the award of attorney's fees were

appropriate. (R. 452).

On April 9, 2007, the Circuit Court entered Final Judgment reflecting a total reward of \$284,286.47. (R. 456) On July 30, 2007, Amfed submitted an Amended Final Agreed Judgment to correct a mathematical error. (R. 466). The Amended Final Judgment was for the amount of \$130, 568.00 as contractual and extra contractual damages, less a credit of \$78,795.41 for benefits previously paid and \$17, 808.35 for penalties previously paid. This resulted in a net compensatory award of \$33, 978.12, \$200,000.00 awarded for punitive damages, and \$32,500.00 for attorney's fees bringing the total award and Amended Final Judgment to the sum of \$266, 478.12. (R. 466).

Amfed filed Motion JNOV on July 30, 2007 (R. 460) and the Jones County Circuit Court Judge Billy Joe Landrum entered Order Denying Defendants' Motion for New Trial (R. 469). This appeal ensued.

SUMMARY OF THE ARGUMENT

A. The Law of Bad Faith and Bad Faith Delay

Appellant's appropriately argue that the burden rests with the Plaintiff seeking to establish a claim for an intentional tort to prove that (1) the carrier denied *or delayed* the payment of a compensable claim without a legitimate or arguable reason; and (2) the denial *or delay* of payment constitutes a willful, intentional malicious wrong or is a reckless and wanton disregard for the rights of the claimant. *Southern Farm Bureau Casualty Ins. Co. v. Holland* 469 So. 2d 55, 58-59(Miss. 1989). (Appellant's Brief Pg. 19)

This case does not center around the lone clerical error of the initial adjuster entering

the wrong weekly benefit amount payable to the widow and surviving children. It is the subsequent handling of the claim by the adjuster and Amfed attorney that resulted in cumulative, reckless actions illustrating a disregard for the rights of the widow and the minor children. This included the failure to tell Jennifer that Amfed had wrongfully terminated her benefits, and had concluded she was entitled to them for a period of two and a half months while the adjuster took a marriage holiday, and the attorney took a vacation. It is quite reasonable why the jury in this matter considered the activities of Amfed and its attorney to be much more than simple negligence, but in utter disregard, insult, and abuse of the contractual rights of Jennifer Jordan and her children, and the obligations of Amfed to pay promptly amounts it knew to be due.

Plaintiff has shown that (1) a contract of Workers' Compensation Insurance existed; (2) that the carrier failed to tender Plaintiff widows benefits under the June 5, 2001 lump sum order of the MWCC; and (3) refused to correct promptly the nonpayment of benefits owed to the widow, and the children after discovering an additional error and after their attorney informed them that payment must be made.

On April 14, 2003, Amfed knew that Jennifer and her family were financially distressed; that Jennifer's husband had lost his job and was having to care for a sick child; that Jennifer was wrongfully told by the same adjuster that her benefits were being terminated, she was entitled to nothing further because of her remarriage even though she knew that Jennifer had a lump sum award order that had remained unpaid for over two years. Amfed later discovered that the minor children and Jennifer had been underpaid by

one-half of the weekly payments owed to them for a period of two years.

On July 7, July 21, and August 1, 2003, demand was made upon Amfed for the statutory penalty owed to Jennifer for those amounts remaining unpaid under the MWCC Lump Sum Order. Payment had not been made within fourteen (14) days from the date the Defendants knew that order existed but continued to hold the statutory penalty, without any arguable reason and did not pay it until a second litigation was threatened.

Every contract of insurance contains an implied covenant of good faith and fair dealing. *UHS Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So. 2d 746 (Miss. 1987). This duty of good faith implies that neither party will do anything which will injure the right of the other to receive the *benefit* of the agreement. In this case, the benefit is also a statutory one. A Workers' Compensation insurer is liable to its insured under the implied covenant of good faith by law, and Mississippi Code Annotated §71-3-25; §71-3-37.

Importantly, the purpose of Workers' Compensation Act is to facilitate payment of compensation without delay, and without unnecessary costs. *HC Moody and Sons v. Dedaux* (Miss. 1955) 79 So.2d 255. An insurance company has exclusive control over evaluation, processing and denial of claims. For these reasons a duty is imposed that "[an] indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business." *Andrew Jackson Life Ins. Co. v. Williams* 566 So. 2d 1172 (Miss. 1990) citing *Arnold v. National County Mut. Fire Ins. Co.* 725 S.W. 2d 165, 167 (Texas 1987).

One of the benefits that flow from the insurance contract is the insured's expectation

that his insurance company will not wrongfully deprive him of the very *security* for which he bargains or expose him to the catastrophe from which he sought protection. Conduct by the insurer which does destroy the security or impair the protection purchased breaches a covenant of good faith and fair dealing implied with the contract. *Rawlings v. Apodaca* 726 P.2d 565, 571 (1986).

In all contracts of insurance, companies and their employees have a duty to use the degree of diligence and care which a reasonably prudent person would ordinarily exercise in the transaction of his own business, including the obligation of providing the proper information concerning the progress of the business and entrusted. *Security Ins. Agents Inc. v. Cox* 299 So.2d, 192, 194 (Miss. 1974)

Under Mississippi Law an adjuster has a duty to investigate a claim with reasonable promptness. *Life & Cas. Ins. Co. of Tenn. v. Bristow*, 529 So. 2d 620 (Miss. 1988). See also *Eichenseer v. Reserve Life Ins. Co.*, 628 F. Suppl. 1355, 1366 (5th Cir. 1989).

A realistic evaluation of the claim must be made. *Dunn v. State Farm & Casualty Ins. Co.*, 711 F. Sup. 1359 (N.D. Miss. 1987) And then the adjuster should promptly pay claims that are covered. *Murphree v. Fed. Ins. Co.*, 707 So. 2d 523. (Miss. 1997), *Gregory v. Continental Ins. Co.*, 575 So. 2d 534, 541 (Miss. 1990). If the claim would not be allowed, the adjuster should advise the insured of a valid reason why the claim was being denied. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So. 2d 254, 273 (Miss. 1985).

Recklessness, with regard to whether or not punitive damages should be allowed, depend upon the extent of a defendants actions, and whether or not they disclose a conscious indifference to the consequences of delaying, as here, payment. T.H. Freeland, III and T.H. Freeland, IV, *Bad Faith Litigation: A Practical Analysis*, 53 Miss. L. J. 237, 249-50 (1983), as United States District Court Judge Tom Lee stated in *Rogers v. Hartford Accid. & Idem. Co.*, S.D. Miss., Jackson Div. 3:95CV680LN "The usual meaning assigned to 'willful,' 'wanton,' or 'reckless,' according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow"

(emphasis added). Judge Lee went on to say that "willfulness" was not limited to intentional conduct in the sense of subjective ill will but rather encompasses recklessness as described above. See also *Liberty Mut. Ins. Co. v McKneely*, 2001 WL379996 (Miss. App. 2001), Mississippi Law places a duty of a Workers' Compensation insurance company to *promptly and adequately* investigate all relevance facts involved in an insured's claim. That bad faith refusal to promptly pay a Workers' Compensation benefit, or claim, has been held to be an intentional tort. *Southern Farm Bureau Cas. Ins. v Holland* 469 So. 2d, 55, 59 (Miss. 1984) as shown herein, "promptly" and "adequately" are two words which were totally ignored by Amfed.

Here, there was no effort made whatsoever to avoid the consequences and to correct the effect of the underpayments to the widow and surviving children, even though Amfed knew the widows benefits had been improperly terminated, and the children had been

underpaid for two years.

There was no effort to even **notify** of the errors **nor** that payment would be forthcoming. Defendants seemed to maintain that nothing could have been paid until the precise to-the-penny amount owed to the widow, and the children, could be calculated by an employee of the Workers' Compensation Commission. And then that payment was delayed, until the adjuster returned from her marriage holiday, and the attorney returned from his vacation.

Here, Amfed cannot honestly assert it had a arguable reason for failing to pay (or notify Jennifer of its error), since its own attorney, Bolin, advised as early as on April 16, 2003, that "... there is in fact an application for Lump Sum, signed and notarized on 5 June, 2001, as well as Commission Order Authorizing Lump Sum Payment on the same day." See Ex. "10", Pg. 028 04-16-2003 letter to Nita Cox, and 05-16-2003 letter to Cox, Ex. "10", Pg. 029, wherein it took the attorney one month to draft a letter to the Commission, that he still had not sent.

B. Infliction of Emotional Distress

In recent years this Court has moved away from existing authority that mental anguish damages or damages for emotional distress or not recoverable in a breach of contract case in the absence of a finding of a separate independent tort. See *Life & Casualty Ins. Co. v. Bristow*, 529 So. 2d 620,624 (Miss. 1998). The Rule was once that to recover damages for emotional distress, Plaintiff had to prove either an intentional or at least grossly negligent tort, or negligence accompanied by physical impact. This Rule has been

relaxed in a long series of cases, beginning with *First National Bank v. Langley*, 314 So. 2d 324, 328 (Miss. 1975), and including *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898, 902 (Miss. 1981); *Entex, Inc. v. McQuire*, 414 So. 2d 437, 444 (Miss. 1982); *Royal Oil Co. v. Wells*, 500 So. 2d 439, 448 (Miss. 1986); *Blue Cross & Blue Shield of Mississippi, Inc., v. Maas*, 516 So. 2d 495, 498 (Miss. 1987); *Singleton v. Stegall*, 580 So.2d 1242, 1247 (Miss. 1991); and most recently *Wirtz v. Switzer*, 586 So. 2d 775, 784 (Miss. 1991); see also *McLoughlin v. O'Brian*, (1983) 1 A.C. 410. The upshot of these cases in the present rule is a plaintiff may recover for emotional injury proximately resulting from negligent conduct, provided only that the injury was reasonably foreseeable by the defendant. *Andrew Jackson Life Ins. Co. v Williams* 566 So. 2d, 1172 (Miss. 1990). These same rules, and principles apply to the handling of Workers' Compensation claims as to other lines of insurance. *McCain v Northwestern Nat. Ins. Co.* 484 So. 2d, 1001 (Miss. 1986). Workers' Compensation statute contemplates that for payment of premiums, injured workers, and the survivors of those killed on the job should enjoy some piece of mind. That policy of insurance coverage included intangibles such as risk aversion, peace of mind, and certainty that prompt payment of policy benefits would be made. *Andrew Jackson Life Ins. Co. v Williams* 566 So. 2d, 1172, 1179.

It is entirely foreseeable here that Jennifer Jordan would suffer some anxiety and emotional distress and the defendants own claim file document, and testimony of Jennifer Jordan confirm her difficulties as a result of the loss of her husband, and the exacerbation of those problems by the adjusters hasty decision to inform her she would receive no additional benefits. Although Amfed maintains it was *investigating* Jennifer's claim, the

plain facts reveal that Amfed knew within two days of April 14, 2003, that Jennifer's lump sum order did exist. Amfed did not conduct any investigation. Amfed simply delayed any notification of its errors, and that payment would be forthcoming.

C. Appellee's Issue 1

1. **Under the facts of this case did Amfed have a legitimate or arguable reason for failing and refusing to notify Jennifer Jordan for a period of two and a half (2½) months that her claim to lump sum widows benefits under the order of the Mississippi Workers' Compensation Commission dated June 5, 2001, was valid and would be paid.**

For over two and a half (2½) months, Jennifer heard nothing from Amfed regarding her April 14, 2003, telephone to adjuster Cox. The facts plainly show however that Cox, and the Amfed attorney knew on April 16, 2003 (2 days later) that Jennifer was correct. That she indeed had an unpaid lump sum order, that had been unpaid for over two years. The adjuster and the attorney also knew on that day Jennifer had been wrongfully told her benefits would be terminated. (See Ex. "10", adjuster's file activity notes, Pg. 028).

Interestingly, if Amfed intended to make payment to Jennifer, it would have been easy to provide notification to her, or if the reason that Amfed did not notify Jennifer was because she had an attorney, to notify her attorney. Amfed did not even provide a copy of the letter (Ex. "12") to the Workers' Compensation Commission to Jennifer nor her attorney.

Amfed also knew that Jennifer's financial condition was bad, and that she was extremely upset over being wrongfully told that her benefits were being terminated. Amfed

could have relieved these pressures by confessing their mistakes and a simple phone call.

A whole month passed. Then, on May 16, 2003 Amfed discovered Jennifer and the minor children had been underpaid for the previous two years by fifty (50) weekly installments. But again, Amfed remained mute and did nothing to notify Jennifer. If Amfed intended to argue the balance of Jennifer's widows benefits had somehow been forfeited due to her remarriage, such argument did not relieve Amfed from acting promptly with regard to the underpayments to both Jennifer and the children that it knew had been paid in the improper amounts for two years.

It is also entirely foreseeable that Jennifer would suffer anxiety and emotional distress. Defendants own claim file documents confirm this. (Ex. "10", Pg. 027,028). The testimony of Jennifer Jordan is poignant: (See T.98, Jennifer's Testimony)

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15 A. When she told me she was going to suspend
16 my benefits, yes, sir, I told her what I use those
17 monies for, you now, what I was going through, that
18 Jay was off work, that his daughter was injured. By
19 this time I was crying, I was upset, just letting her
20 know what this was going to do to me.

21 Q. How did you think it was going to affect
22 you, Jennifer?

23 A. It thought that it was going to make it
24 very hard on me because I would have to work more. I
25 would have to come up with those payments for the
26 school and that daycare now.

27 Q. Who was the only person earning any money
28 in the family at that time?

29 A. Myself.

99

1 Q. As a result of that, did she cut off your
 2 benefits?
 3 A. Yes, sir.
 4 Q. How was the extra work - - as a result of
 5 that, did you work overtime or seek extra work.
 6 A. Yes sir, I did. I worked extra when they
 7 would le me at the hospital. My mom helped me out
 8 with my baby. I just - - I had so much going on
 9 trying to keep up with everything.
 10 Q. This was in April, correct?
 11 A. Yes, sir.
 12 Q. Could you pay the April tuition at Sacred Heart?
 13 A. No, sir.
 14 Q. Could you keep paying the daycare for your
 16 son?
 17 A. No, sir.
 18 Q. Who took care of your son?
 19 A. The daycare, and my mom helped me with my
 20 son.
 21 Q. Did that affect your son in any way?
 22 A. Yes, sir. He starting calling my mother
 23 mama instead of me.

The question must be asked, what legitimate or arguable reason does Amfed have for failing to notify Jennifer that payment would be forthcoming. Amfed does not articulate a reason why Jennifer was not notified.³

The breach of good faith amounts to bad faith, when the activity is characterized by some conduct that violates standards of decency, fairness or reasonableness. Restatement (Second) of Contracts §§ 205, 100 (1979). In *Cenac v. Murry* 609 So. 2d, 1257 (Miss. 1992), the Mississippi Supreme Court in quoting from Farnsworth, Contracts, §7.17, 526-27 (1982) stated the following: In recent years, Courts have supplied a term requiring both parties to

³A jury could realistically conclude that Amfed truly had not decided to make payment and that attorney Bolin had been instructed to find a way to avoid payment because of Jennifer's remarriage.

a contract to exercise what is called 'good faith' or sometime 'good faith and fair dealing'. This duty is based on fundamental notions of fairness, and its scopes necessarily varies according to the nature of the agreement. Some conduct such as subterfuge, and evasion, clearly violates the duty. However the duty might not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the others parties duties, but also to take some affirmative steps to cooperate in achieving these goals.

Under the facts here, Amfed was under a clear affirmative obligation to notify Jennifer Jordan that her widows claim would be paid, and to notify her of the errors made regarding the underpaid weekly benefits to her and her children for the previous two years promptly, and timely. The numerous and ongoing instances of sloppy claims handling exhibited by the Defendant in this case has similarly led to an award of punitive damages which were upheld even in the United State Fifth Circuit Court of Appeals. *Eichenseer v. Reserve Life Ins. Co.*, 881 F. 2d 1355 (5th Cir. 1989). Repetitive and sloppy claim handling practices that illustrated disregard for the rights of the insured to know the progress of the claim, and to be informed of the result of that claim, illustrated disregard for the rights of Jennifer and her minor children. The decision to terminate Jennifer's benefits under these facts, without even as much as attempting to ascertain whether or not she was entitled to the remaining benefits owed under her lump sum order is clearly a failure to investigate before such a claim decision can be made.

A jury can also conclude that the failure to notify Plaintiff directly lead to additional emotional upset and anxiety they knew that Jennifer was experiencing after being wrongfully informed she would receive nothing further is socially unacceptable, represents repugnant claim handling practices, and is truly and insult or an abuse of the insured and her minor children constituting an independent tort. *Blue Cross & Blue Shield Inc. v. Maas*, 516 So. 2d 495, 496 - 497 (Miss. 1987).

Stated differently, Amfed was consciencely indifferent to Jennifer's financial problems. Its own attorney Bolin advised as early as April 16, 2003, that "...there is in fact an application for Lump Sum, signed and notarized on 5 June, 2001, as well as Commission Order authorizing lump sum payments on the same." See Ex. "10", Pg. 028, 4-16-03 letter to Nita Cox, and 5-16-03 letter to Cox, Pg. 29. "...it appears that the widow, and the children have been paid [sic](meaning one-half) of the benefits they are entitled to." "...The children then are also short by [sic](meaning one-half) and that will need to be addressed with penalty as well."⁴

It took the attorney one additional month to draft a letter to the Commission. It is very strange that during that time neither he nor Amfed notified Jennifer of Amfed's multiple errors. Because the amounts of weeks owed for underpayment were exactly fifty, the writing of a check, for the amounts underpaid to the children would have been quite simple.

⁴Amfed has never paid the penalty for missing fifty weekly installments due to the children.

It is without dispute that Amfed knew of these errors, and notwithstanding the knowledge of its errors, did nothing to correct the information given to Jennifer concerning her future entitlement to benefits, nor even attempt to tender undisputed amounts to be owed. Amfed had an obligation to provide the proper information concerning Jennifer's claim and her simple inquiry. Amfed was obligated to inform promptly of the underpayments. *Security Ins. Agents Inc. v. Cox* 299 So. 2d, 192, 194 (Miss. 1974) Amfed was under a duty of good faith that required it to refrain from doing anything which would deprive Jennifer and her children of the right to receive the *benefit* of the contractual Workers' Compensation coverage. Amfed had the exclusive control over the valuation and processing of Jennifer's claims. It had a duty to use that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d, 1172 (Miss. 1990).

Amfed not only destroyed the right to the benefit that Jennifer and her children were entitled to receive, but clearly failed to take any positive action to simply notify her that she was going to be paid.

Amfed did not have to sit down and right a check at that moment. A simple telephone call to her, or her attorney would have sufficed. Strangely in contravention to all societal norms, and politeness, not to mention statutory, or contract obligations to care for the widow and surviving children of deceased workers, Amfed saw no need nor obligation to even make a telephone call notifying Jennifer, that the adjuster was going to be off work because of a marriage holiday, or that Amfed's attorney would be out of the office for a

while because of family obligations. Amfed has demonstrated no legitimate nor arguable reason for failing to notify Jennifer Jordan that her claim for lump sum widows benefits was valid, that she was correct, that Amfed was wrong, and that the balance of the lump sum order would be paid.

D. Appellee's Issue 2

2. Did Amfed commit bad faith in notifying Jennifer Jordan that her widows benefits would be terminated without conducting any investigation as to the validity and effect of her June 5, 2001, Workers' Compensation Commission Lump Sum Order?

Factually, the entire jest of this case is laid out on Pages 027-030, Ex. "10" of the Adjuster Cox's file activity notes.

On April 11, 2003, Jennifer called to see why her lump sum benefits had never been paid. The adjuster clearly knew that Jennifer was claiming benefits owed under a Workers' Compensation Commission Order. Learning that Jennifer had remarried, the adjuster plainly lost sight of what was at issue but, because of the remarriage, saw opportunity to terminate weekly benefits immediately, or so she thought. The file activity sheets, and the adjusters comments indicate she gave no consideration whatsoever to the right of the widow. She also acted without any regard to the effects of her almost immediate decision to terminate Jennifer's benefits. "I am suspending the check that goes to the wife." Ex. "10", Pg, 027 04/11/2003 entry.

Three days later, 04/14/2003, she indicates that she has attempted to reach T.G.

(Attorney Bolin), "to see what we need to do".

At trial, T.G. Bolin, Amfed's attorney testified that he did admit it would have been his better advice, - - prudent advice for Cox not to have terminated Jennifer's benefit. He explained that answer by claiming the affirmative response was because he was sitting in a deposition. (T.313).

On April 16, 2003 (2 days later) Bolin told Cox after he confirmed the Lump Sum Order had been entered June 5, 2001, "Upon your review of the enclosures, please call me to discuss **our options** as far as a **response to the Claimant** and to the MWCC". Ex. "10", 028.

Jennifer testified that she was not told on April 11, 2003, her benefits were being terminated but relates that she had to call back on April 14, 2003, to speak with Cox again about the lump sum order. (T.97) During a second conversation that same day, Jennifer testified in response to Cox's claim that her attorney should have told her to notify Amfed in the event of her remarriage, Jennifer explained that the attorney did not represent her in the Workers' Compensation benefits and it was not discussed with him.(T.98) Jennifer then stated that she was told that her weekly benefits would be suspended and she would receive no more monies from Amfed. (T.98) Jennifer indicated that she was talked to like a child and like she had done something wrong. Jennifer then explained to Cox how important those benefits were and what terminating those benefit do to her and her family.

Amfed has advanced no authority, nor justification for pretending the lump sum benefit order of the Mississippi Workers' Compensation Commission was not valid. Even

if those benefits were erroneously paid by Amfed weekly. The plain facts are that the order was entered June 5, 2001 (Ex. "6"), and she did not remarry until some time in August of 2002. There was simply no way Amfed was entitled to terminate the widow's benefits under the order that predated her marriage, and the telephone conversation of April 11, 2003, with the adjuster. The adjuster acted wrongly, improperly, and without any investigation whatsoever into the propriety of termination of weekly benefits to Jennifer Jordan. Widows benefits can be paid in a lump sum or weekly. Miss. Code Ann. §§71-3-25, and 71-3-37 (10).

The decision of the adjuster in this case, was a decision to ignore an order of the Mississippi Workers' Compensation Commission and to make a decision to terminate benefits, and to continue the termination of those benefits, even after knowledge the order existed, and after confirmation (2 days later, April 16, 2003), the order indeed existed. For Jennifer Jordan, the adjuster's decision, without any investigation as to the propriety thereof, had harsh effects, both emotionally and financially. Amfed has not articulated any legitimate fact, nor no arguable legal reason for the adjuster having terminated Jennifer's benefits on April 11, 2003, thereafter, or for continuing to have terminated those benefits even after her attorney told her April 16, 2003 (Ex. "10" 028) that "...there is in fact an application for lump sum, signed and notarized on 5 June, 2001, as well as a Commission Order Authorizing Lump Sum Payments of the same date." Cox clearly had no authority to suspend benefits owed to Jennifer Jordan nor was the suspension done with a factually legitimate nor legally arguable reason. She acted hastily, and without regard to the rights

of Jennifer to receive benefits.

Amfed made no effort to reinstate these benefits, pay the same, or notify Jennifer until after she filed this suit, and until after two and a half months had lapsed.

A jury could easily conclude the adjuster acted without regard to Jennifer's rights, and without regard to the effects of her decision.

E. Appellee's Issues 3

3. **Did Amfed commit bad faith by not immediately tendering on May 16, 2003, those unpaid portions of the weekly benefits owed both to the widow and children, it discovered had not been paid for the previous two years?**

Amfed argues that Appellant's claim was never denied, and this is true. So why, was any investigation necessary for two and a half months? Why couldn't Jennifer simply be notified, or paid the undisputed portions that very easy to calculate, and which Defendants knew were owed? Under the facts, Amfed attempts to hide behind the term *investigation*, arguing ostensibly, that no payment whatsoever could be made until Amfed had received an exact to-the-penny computation from the Mississippi Workers' Compensation Commission.

There was no prohibition whatsoever in Amfed tendering promptly the unpaid and undisputed amounts owed. Amfed even contacted the Mississippi Workers' Compensation Commission, *ex parte*, or unilaterally, without notifying Jennifer nor her attorney. A copy of that letter (Ex. "12") dated May 27, 2003, would have provided notice to Jennifer of Amfed's errors, one whole month prior to Bolin's June 26, 2003 letter (Ex. "14") finally

tendering the unpaid children's benefits, and the balance of the Lump Sum Order.(Jennifer's attorney was not provided a copy of the letter either).

On May 16, 2003, T.G. Bolin told the adjuster that Jennifer had received one hundred checks for one-half of the weekly payments owed for her and her children. A month earlier, the adjuster had been made aware of why Jennifer was calling and that her financial condition was bad. The adjuster also knew that Jennifer had been incorrectly told she would receive nothing further. On May 16, 2003, not only did the adjuster and T.G. Bolin know that Jennifer was entitled to benefits under the lump sum order but she was also entitled to payments of an additional fifty (50) weeks of payment, as were her children. While it might have been inconvenient for Amfed to write two checks to Jennifer and her children, it was not very difficult at all to pick up the phone to notify Jennifer or her attorney that payment would be forthcoming (See testimony of Amfed 's Supervisor, Bob Blackledge T. 246-248). This is particularly true here, where Amfed knew it had wrongfully terminated Jennifer's benefits, new of her financial condition, and that for one whole month prior, it had done nothing to correct the errors. *McCain v. Northwestern Nat. Ins. Co.* 484 So. 2d, 1001 (Miss. 1986). The same rules apply to Workers' Compensation Claims and policies as they do to health, fire, casualty, accident and other insurance policies. There was no issue over the undisputed amounts owed. Workers' Compensation benefits are payable every fourteen (14) days. Miss. Code Ann. 71-3-31(2).

F. Appellee's Issues 4 and 5

4. Did Amfed have a legitimate or arguable reason for failing and refusing to tender

unto Jennifer Jordan, for a period of over three months, statutory penalty owed for failure to make timely payment of benefits under the Mississippi Workers' Compensation Act.

5. Has Amfed committed bad faith by refusing to pay the minor children, the statutory penalty for unpaid survivors benefits it learned had not been paid for a period of two years.

On May 16, 2003, T.G. Bolin notified the adjuster Nita Cox that he had discovered the widow and minor children had been underpaid by one-half of the amounts owed for two years. He told Cox that "the children are also short by [sic] (meaning one-half), and that will need to be addressed with penalty as well." See Ex. "10" 05-16-2003 entry, Pg. 029. One month earlier, Bolin had notified Cox that he had located the lump sum order that had remained unpaid since June 5, 2001.

Miss. Code Ann. §71-3-31(5) deals precisely with penalty owed where installments of compensation are payable without an award, those payable to the children. The same are to be paid within fourteen (14) days after they become due and if not, there shall be added to the installment, an amount equal to ten percent (10%) thereof which shall be paid at the same time as, but in addition to such installment.

Amfed, its adjuster, and its attorney, plainly knew the missed installments for the minor children were payable, with penalty. Even though the plain facts show Amfed missed fifty (50) weeks of installments, and Attorney Bolin told Amfed those payments would have to be addressed with penalty, Amfed never paid it even by the time of trial.

Amfed never applied to the Commission for excusal for nonpayment. See MCA§71-3-37(2).

At Trial, Bob Blackledge, adjuster Cox's Supervisor testified as follows (T.252, 253):

252

25 Q. Would you agree with me that when the
26 checks were tendered in the latter part of June, the
27 penalty was due?

28 A. To the children, yes.

29 Q. Why didn't you pay it?

253

1 A. You will have to ask Nita or T.G. I was
2 not involved in that part.

3 Q. That penalty to the children has never been paid,
4 has it?

253 Cont'd

5 A. I don't know.

6 Q. The penalty to the widow, based upon the
7 Order of June 1, 2001 and finding about it in April
8 2003, did you tender penalty for that payment when
9 the checks were mailed to the widow?

10 A. I don't know.

11 Q. Can you tell us a reason why that penalty
12 was not tendered?

13 A. If it was not tendered, I can't.

23 Q. Now if the penalty for the children hadn't
24 been tendered now, when are you going to tender it?

25 A. What or when?

26 Q. When?

27 A. I can't answer that?

The widows benefits were payable under the terms of an award but were likewise payable within fourteen (14) days after they became due. Miss. Code Ann. §71-3-31(6). A

twenty (20%) percent penalty is owed for unpaid installments under an award. If one ignores for the moment that Amfed did not make payment within fourteen (14) days of the June 5, 2001, entry of the Lump Sum Order, it is undisputed Amfed did not make payment within fourteen (14) days of the April 14, 2003, acknowledgment and letter by T.G. Bolin to Anita Cox that he had found the Lump Sum Order. Payment of the penalty was not even made within fourteen (14) days of tendering the balance of the lump sum benefits owed to the widow on June 26, 2003, Ex. "14", Bolin letter to William H. Jones.

On July 7, 2003, Bolin was notified that payment of the penalty was demanded. Ex. "15". This letter was ignored. On July 23, 2003 (Ex. "16"), Bolin was again requested to respond to the July 7, 2003, letter regarding nonpayment of the penalty. It was pointed out that Jennifer should not have to litigate the matter as the penalty was clearly owed. This letter was ignored.

On August 1, 2003, Bolin was again notified (Ex. "17") indicating he was refusing to return phone calls, and if he had not responded by next Wednesday afternoon, August 6, 2003, Jennifer would file a Petition to Controvert just to obtain the statutory penalty. (Amfed argues that because the wrong penalty percentage was claimed, it was somehow relieved of responding to Jones letters; or that Amfed did something good in finally tendering the statutory penalties in the proper amount.) Amfed has demonstrated no legitimate nor arguable reason for failing to pay the statutory penalty timely, to Jennifer. Amfed advances no legitimate or arguable reason for failure to tender the penalty for the fifty weeks of unpaid benefits owed to the minor children.

G. Response to Appellant's Issues 1 through 5

Amfed argues that it had no notice of the lump sum award prior to April 11, 2003, but this belies the fact that Amfed received Commission Form C01 (Ex. "7") in September 2002. This form is only utilized where a final order has been entered and appears to be at least a second request for the filing of MWCC Form B-31. A B-31 form is only requested after entry of a Final Order. See Testimony of Joann McDonald, Commission Secretary, T. 160, 161, and Ex. "10", 4/16/2003, Pg. 028 letter to Cox from Bolin, last paragraph. See also Testimony of Nita Cox, T.183, 184. In this death claim, Cox was able to reduce reserves by one-half. This occurred just a few weeks before Jennifer called. (T. 182-186). Truly any juror can reject Amfed's claim that it had no knowledge, nor reason to know of the lump sum order and played the odds hoping that Jennifer would remarry, an occurrence that literally drove the decision of the adjuster to terminate benefits immediately, despite having been told Jennifer's lump sum order had been unpaid for two years.

Amfed alleges the delay in paying the penalty on the Lump Sum Award Order from June 26, 2003, until August 8, 2003, can be legitimately explained. As stated in its Brief (Pg. 32), Amfed states as follows: "Again, Amfed gave a reasonable explanation for the short delay in payment - they were continuing their investigation." This is laughable. Amfed put forth no evidence whatsoever that there was an actual investigation of any kind or type. The facts are the adjuster went on a marriage holiday, and Bolin, Amfed's attorney, took a vacation. Except for the multiple letters sent by Attorney Jones to Bolin, Amfed produced not one document showing anything like an "investigation" was had.

Amfed claims an additional reason the penalty was not tendered was because it was not computed in the recalculation of the benefit by the MWCC. Bolin's letter (Ex. "12") does not requests that the MWCC compute a penalty. Amfed could not convince a jury that the penalty would have been paid without the series of letters from Jones, and the threat of additional litigation. Amfed did not demonstrate to the jury an arguable reason in fact, nor at law, why it did not follow MCA§71-3-31(6)... there shall be added to such unpaid installment in amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to such compensation.

H. Appellant's Issue 6 - Termination of Widow's Bi-Weekly Benefits

Amfed actually argues that the termination of Jordan's widows benefits upon notification that she had remarried on August 10, 2002, was required under the statute and cannot constitute bad faith (Amfed Brief §B. P. 14).

First, this is the exact attitude the adjuster had, and it led to no investigation whatsoever as to the peremptory effect of the lump sum order over Jennifer's remarriage. Stated differently, the Amfed adjuster chose to make no use of the multiple resources she had available, and Amfed dedicated no part of its "*investigation*", to resolving the claim of Jennifer to unpaid lump sum benefits, before the decision was made to terminate Jennifer's bi-weekly payments. Under the facts, and under the plain chronology of events, Amfed was not required to terminate the widows benefits at all. Amfed does not support its argument that it was necessary or required that benefits be terminated with any authority whatsoever. Such was the improper and obviously arbitrary decision of the adjuster without

investigation at all.

I. Appellant's Issue 7 and 8 - Actions of the Attorney

First, Amfed did not plead reliance upon counsel as a defense to this proceeding. Amfed advances the proposition that it cannot be held responsible for the actions or inactions of its attorney nor can such actions be in punitive to Amfed as evidence of bad faith since he was operating as an independent contractor.

Without doubt, Attorney Bolin was Amfed's agent and did not act in an independent fashion at all.

In his correspondence to Cox of 4/16/2003, Ex. "10", Pg. 028, last paragraph, Bolin plainly tells Cox that upon her review of the information he had provided, to please call him to discuss "our options" as far as a response to the Claimant and to the MWCC. In his correspondence of 5/16/2003, "Ex. "10", Pg. 029, he clearly asked the adjuster to please call him to discuss, and determine whether his analysis of the facts were correct.

Amfed's own claim guidelines (Ex. "20") clearly maintains any investigation should be substantially complete within fourteen(14) days of receipt of claim. That means all issues regarding the initial compensability of a claim had been resolved. (Ex. "20", DA 535). If benefits are terminated or delayed for cause, the reason must be clearly documented and diligent efforts must be made to clarify the situation and resume payments, if justified, as quickly as possible. (DA 543).

Importantly however, Amfed should not be heard to complain that the attorney mishandled the claim. Litigation management for Amfed is an ongoing process. File

abandonment to defense counsel is unacceptable. The file handler must stay involved with the claim and keep defense counsel aware of all pertinent developments as they occur. (Ex. "20", DA 552). Of course this file was not in litigation. But Amfed seems to argue that no bad faith was committed, and that the delay's were justified, but if there was bad faith, and if the delay's were not justified, it is somehow the fault of their attorney, not Amfed. This argument is also advanced, in this appeal, without citation of authority.

J. Jury Instructions.

The entirety of the Brief of Amfed with regard to jury instructions, does not contain one citation of authority except a reference to MCA§11-1-65. Amfed complains of Jury Instructions P1, P2, P6, P8, P12, P15, P21 and P23, without one quote from any Mississippi Supreme Court decision indicating how and in what respect it is claimed that these instructions should not have been given. Not one phrase is pointed out as to how it violates existing precedent with regard to the issue of punitive damages.

K. The Punitive Damage Phase

Amfed argues that the statutory scheme approved for the assessment of punitive damages as set forth in Miss. Code §11-1-65, and as clarified in *Bradfield v. Schwartz* 936 So. 2d, 931 (Miss. 2006) was violated. The record in this case, T.394 - 400, demonstrates no objection to the procedure used. The jury had heard all of the damning testimony from witnesses because they were simply part and parcel of the case in chief. Two (2) additional exhibits however, were introduced in the punitive damage phase (Ex. "27"), Annual Report to Commission of Insurance, and (Ex. "28"), Amfed Companies LLC net worth documents.

Again, Amfed did not object that additional testimony be presented, and this with very good reason. Amfed could easily have determined that it did not want the jury to hear anymore. Amfed and its attorneys have a right to waive a continued repetition of the conduct of the handling of this claim based upon a decision to let the jury simply hear no more. (See R., T 394 - 400).

CONCLUSION

In this case Amfed clearly mishandled a simple inquiry from the widow of a deceased worker and knew within three (3) days that she would have to be paid. Amfed also knew that it had erroneously told Jennifer that she was entitled to nothing further, that her family was distraught, and that she was having financial difficulty. The Amfed adjuster also knew the effect her decision to terminate Jennifer's benefits would have upon her, and for the entire next month, did absolutely nothing to notify Jennifer that she had been improperly told she was entitled to nothing; and that she was entitled to the balance of the benefits under the lump sum order.

A month later Amfed discovered additional errors in the payment of benefits not only to Jennifer, but to her children. Knowing of Jennifer's financial difficulty, and of the additional hardship she faced, Amfed did nothing to rectify the known missed fifty (50) weekly payments of benefits for which a check could have been easily, and promptly tendered, without waiting on computations from the MWCC, and without waiting for the adjuster and Amfed's attorney to return from holidays.

Arguing that it was *investigating* this *claim*, is hypocritical, and outright insulting.

The plain facts show the adjuster took a marriage holiday, and the attorney took a vacation. Amfed did not pay the penalty required by statute within fourteen (14) days after it had the final calculations owed to Jennifer under the lump sum order and only under threat of additional litigation was it tendered many months after Amfed's attorney admitted in correspondence the penalty would have to be paid. Amfed never paid the penalty owed to the children. The actions of Amfed are colored with abuse. The actions of Amfed illustrate conduct which violate standards of decency, fairness, and reasonableness. They clearly show a conscious disregard for the rights of the surviving widow and minor children. These are not clerical errors, and are much more than just bad judgment and negligence. They demonstrate utter indifference.

It is submitted Amfed was required to act positively to notify Jennifer of its mistake in the handling of her claim, to notify her that she would paid, and to promptly correct the underpayment of benefits to Jennifer and her children when they were discovered. Amfed's refusal to pay and tender penalties as required by the Workers' Compensation Statute evinces the utter disregard of Amfed for statutory obligations owed to the widow and the minor children. Amfed should not be heard to argue that it had a legitimate or arguable reason for not tendering the penalty under these facts, where it did not even request that the MWCC to excuse the penalty.

The actual damage verdict in this case was modest, as was the punitive damage verdict. The Final Judgment of the Circuit Court of the First Judicial District of Jones County, Mississippi, should be upheld.


Respectfully submitted,

WILLIAM H. JONES

CERTIFICATE OF SERVICE

I, the undersigned WILLIAM H. JONES, Attorney for Appellant Jennifer Jordan Brown, do hereby certify that on the date set forth below I have furnished unto Lori Jordan Graham, Attorney for Appellants, by United States Mail, postage fully pre-paid, to her usual business address P.O. Box 6020, Ridgeland, MS 39158-6020; and to Hon. Billy Joe Landrum, Jones County Circuit Court Judge, P.O. Box 685, Laurel, MS 39441. I furthermore hereby certify that the Brief submitted complies with the type-volume limitations with regard to the number of words in the Brief and the number of lines of monospaced type.

This the 15th day of November, 2008.



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