

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

APPELLANTS
[REDACTED]

VS.

CAUSE NO. 2007-CA-01422

JENNIFER BROWN JORDAN

APPELLEE

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

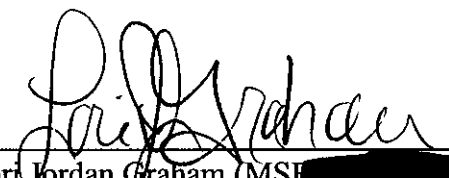

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STATEMENT OF THE ISSUES

1. Amfed's nonpayment of the lump sum award from the entry of the order on June 5, 2001, until Amfed received a copy of the Order on April 16, 2003, does not constitute bad faith.
2. Amfed's nonpayment of the of the lump sum award from April 16, 2003 until June 25, 2003, does not constitute bad faith.
3. Amfed's nonpayment of the twenty percent (20%) penalty on the lump sum award from the entry of the order on June 5, 2001, until it was paid on August 13, 2003, does not constitute bad faith.
4. Amfed's under payment of the children's benefits from May 17, 2001 until May 16, 2003, was the result of a clerical error and does not constitute bad faith.
5. Amfed's nonpayment of the deficiency in the children's biweekly benefits from the discovery of the error on May 16, 2003, until payment on June 25, 2003, does not constitute bad faith.
6. Amfed's termination of the widow's biweekly benefit upon notice of her remarriage was in accordance with the Workers' Compensation Act and did not constitute bad faith.
7. Amfed's attorney was an independent contractor and any delay in payment of benefits resulting from his acts or omissions cannot be imputed to Amfed as evidence of bad faith.
8. Amfed's reliance on their attorney to notify Jordan or her attorney that the lump sum award had been confirmed and would be paid was reasonable under the circumstances and does not constitute bad faith.
9. The trial court erred in denying Amfed's pretrial motion for summary judgment and supplemental motion for summary judgment on the issue of bad faith.
10. The trial court erred in denying Amfed's motion for a directed verdict at the conclusion of Jordan's case in chief.
11. The trial court erred in refusing to give the instruction submitted as D-1 which peremptorily instructed the jury to find for Amfed on all issues.
12. The trial court erred in refusing to give the jury instructions submitted as D-2, D-3, D-4, D-5 and D-6 which peremptorily instructed the jury to find for Amfed on the issues of the delay in paying the lump sum award, the underpayment of children's benefits, and the termination of the widows biweekly benefits on remarriage.
13. The trial court erred in giving peremptory instructions to the jury to return a verdict for Jordan awarding the contractual damages which had been paid prior to the trial.

14. The trial court erred in submitting Jordan's extra-contractual claim for emotional distress to the jury over Amfed's objection.
15. The trial court erred in giving instructions P-1, P-2, P-3, P-6, P-8 and P-12, in the compensatory phase of the trial over Amfed's objections.
16. The trial court erred in submitting the issue of punitive damages to the jury over Amfed's objection.
17. The trial court erred in orally instructing the jury on the issue of punitive damages.
18. The trial court erred in giving instructions P-15, P-21 and P-23 on the issue punitive damages over Amfed's objections.
19. The trial court erred in refusing to give instructions D-10, D-11, D-12, D-13 and D-16 offered by Amfed on the issue of punitive damages.

STATEMENT OF THE CASE

I. Statement of the Facts

This is a claim for bad faith claims handling in the administration of a workers' compensation claim for death benefits. Plaintiff sought recovery of contractual, extra-contractual and punitive damages on allegations that the Defendants delayed payment of workers' compensation benefits and penalties without an arguable basis or justifiable reason and with either malice or a reckless indifference to Plaintiff's rights.

The claim arises from the May 4, 2001, death of James H. Brown, III. He was electrocuted in a work-related accident while he was employed by A&B Electric Company.¹ American Federated Insurance Company was the workers' compensation carrier for A&B Electric. Amfed Companies, LLC, was the third party administrator responsible for adjusting the claim.²

A. May 11, 2001, AmFed's First Notice of Claim

On May 11, 2001, the claim was reported to AmFed Companies, LLC. (T.144) Neither American Federated Insurance Company, nor Amfed Companies, LLC had notice of Brown's May 4, 2001 injury until May 11, 2001. (T.144)

Stacy Stuart was assigned to adjust the claim. (T.144) Stuart immediately conducted a thorough investigation of the claim, including making requests for medical, death, marriage and birth records necessary to the proper investigation of the claim and identification of dependents entitled to receive death benefits under the Mississippi Workers' Compensation Act. (T.145-146) Stuart contacted Mr. Brown's surviving spouse, Jennifer Brown, and explained her right to

¹ A&B Electric will be referred to as the "Employer in this brief.

² Defendants Amfed Companies, LLC and American Federated Insurance Company will be referred to collectively as "Amfed" in this brief, unless otherwise noted.

benefits under the Workers' Compensation Act.³ (T.145) Stuart promptly determined that benefits were owed to the widow and dependant children and requested wage information from the employer so she could calculate Mr. Brown's average weekly wage and determine the weekly benefit amount owed. (T.145) While speaking with Ms. Brown she realized the widow and small children were in need of the payment as soon as possible and therefore she estimated the benefit payment amounts in order to get the checks out quickly. (T.136) On May 17, 2001, Stuart mailed the first benefit payment to Ms. Brown. (T.146) On May 21, 2001, Stuart filed a MWCC Form B-18, Supplemental Agreement as to Compensation, with the Commission reflecting the commencement of weekly benefits payable to Jennifer Brown and Mr. Brown's dependent children, Justin Matthew Brown, Laura Elizabeth Brown, and James H. Brown, IV. (T.147, Ex. P-2,D-8)

On May 25, 2001, Stuart requested a death benefits calculation from the Mississippi Workers' Compensation Commission statistician. (T.148, Ex. P-3, D-10) She requested the calculation in order to verify that her calculations were correct, and that she was paying the correct weekly rate. (T. 129,148,153) On May 30, 2001, the MWCC issued a computation confirming Stuart's calculations. (Ex. P-4, D-11)

Stuart set up the claim in AmFed's deferred payment system to automatically issue bi-weekly checks. (T.148) Unknown to Stuart, she set up the payment schedule so that checks for weekly benefits were sent out every two weeks. (T.148-149) Stuart did not realize that she did not check the appropriate box to pay two weeks of benefits as was customary. (T.149) Rather than issuing checks for \$340.78, the payments were set up to issue checks for \$170.39. (T.149) Timely payments continued to Ms. Brown and the children for almost two years. (T.90) Stuart

³ Plaintiff, Jennifer Brown Jordan, is referred to in this brief as "Ms. Brown" and "Ms. Jordan." She changed her name to Jordan on August 10, 2002, when she remarried.

was not aware this clerical mistake had been made until later, during the investigation regarding the Lump Sum Order. (T.149, 153)

On June 5, 2001, unknown to AmFed, Ms. Brown went to the Mississippi Workers' Compensation Commission and filed an Application for Lump Sum Payment, MWCC Form B-19. (T.86, Ex.P-5) On June 5, 2001, the MWCC issued to Ms. Brown an Order Authorizing Lump Sum Payment. (Ex.P-6) AmFed never knew about the Order until April 11, 2003. (T.187) So weekly payments continued to the widow and children until approximately April 11, 2003. (T.150) AmFed had no knowledge that Jordan had requested the lump sum. (T.111) Jordan never sent a copy of the Order to AmFed and never contacted AmFed during this time to ask why she did not receive her lump sum payment. (T.111) The Mississippi Workers' Compensation Commission did not send a copy of the Order to AmFed. (T.151)

Following her husband's death in 2001, Jordan hired attorney, Glenn White, to represent her and her children in a third party wrongful death action. (T.112) In July 2002, the employer and carrier hired attorney, T.G. Bolen, to pursue their subrogation interest in the third party suit. (T.263-265, Ex.D-15) Attorney Bolen would not have any direct involvement in the workers' compensation case until April 2003, approximately nine months later. (T.267)

In February 2002, Jordan spoke with AmFed adjuster, Daron Perkins, who called to inquire about the well being of her children.⁴ (T.113-114) She did not mention the Lump Sum Order to him and reported that she did not have any problems. (T.114) Immediately after this contact, on February 7, 2002, attorney White informed Perkins by letter that he was representing the widow and Mr. Brown's estate in any claims made due to the fact of Mr. Brown's death. (Ex.D-14) Therefore direct contact between Jordan and AmFed ceased until April 11, 2003.

⁴ At the time of this contact, adjuster, Daron Perkins, had replaced Stacy Stuart. Neither Stuart nor Perkins were aware that Jordan was represented by counsel prior to this call.

During various conversations between attorney White and attorney Bolen regarding the third party lawsuit and subrogation neither the existence nor the nonpayment of the lump sum award was ever mentioned. (Ex. D.16, D-17)

B. April 11, 2003, AmFed's First Knowledge of the Lump Sum Award and May 16, 2003, AmFed's First Knowledge of Mistake in Bi-weekly Payments

On April 11, 2003, attorney White informed Jordan that the wrongful death suit was futile and should be dismissed. (T.94) Later that same day Jordan contacted AmFed adjuster, Nita Cox, to inquire why she had not received her lump sum payment.⁵ (T.112) This was AmFed's first notice of the existence of the Lump Sum Order. (T.187) Cox told Jordan she would look into the matter and call her back. (T.115) Cox contacted her attorney, T.G. Bolen, to find out if he had any knowledge of the Lump Sum Order. (T.188-189) Bolen did not have a copy of the Order in his file, and advised he would go to the Workers' Compensation Commission and review the file. (T.192, 269)

During the April 11, 2003, conversation Jordan informed Cox that on August 10, 2002, she married Jay Jordan. (T.187) The Workers' Compensation Act provides that widow's benefits are terminated when she remarries.⁶ So AmFed terminated Jordan's weekly benefit payments upon notification that she had remarried. (T.190)

On April 14, 2003, Jordan contacted Cox again and Cox advised she had not been able to locate a copy of the Order, but would continue to investigate it. (T.116, 191)

On April 16, 2003, Bolen wrote to Cox advising he had been to the Mississippi Workers' Compensation Commission and located the Order in the Commission file and enclosed a copy of

⁵ At the time of this contact, adjuster, Nita Cox, had replace Daron Perkins.

⁶ See Miss. Code Ann. § 71-3-25.

the Order. (Ex.D-19) Cox was out of the office on her honeymoon the week Bolen's letter was received. (T.213) Cox returned to the office on April 30, 2003, and discussed the Order with her supervisor, Bob Blacklidge. (T.214-215) That same day, April 30, 2003, Cox asked Bolen to obtain a calculation from the Mississippi Workers' Compensation Commission so Amfed could pay the benefits. (T.214) On May 5, 2003, Cox followed up with Bolen and he advised he was preparing a letter to the Commission. (T.215-216) Cox provided the necessary payment information for him to submit with the request. (T.216) On May 12, 2003, Cox again followed up with Bolen concerning the status. (T.217)

On May 16, 2003, Bolen advised Cox that he had a letter drafted to the Commission concerning the lump sum calculation, but wanted to discuss it with her before he sent it. (T.217) He explained that when he looked at the figures the second time, it appeared the widow and children had both been paid half the benefits they were owed, the bi-weekly payments had been issued in the amount of weekly payments. (T.218, Ex.D-21) Bolen discussed the matter with Cox and made a note in his file to obtain a calculation of benefits owed to the children in addition to those owed to Jordan. (Ex.D-20)

C. May 27, 2003, AmFed's Letter to the MWCC Concerning Payment of the Lump Sum Award and Mistake in Bi-weekly Payments

On May 27, 2003, Bolen wrote to Ben Barrett Smith, MWCC Chairman, advising that AmFed was not aware of the Lump Sum Order until Jordan's recent telephone call. (Ex.D-21) He advised that AmFed was ready and willing to forward the appropriate lump sum amount immediately upon receipt of the calculation. (Ex.D-21) This correspondence also advised that AmFed had discovered the mistake with the payment amounts and requested a calculation of additional benefits owed to James H. Brown, IV, Laura Elizabeth Brown, and Justin Matthew Brown. (Ex.D-21)

Shortly after her conversation with Nita Cox on April 14, 2003, attorney White referred Jordan to Attorney William H. Jones to discuss non payment of the lump sum award. (T.101) Although Jordan had discussed the matter with attorney Jones in April, she did not actually employ him to represent her until May 20, 2003. On May 20, 2003, Jordan hired attorney William H. Jones. Had Mr. Jones inquired with either Amfed or Bolen, he would have discovered Amfed's May 27, 2003, letter to the MWCC concerning payment of the Lump Sum Order. (T.101-102) On May 29, 2003, attorney Jones filed this bad faith lawsuit on Jordan's behalf. (R.3-12)

D. May 30, 2003, Calculation by the Mississippi Workers' Compensation Commission

On May 29, 2003, the MWCC issued a calculation of benefits, with interest, owed to Jennifer Brown Jordan, Justin M. Brown, Laura E. Brown, and James H. Brown, IV. (Ex.D-22) The calculation was mailed to Bolen with a letter from the MWCC dated May 30, 2003. (Ex.D-23) The calculation showed a total payment owed to Jordan for the lump sum award of \$71,795.41 and the total payable to each of the children for the underpayment of the biweekly benefits of \$3,493.06. (Ex. D-22) The calculation included interest on the amounts due but did not include a penalty. (Ex D-22).

On June 9, 2003, Cox contacted Bolen regarding the status of the calculation. (T.224-225) On June 10, 2003, the calculations were faxed to Amfed. On June 26, 2003, Bolen sent attorney Jones the following: (a) a check for \$71,795.41 payable to Jordan for the lump sum award; (b) a check for \$3,493.06 payable to Jordan as guardian of Justin; and (c) a check for \$3,493.06 payable to Jordan as guardian of Laura. (Ex.D-25) The letter further informed Jones that the checks payable to Jordan for the children were to cover the under payment resulting from the error in entering the biweekly payment amounts. (Ex.D- 25) Prior to receiving this

letter, neither Jordan, nor her attorneys, were aware of the under payment and had not made a claim for it. (T.119-120)

E. Payment of the Penalty

On July 7, 2003, attorney Jones wrote to Bolen inquiring as to whether Jordan and the children were entitled to a ten percent (10%) penalty for late payment under the provisions of Miss. Code Ann. § 71-3-37(5). (Ex. D-26) On July 21, 2003, and August 1, 2003, Jones wrote to Bolen again requesting payment of the penalty. (Ex.P-16, P-17) On August 4, 2003, Bolen responded to Jones that he was trying to locate an MWCC order to see if penalties were allowed. (Ex.D-28) Bolen pointed out that the Commission's calculation of benefits dated May 29, 2003 did not include a penalty, casting doubt on whether one was due. (Ex. D-28)

On August 8, 2003, Bolen wrote to Jones stating that after he informed Amfed concerning the penalty, Amfed agreed to pay the penalty but that the check had to be reissued because of an error in the payee name. (Ex. D-29). By letter dated August 13, 2003, Bolen forwarded to Jones a check for \$17,808.35 for payment of the penalty and pointed out to Jones that the twenty percent (20%) penalty provision of Miss. Code Ann. § 71-3-37(6) applied rather than the ten percent (10%) penalty under subparagraph (5), which Jones had asserted was applicable. (Ex. D-30)

II. Course of Proceedings and Disposition in the Jones Circuit Court

On May 29, 2003, attorney Jones filed this bad faith lawsuit on Jordan's behalf. (R.3-12) On October 24, 2003, attorney Jones filed an Amended Complaint asserting claims on behalf of Justin Matthew Brown and Laura Elizabeth Brown alleging bad faith based on the mistake in the amount of benefits weekly paid to them between May 4, 2001 and August 8, 2003. (R.33-47)⁷

⁷ On July 27, 2004, Plaintiffs filed a Second Amended Complaint. This Complaint did not add any additional claims, but joined the Mississippi Workers' Compensation Assigned Risk Plan as a Defendant. The Plan was dismissed prior to trial. Defendant, A&B Electric of Hattiesburg, the Employer, was also dismissed prior to trial. (R.298-299)

On June 15, 2004, AmFed filed a Motion for Summary Judgment on all issues. (R.73, 271) In essence, the motion asserted that the undisputed facts did not establish a basis for Jordan's claim that the failure to pay benefits or penalties was the result of any willful, intentional or malicious act by Amfed and therefore Amfed was entitled to judgment as a matter of law. (R.73, 271) On March 23, 2005, the Jones Circuit Court entered an Order granting the motions as to A & B Electric and the Assigned Risk Plan and dismissing them from the case; however, the Court denied the Motion as to Amfed Companies, LLC and American Federated Insurance Company. (R. 298)

On March 5, 2007, a jury trial began in the Jones County Circuit Court before Honorable Billy Joe Landrum. The trial was bifurcated into two phases; compensatory damages and punitive damages. At the close of evidence on the compensatory phase, AmFed moved for a directed verdict on the issue of any act of bad faith prior to May 16, 2003. (R.315) The mistake as to the weekly payment amounts was due to Stacy Stuart's clerical error and AmFed was not aware the mistake had been made until May 16, 2003. Therefore, Amfed could not have acted in bad faith prior to May 16, 2003. (R.315) Amfed next moved for a directed verdict on the issue of knowledge of the Lump Sum Order prior to April 16, 2003. (R.315-318) Mississippi Workers' Compensation Commission Secretary, Joann McDonald, testified that she could not testify under oath that the Order had been stamped, sealed, and delivered to Amfed and Jordan had not presented any testimony to prove that Amfed had received the Order. (R.316) Jordan did not present proof that Amfed had knowledge of the Order prior to April 16, 2003, therefore Amfed could not have acted in bad faith prior to April 16, 2003. (R.318) Next, Amfed moved for a directed verdict on the issue of delay of payment between May 16, 2003 and June 25, 2003, during which time Amfed was conducting its investigation and obtaining a calculation of benefits owed. (T.319) Amfed was entitled to conduct a reasonable investigation. During the

investigation and requesting of the calculation on the Lump Sum Order, Amfed discovered the mistake in the weekly payments, requested a calculation by letter dated May 27, 2003, and payment was made on June 25, 2003. The time it took Amfed to make the payment was reasonable and justified under the circumstances. Therefore Amfed could not have acted in bad faith during this time period. (R.320) Finally, Amfed moved for a peremptory instruction on the issue of intentional infliction of emotional distress. (R.321) Jordan failed to present any evidence of injury; and did not produce any medical records, bills, or prescriptions. (R.321) Jordan did not put on any proof of malicious, intentional, willful, wanton, grossly careless indifference or reckless acts by Amfed as a basis of her claim for emotional distress. (R.322) The Court overruled all of Amfed's motions, allowing all Jordan's claims to proceed to the Jury. (R.313-331)

At the conclusion of the compensatory phase, the Jury returned a verdict awarding Jordan \$130,568.00 as contractual and extra contractual damages, which included benefits and penalties paid by Amfed some four years prior to the trial. (R.443)

After the verdict was received and read, Jordan moved to submit the issue of punitive damages to the Jury. Over Amfed's objection, the motion was granted, and the trial proceeded into the punitive damages phase. No further evidence was introduced by either party. (T.391-414) Plaintiff did not offer any evidence of Amfed's alleged egregious behavior. (T.391-414) After receiving the instructions and hearing arguments of counsel, the Jury returned a punitive damages verdict for Jordan in the amount of \$200,000.00. (R.444)

On March 13, 2007, Amfed filed a motion for a credit in the amount of \$78,781.53 in benefits and \$17,808.35 in late payment penalties paid prior to trial. (R. 445) Plaintiff filed a post trial motion for attorney's fees in the amount of \$32,500.00. (R. 448) Amfed objected to an award of attorneys fees and without waiving their objection, agreed to stipulate that the amount

claimed was reasonable if an award of attorneys fees was appropriate under the evidence and the applicable law. (R.452)

On April 9, 2007, The Circuit Court entered a Final Judgment reflecting a total of award of \$284,286.47. (R.456). This Judgment erroneously omitted a credit for the penalties already paid by Amfed. On July 30, 2007, an Amended Final Judgment was entered to correct this error. (R.466) The Amended Final Judgment awarded Jordan \$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, a net compensatory award of \$33,978.12. \$200,000.00 was awarded for punitive damages and \$32,500.00 as attorneys fees for a total award of \$266,478.12. (R.466)

Amfed filed a Motion for a Judgment Notwithstanding the Verdict or, in the Alternative, For New Trial. (R.460) On July 30, 2007, the Jones Circuit Court entered an Order Denying Defendants' Motion for New Trial. (R.469) Amfed appeals the Amended Final Judgment entered by the Jones Circuit Court on July 30, 2007. (R.466)

Jordan's evidence was totally insufficient to establish a claim of bad faith. The verdicts were the result of the Jury being confused or mislead by various errors committed by the Circuit Court during the trial, including the Court's instructions on the law applicable to both the compensatory and punitive phases of the trial. Consequently, the verdicts are contrary to law and against the overwhelming weight of the evidence and the Judgment should be reversed.

SUMMARY OF THE ARGUMENT

A. Appellant's Issues 1 through 5 - The Law of Bad Faith Workers' Compensation

The Appellant's arguments under Statement of the Issues 1 through 5 center around the seminal case of *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So.2d 55 (Miss. 1989), which held that the exclusive remedy provision of the Worker's Compensation Act precludes an action against an insurance carrier for an intentional tort independent of the compensable accident and made an exception for an intentional tort action. The burden rests with a plaintiff seeking to establish a claim against the carrier 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 and intentional or malicious wrong or is a reckless and wanton disregard for the legal rights of the claimant. *Id.* at 58-59.

Analyzed in the context of Issues 1 through 5 and the available evidence, Amfed had either an arguable basis or legitimate reason for everything they did in connection with the payment of the Lump Sum Award, the underpayment of the children's benefits, and the penalty. First, the lump sum award could not be paid prior to April 11, 2003, as Amfed did not have notice that it had been entered or even existed until then.

Second, the delay in paying the award between April 16, 2003, and June 26, 2003, was not unreasonable considering that the matter required some investigation, a recalculation of the benefits, the payment had to be processed and the check issued. Other factors contributed to the delay, such as the adjuster and attorney handling the matter being out of their offices during the period but at different times.

Third, the delay in paying the penalty on the Lump Sum Award from June 26, 2003 until August 8, 2003, can be legitimately explained. No penalty was computed in the recalculation of

the benefit and Jordan's attorney claimed the penalty under the wrong provision and in the wrong amount, which Amfed's attorney recognized and corrected.

Fourth, it is undisputed that the underpayment of the children's benefits beginning on May 17, 2001, resulted from a clerical error which was not discovered until May 16, 2003. Nonpayment resulting from error, inadvertence or negligence does not constitute bad faith as a matter of law.

Fifth, the delay in paying the under payment of the children's benefits from May 16, 2003 until June 25, 2003, was reasonable under the circumstances because the amount had to be verified. After doing so, it became necessary to request and obtain a recalculation of the benefits from the Mississippi Workers' Compensation Commission. After the attorney received the recalculation on May 30, 2003, the checks were issued and mailed to Jordan's attorney.

B. Appellant's Issue 6 - Termination of Widow's Bi-weekly Benefits

Sixth, the termination of Jordan's widow benefit upon notification that she had remarried on August 10, 2002, was required under the statute and cannot constitute bad faith as a matter of law. Amfed terminated the benefits in compliance with the Mississippi Workers' Compensation Act.

C. Appellant's Issues 7 and 8 - Actions of the Attorney

Seventh, any delay in paying the claims from April 16, 2003, through June 25, 2003, which is attributable to the actions or inactions of the Amfed's attorney, cannot be imputed to Amfed as evidence of bad faith since they had the right to employ counsel and to rely on his competence, skill and judgment in rendering legal services and advice as an independent contractor.

Eighth, Amfed's failure to contact Jordan directly between April 16, 2003 and June 26, 2003, to inform her that the Lump Sum Order was valid and being processed for payment was

the result of their belief in good faith that because Jordan was represented by counsel, all contacts should be handled by the attorneys. Amfed's reliance on their attorney to contact Jordan's attorney during that period was reasonable and justified and does not constitute bad faith as a matter of law.

D. Appellant's Issue 9 and 10 - The Trial Court's Failure to Grant Amfed's Motions for Summary Judgment and Directed Verdicts

Ninth and Tenth, to avoid unnecessary repetition, Appellant's summarize their argument on these two issues by incorporating the summarization of the arguments appearing under Issues 1 through 5 above. The evidence clearly establishes that all of Amfed's actions were supported by an arguable basis or a justifiable reason and do not constitute bad faith as a matter of law. Thus, Amfed was entitled to either summary judgment or directed verdicts on the issues of extra contractual or *Veasley* damages and on the issue of punitive damages.

E. Appellant's Issue 11 and 12 - The Trial Court's Failure to Grant Amfed's Peremptory Instructions.

Eleventh and twelfth, the trial court refused to grant Instruction D-1 which peremptorily instructed the jury to find for the Defendants on all issues, and Instructions D-2, D-3, D-4, D-5 and D-6, which peremptorily instructed the jury to find for Amfed on the issues of delay in paying the Lump Sum Order, the underpayment of children's benefits, and the termination of the widows biweekly benefits on remarriage.

Again, to avoid repetition, these instructions should have been given for the same reasons that the motion for summary judgment and directed verdicts should have been granted. As already discussed, Amfed had an arguable basis or justifiable reason for everything they did in investigating, processing and paying Jordan's claims. The evidence does not rise to the level of bad faith for the purpose of extra contractual damages and certainly not to the higher standard required for punitive damages.

F. Appellant's Issues 13 and 14 - The Trial Court's Submission the Claims for Extra Contractual Damages and Punitive Damages to the Jury

Thirteenth and fourteenth, although these issues are very closely aligned with the arguments summarized above to the affect that Amfed's had an arguable basis or justifiable reason for all their actions and do not constitute bad faith as a matter of law, these points require further elaboration to clarify how those arguments apply to these issues. First, if Amfed had an arguable basis or justifiable reason for the handling and processing of Jordan's claims, extra contractual damages do not apply and the trial court erred in submitting Jordan's claim for emotional distress to the jury.

Second, even if it is held that there was no arguable basis or justifiable reason, the evidence is nevertheless wholly insufficient to establish clearly and convincingly that Amfed acted either maliciously or with a gross and reckless disregard for Jordan's rights and the claim for punitive damages should not have been submitted to the jury.

G. Appellant's Issue 15 - The Trial Court's Ruling on Certain Instructions Requested by the Plaintiff in the Compensatory Phase.

Fifteenth, at the conclusion of the compensatory phase the trial court erroneously gave Instructions P-1, P-2, P-6, P-8, and P-12 over Amfed's objections. This was in error for the following reasons. Instruction P-1 peremptorily instructs the jury to find for Jordan for the lump sum award and for the penalty which Amfed had paid some four years before the trial without informing the jury of the payment. This instruction was misleading and confusing to the jury and prejudicial to Amfed in that the instruction indicates that the amounts had not been paid. Instruction P-2 is an abstract statement of the purpose of the Workers' Compensation Act which has no relation to the issues or to the evidence, is not helpful to the jury in arriving at its verdict, and is calculated to infer that Amfed has somehow violated the purpose and intent of the Act.

Instruction P-6 submits Jordan's claim for extra contractual damages to the jury when there was no basis in the evidence for doing so. In addition, even if the claim should have been submitted to the jury, the instruction does not correctly instruct the jury on the elements of damages it may consider, but rather uses such vague and undefined terms as "all detriment" and "economic distress and loss," which have no legal meaning and are confusing and misleading to the jury.

Instruction P-8 is peremptory in nature and is an incorrect statement of the law as it applies to compensatory damages and the elements which the jury may consider in arriving at its verdict. Further, the reference in paragraph two to the loss of a loved one and the attendant financial affects are improper comments which have a very real potential to inflame the jury.

Instruction P-12 peremptorily instructs the jury to find for Jordan for the amounts previously paid to rectify the under payment of the biweekly benefits to the children together with the penalty without informing the jury that these amounts were paid some four years prior to trial. The instruction as given is confusing and misleading to the jury and is prejudicial to Amfed.

H. Appellant's Issues 16, 17 and 18 - The Trial Court's Instructions on the Issue of Punitive Damages

Sixteenth, seventeenth and eighteenth, the trial court erred in attempting to orally instruct the jury on the issue of punitive damages and further erred in giving instructions P-15, P-21, and P-23 on this issue over Amfed's objection. The trial court attempted to orally instruct the jury on the law as it applies to punitive damages and incorrectly stated the law resulting in the jury being confused and misled on this issue. Instruction P-15 is an abstract statement of the law which does not relate to the issues or the evidence and implies that Amfed violated the covenants of good faith and fair dealing. Thus, it is not only abstract but is also peremptory. Instruction P-

21 is an incorrect statement of the law, fails to place the burden of proof on Jordan, and fails to define the standard of proof required as “clear and convincing.” Instruction P-23 incorrectly instructs the jury that the standard of proof on the issue of punitive damages is by “the preponderance of the evidence” rather than by “clear and convincing evidence.”

I. Appellant’s Issue 19 - The Trial Court’s Summary Refusal of the Defendant’s Requested Instructions on the Issue of Punitive Damages

Nineteenth, the trial court summarily refused Amfed’s instructions on the issue of punitive damages submitted as D-10, D-11, D-12, D-13 and D-16. These instructions would have correctly instructed the jury on this issue and it was error for the trial court to refuse them.

ARGUMENT

Section “I” below will set forth the law pertinent to this appeal and sections “II” “III” “IV” “V” “VI” and “VII” will specifically address the Appellant’s issues.

I. The Law of Bad Faith Workers’ Compensation

The Mississippi Workers’ Compensation Act is the exclusive remedy available for an on the job injury. “The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee.” Miss. Code Ann. § 71-3-9. Plaintiff brings this action pursuant to the holding in *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So.2d 55, 58-59 (Miss. 1984), which created an exception to the exclusive remedy provision in situations where the employer or the employer’s insurance carrier commit an intentional tort independent of the accident compensable under the workers’ compensation scheme.

Holland created the cause of action which is commonly referred to as bad faith and is described as “an independent tort action against an insurance carrier for intentional and bad faith refusal of payment of a legitimate claim.” *Id.* at 59. A workers’ compensation claimant maintaining an action against the carrier based upon a wrongful refusal to pay her claim must, of course, allege and prove the recognized elements of such a claim in order to be entitled to punitive damages. *Id.* at 59.

As Mississippi jurisprudence has consistently held, simple negligence in the handling of a workers’ compensation claim does not give rise to any cause of action. The reason our courts have set such a standard in these cases is because of the literally hundreds and thousands of transactions which take place in this state each year in the handling of workers’ compensation claims. If the Court were to allow claims based in negligence, there would be some instance of negligence found in a countless number of cases. In fact, there are penalty provisions provided

by the Act that compensate for any negligent conduct in claims handling.⁸ A claim for punitive damages requires an intentional denial of benefits. *Id.* at 58.

A few years after *Holland* created the action for bad faith, the Fifth Circuit Court of Appeals set forth the specific elements of a claim for bad faith in *Rogers v. Hartford Acc. & Indem. Co.*, Pursuant to *Rogers*, in order for Jordan to succeed on a claim of intentional tort against Amfed, she must prove the following three elements: “(1) a contract of workers’ compensation insurance existed between the defendant and the plaintiff’s employer; (2) the carrier denied the plaintiff’s compensable workers’ compensation claim without a legitimate or arguable reason; and (3) the denial of benefits constitutes a willful and intentional or malicious wrong.” *Rogers v. Hartford Acc. & Indem. Co.*, 133 F.3d 309, 312 (5th Cir. 1998) (citing *Holland*, 469 So.2d at 58-59, *Leathers v. Aetna Casualty & Surety Co.*, 500 So.2d 451-53 (Miss. 1986); *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288, 289-90 (Miss. 1985)). Only upon satisfaction of all three elements may punitive damages be awarded. *Id.* at 312. Jordan’s failure to meet the *Rogers* elements can be succinctly summarized as follows.

1) Contract of Insurance. There is no dispute that a contract of workers’ compensation insurance existed between the employer and American Federated Insurance Company. This element has been met and this brief will not discuss the contract between the parties.

2) Denial of the Claim for Compensation. A showing of bad faith must include proof the carrier denied the plaintiff’s compensable claim without a legitimate or arguable reason. There was no such denial in this case. This is most clear when the time periods are divided into five parts: (a) On May 11, 2001, Amfed received its first notice of the claim. Amfed

⁸ See Miss. Code Ann. § 71-3-73.

immediately commenced payment of death benefits; (b) On April 11, 2003, Amfed received its first notice of the Lump Sum Award. Amfed promptly investigated the circumstances surrounding the award and requested a calculation of benefits owed to Jordan. On May 16, 2003, Amfed received its first notice of the mistake in weekly payment amounts. (c) On May 27, 2003, Amfed requested a calculation of benefits from the MWCC so the lump sum and mistake in weekly benefits amount due could be determined. (d) On May 30, 2003, the Commission issued its calculation and upon receipt Amfed began processing payment of the benefits owed to Jordan. (e) From July 2003 to August 13, 2003, the attorneys were discussing whether a penalty was owed and if so, what penalty should apply.

Each of these sections will be addressed in detail below. At trial, Jordan failed to prove that Amfed denied her claim without a legitimate and arguable basis during any of these five time periods and the Jury Verdict was erroneous as a matter of law. Jordan failed to present a claim for punitive damages.

3) The Denial of Benefits Must Constitute a Willful and Intentional or Malicious Wrong. As is clear from the evidence presented at trial, Amfed never willfully, intentionally or maliciously denied Jordan's claim for benefits. Mississippi Courts have discussed what type of intent is required to constitute bad faith. In 1998, United States District Court Judge Tom S. Lee discussed in detail the type of "intent" required to recover punitive damages for the wrongful denial of a workers' compensation claim. The defendant's actions must be a positive action, not inaction. Judge Lee's Order Granting Summary Judgment in *Rogers v. Hartford*, explained "[It appears] the footnote in the Fifth Circuit's opinion 'rejected gross negligence as a basis for the recovery of punitive damages for the denial of workers'

compensation benefits and that the Court required proof of an intentional tort.” The Order goes on to quote the following:

Although mere negligence will not support an award of punitive damages, recklessness in the handling of a claim may be deemed equivalent to willful misconduct. For the defendant’s negligence to be deemed reckless, *the lack of care must amount to a positive act, rather than a simple failure to act.*

(Quoting T.H. Freeland, III and T.H. Freeland, IV, *Bad Faith Litigation: A Practical analysis*, 53 Miss. L.J. 237, 249-50 (1983). (See *Memorandum Opinion and Order, Thomas Allen Rogers v. Hartford Accident & Indemnity Co.*, in the United States District Court, Southern District of Mississippi, Jackson Division, 3:95CV680LN, August 6, 1998)

Bad faith is further characterized by some conduct which violates standards of decency, fairness, or reasonableness.” *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992) . Bad faith requires a showing of more than bad judgment or negligence; rather, it implies some conscious wrongdoing because of dishonest purpose or moral obliquity. *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss. 1998).

Holland and its progeny have explained that in order to avoid the exclusivity of the Workers’ Compensation Act and proceed on a claim for bad faith, a plaintiff must allege an injury that was caused by the willful act of the employer or carrier which is not compensable under the Act. *Peaster v. David New Drilling Co., Inc.*, 642 So.2d 344, 346 (Miss. 1994) . This requires “actual intent to injure.” *Id.* at 348-349. A carrier’s negligence, even gross negligence, will not remove the case from the exclusive remedy of the Act. *Id.* at 348. Mississippi Courts have repeatedly held that the exception applies only to actions which are willful and intentional and not to negligent or grossly negligent acts. *Davis v. Pioneer, Inc.*, 834 So.2d 739 (Miss. App. 2003).

Clerical error does not reflect the existence of malice. *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 293 (Miss. 1992) The punitive damages issue should not be submitted to the jury in cases involving an insurer who wrongfully denied a claim because of “clerical error” or “honest mistake.” *Id.* at 293. Even if the mistake is undeniably erroneous, when the error is corrected promptly after receiving notice of the mistake, there is no bad faith. *Id.*

The Mississippi Supreme Court and Court of Appeals have consistently held that in a claim for bad faith failure to pay workers’ compensation benefits the essential factor in determining whether a claim for punitive damages could be submitted to the jury is whether the carrier had an arguable reason for its failure to pay the claim. Simple negligence in the handling of a workers’ compensation claim will not give rise to any cause of action outside of the Workers’ Compensation Act. The Courts have allowed an employee’s claims outside of the exclusive remedy of the Act only where the carrier’s actions rise to the level of willful, intentional or malicious conduct. Simply, the standard in this case is whether Amfed intentionally denied payment of Jordan’s benefits without a legitimate or arguable reason. (*See Standard Life Ins. Co. of Ind. v. Veal*; 354 So.2d 239, 248 (Miss.1977); *Rogers v. Hartford Acc. & Indem. Co.*, 133 F.3d 309, 312 (5th Cir. 1998); *Leathers v. Aetna Casualty & Surety Co.*, 500 So.2d 451-53 (Miss. 1986); *Luckett v. Mississippi Wood, Inc.*, 481 So.2d 288, 289-90 (Miss. 1985); *Southern Farm Bureau Cas. Ins. v. Holland*, 469 So.2d 55, 58-59 (Miss. 1984); *Mississippi Power & Light v. Cook*, 832 So.2d 474, 484 (Miss.2002); *Pilate v. American Federated Ins. Co.*, 865 So.2d 387, 391 (Miss. 2004); *Liberty Mutual Ins. Co. v. McKneely*, 862 So.2d 530, 534 (Miss.2004); *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290. (Miss. 1992)).

II. May 11, 2001, Amfed's First Notice of Claim

On May 11, 2001, the claim was reported to Amfed Companies, LLC. (T.144) Amfed had a duty to conduct a reasonable investigation and to obtain all information relevant to the case. *Pilate v. Amfed*, 865 So.2d 387, 394 (Miss. 2004). Stacy Stuart immediately conducted a thorough investigation and contacted Mr. Brown's surviving spouse, Jennifer Brown, to explain her right to benefits under the Workers' Compensation Act. (T.144-145) Stuart promptly determined that benefits were owed, estimated the weekly payment amount in order to get the first check out quickly, and commenced payment of benefits. (T.136,145) On May 17, 2001, Stuart mailed the first benefit payment to Ms. Brown. (T.146) On May 21, 2001, Stuart filed a MWCC Form B-18, Supplemental Agreement as to Compensation, with the Commission reflecting the commencement of weekly benefits payable to Jennifer Brown and Mr. Brown's dependent children, Justin Matthew Brown, Laura Elizabeth Brown, and James H. Brown, IV. (T.147, Ex. P-2,D-8)

On May 25, 2001, Stuart requested a death benefits calculation from the Mississippi Workers' Compensation Commission statistician in order to verify that her calculations were correct. (T.129,148,153, Ex. P-3, D-10) On May 30, 2001, the MWCC issued a computation confirming Stuart's calculations. (Ex. P-4, D-11)

After the initial payment, Stuart set up the claim in Amfed's deferred payment system to automatically issue bi-weekly checks. (T.148) She did not realize at the time that she had set it up to issue payments every two weeks in the weekly amount, or half the amount of benefits owed. (T.149) Rather than issuing checks for \$340.78, the payments were set up to issue checks for \$170.39. (T.149) Timely payments continued to Ms. Brown and the children for almost two years. (T.90) Stuart was not aware this clerical mistake had been made until after the bad faith lawsuit was filed. (T.149, 153)

On June 5, 2001, Ms. Brown went to the Mississippi Workers' Compensation Commission and filed an Application for Lump Sum Payment, MWCC Form B-19. (T.86, Ex.P-5) On June 5, 2001, the MWCC issued an Order Authorizing Lump Sum Payment. (Ex.P-6) Amfed was not provided a copy of the Order, so weekly payments continued to the widow and children until approximately April 11, 2003. (T.150) Amfed had no knowledge that Jordan had requested the lump sum. (T.111) Jordan never sent a copy of the Order to Amfed and never contacted Amfed during this time to ask why she did not receive her lump sum payment. (T.111)

At some point in 2001, Jordan hired an attorney, Glenn White, to represent her and her children in a third party wrongful death action. (T.112) In July 2002, the employer and carrier hired attorney, T.G. Bolen, to pursue their subrogation interest in the third party suit. (T.263-265, Ex.D-15) Attorney Bolen would not have any direct involvement in the workers' compensation case until April 2003, approximately nine months later. (T.267)

Ms. Jordan had one conversation, around February 2002, with Amfed adjuster, Daron Perkins, who called to inquire about the well being of her children. (T.113-114) She did not mention the Lump Sum Order to him, and reported that she did not have any problems. (T.114) None of Amfed's actions during this time period can be construed to constitute bad faith, and therefore the Circuit Court erred in refusing to grant Amfed's direct verdict regarding this time period.

III. April 11, 2003, Amfed's First Knowledge of the Lump Sum Award and May 16, 2003, Amfed's First Knowledge of Mistake in Bi-weekly Payments

On April 11, 2003, Jordan contacted Amfed adjuster, Nita Cox, to inquire why she had not received her lump sum payment. (T.112) This was Amfed's first notice of the existence of the Lump Sum Order. (T.187) Jordan did not present any evidence at trial to dispute that Amfed

did not have knowledge of the Order prior to April 11, 2003. How could Amfed deny payment of an award they did not even know existed?

The second element of proof required by *Rogers* is that the defendant “denied the plaintiff’s compensable workers’ compensation claim without a legitimate reason.” *Rogers v. Hartford Acc. & Indem. Co.*, 133 F.3d 309, 312 (5th Cir. 1998). There was never a denial of Jordan’s benefits. Upon receiving Jordan’s call about the Order, Amfed had a duty to conduct a reasonable investigation and to obtain all information relevant to the case. *Pilate v. Amfed*, 865 So.2d 387, 394 (Miss. 2004). Stuart immediately asked her attorney, T.G. Bolen to assist her in investigating Jordan’s claim. (T.188-189)

On April 16, 2003, Bolen confirmed there was a Lump Sum Order on file at the Commission.(Ex.D-19) Cox was out of the office for a few days and received Bolen’s notification of the Lump Sum Order when she returned. (T.213) On April 30, 2003, Cox asked Bolen to obtain a calculation of benefits owed. (T.214) Cox provided the information necessary for the calculation and called Bolen again on May 5, 2003 and again on May 12, 2003, to find out the status of the calculation. Amfed took a reasonable amount of time to investigate the existence of the Order and to obtain the payment information. Once Amfed confirmed there was an Order on file at the MWCC, Amfed immediately started the process to make the payment. Jordan failed as a matter of law to present proof that Amfed intentionally denied payment under the Order and the Circuit Court erred in submitting this issue to the jury.

During the nearly two year period between when the Lump Sum Order was entered and the time she called Nita Cox on April 11, 2003, Jordan never notified Amfed of the existence of the Lump Sum Order. (T.111) She never contacted Amfed to ask why the Order had not been paid and, in fact, told Daron Perkins when he contacted her that she had “no problems.” (T.114) There was no “denial” of the claim. Again, there is no proof that Amfed had knowledge of the

Order, so how could they have denied the payment? Mississippi Workers' Compensation Commission Secretary, Joann McDonald, testified that she could not testify under oath that the Order had been stamped, sealed, and delivered to Amfed and Jordan presented no testimony to prove that Amfed had received the Order. (R.316) Jordan did not present proof showing that Amfed had knowledge of the Order prior to April 16, 2003. Therefore, Amfed could not have acted in bad faith prior to April 16, 2003. (R.318) Jordan failed to produce any proof at trial that Amfed had knowledge of the Order prior to April 2003. There is no evidence that Amfed denied benefits after it received the necessary information and obtained a calculation of benefits.

On May 16, 2003, Bolen advised Cox that he had a letter drafted to the MWCC regarding the Lump Sum Order, but wanted to discuss it with her before he sent it. (T.217) He explained that when he looked at the figures the second time, it appeared the widow and children had both been paid half of the benefits they were owed as the bi-weekly payments had been issued in the amount of weekly payments. (T.218, Ex.D-21) Bolen's investigation had revealed that the first adjuster on the file, Stacy Stuart, had made an error when she input the weekly payment amounts into the deferred payment system. (T.149) Rather than issuing checks for \$340.78, the payments were set up to issue checks for \$170.39. (T.149) Stuart testified at the trial that she was not aware of the mistake until after the bad faith lawsuit was filed and that she "felt awful once [she] found out [she] had done it." (T.149, 151) On the same day that Bolen advised Cox of the mistake, Cox told Bolen to "get payment for kids as well" when he obtained the calculation on the Lump Sum Award. (T.227, Ex.D-20)

Jordan did not produce any evidence at trial that Amfed intentionally denied benefits to the children. There is no evidence in the record that this mistake was anything other than a clerical error, or negligence. Simple negligence in the handling of a workers' compensation claim will not give rise to any cause of action outside of the Workers' Compensation Act.

Southern Farm Bureau Cas. Ins. v. Holland, 469 So.2d 55, 58-59 (Miss. 1984). The mistake as to the payment amounts can not be considered a denial. Amfed was paying benefits during the entire time period in question. As Stacy Stuart testified, the incorrect amount was simply a human mistake or a clerical error and therefore Jordan failed to establish a claim for bad faith.

The *Universal Life Ins. Co. v. Veasley* the Court held that when the carrier's actions do not reflect the existence of malice, the standard to be applied should be that of gross negligence or reckless disregard, and that the burden of proof is on the plaintiff to show that the conduct in question rises to the level necessary to justify the imposition of punitive damages. *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290, 293 (Miss. 1992). The Court further explained the issue of clerical error:

There is an absence of evidence establishing that the error here was anything more than clerical. The evidence simply does not rise to the level of gross negligence. Although the reasons given by the company for denying Veasley's claim were undeniably erroneous, the error was corrected promptly after Universal received a non-threatening letter from Veasley's attorney inquiring about the denial of payment of the claim. There is no evidence suggesting that this type of oversight happened on a regular basis. Finally, nothing in the record indicates that a letter from one other than an attorney would not have produced the same result.
Id. at 293.

The issue of punitive damages should not be submitted to the jury in cases involving an insurer who wrongfully denied a claim because of clerical error or honest mistake. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1185-86.

IV. May 27, 2003, Amfed's Letter to the MWCC Concerning Payment of the Lump Sum Award and Mistake in Bi-weekly Payments

On May 27, 2003, Bolen wrote to Ben Barrett Smith, MWCC Chairman, advising that Amfed was not aware of the Lump Sum Order until Jordan's recent telephone call. (Ex.D-21)

Bolen's letter, which is supported by Bolen, Blacklidge and Cox's testimony, summarizes Amfed's actions upon discovery of the mistake.

Enclosed for your ready review, please find a copy of the Commission's Order Authorizing Lump Sum Payment dated 5 June 2001. I also enclose a copy of the B-18 Form, which was stamped "Filed" with the Commission on or about 17 May 2001.

Jennifer D. Brown, the decedent's widow, recently contacted the adjuster inquiring about the status of the lump sum. The carrier informs me that the phone call was first notice of the lump sum order. I have had the opportunity to review the Commission's file and obtained a copy of the Application for Lump Sum Payment, as well as the above-referenced Order. The employer and carrier do not dispute the widow's entitlement to her lump sum, but would seek the Commission's assistance in preparing a new and proper calculation.

Benefits have been commenced up until April 2003 when Mrs. Brown contacted the adjuster, and further informed her that she has since remarried, which under the statute terminates any right for ongoing payments. In that regard, I would inform the Commission that a total of 50 payments of \$170.39 have been made on a timely basis. Please forward the updated calculation, and the carrier stands ready and willing to forward the appropriate lump sum to the widow immediately upon receipt.

On a similar note, in reviewing this matter, it appears that the "weekly rate" was placed in the carrier's computer as the "bi-weekly payment", and accordingly, it appears that only one-half of the proper payment has been made, although ongoing payments continue to the dependent survivors. In that regard, it will be necessary to also obtain calculations regarding additional benefits owed to James H. Brown, IV, Laura Elizabeth Brown, and Justin Matthew Brown. Naturally, the corrected amounts will be forthcoming on the remaining weekly benefits owed to the surviving dependents.

Please feel free to contact me with any questions or comments or if I can be of any further assistance regarding the proper calculation. If up to the date paid to date information is required regarding the dependent children, please do not hesitate to contact me or Ms. Nita Cox directly at Amfed Companies at 853-4949, extension 452. As always, I am available for any additional questions or comments you may have.

V. May 30, 2003, Calculation by the Mississippi Workers' Compensation Commission

On May 29, 2003, the MWCC issued a calculation of benefits, with interest, owed to Jennifer Brown Jordan, Justin M. Brown, Laura E. Brown, and James H. Brown, IV. (Ex.D-22) The calculation was mailed to Bolen with a letter from the MWCC dated May 30, 2003. (Ex.D-23) The calculation showed a total payment owed to Jordan for the lump sum award of \$71,795.41 and the total payable to each of the children for the underpayment of the biweekly benefits of \$3,493.06. (Ex. D-22) The calculation included interest on the amounts due but did not include a penalty. (Ex D-22).

On June 9, 2003, Cox contacted Bolen regarding the status of the calculation. (T.224-225) On June 10, 2003, Bolen faxed the calculations to Amfed and Amfed issued the payment on June 23, 2003. On June 26, 2003, Bolen sent attorney Jones the following: (a) a check for \$71,795.41 payable to Jordan for the lump sum award; (b) a check for \$3,493.06 payable to Jordan as guardian of Justin; and (c) a check for \$3,493.06 payable to Jordan as guardian of Laura. (Ex.D-25) The letter further informed Jones that the checks payable to Jordan for the children were to cover the under payment resulting from the error in entering the biweekly payment amounts.(Ex.D- 25) Prior to receiving this letter, neither Jordan, nor her attorneys, were aware of the under payment and had not made a claim for it. (T.119-120)

Once Amfed had the information necessary to correct the mistake they promptly paid the benefits. Amfed conducted a reasonable investigation and obtained a calculation of benefits owed. (R.319) Any allegations of delay during this period may be attributed to Amfed's attorney. Cox inquired with Bolen repeatedly and continued to follow up until he responded. The relationship between an insurer and its attorney is one of independent contractor. As the employer of an independent contractor, Amfed had no vicarious liability for his actions.

Mississippi Power Co. v. Brooks, 309 So.2d 863, 867 (Miss.1975). This brief period of time was reasonable and justified under the circumstances and Amfed could not have acted in bad faith during this time period. (R.320) Therefore the Jury Verdict is erroneous as a matter of law.

As discussed in detail above, in order to recover punitive damages, Jordan must prove that “the carrier denied the plaintiff’s compensable workers’ compensation claim without a legitimate or arguable reason.” *Rogers v. Hartford Acc. & Indem. Co.*, 133 F.3d 309, 312. Jordan’s claim certainly fell short of the requirement that she prove her claim was denied without a legitimate and arguable reason. Amfed never denied the benefits. Jordan argued at trial that because the bi-weekly payments were paid at the incorrect rate this should be considered a denial of benefits. Mississippi law does not support this argument. The underpayment of benefits was not intentional, but was simply a clerical mistake. Amfed’s first knowledge of the mistake was after investigation by their attorney. Immediately upon gaining knowledge of this mistake, Amfed requested a calculation of benefits owed and then paid out the full amount of past due benefits pursuant to the MWCC calculation. (Ex.D-30)

VI. Payment of the Penalty

This case involved an unusual situation as it pertains to the provision for penalties under Miss. Code Ann. § 71-3-37 subsections (5) and (6). Subsection (5) provides for a 10% penalty for late payment of “any installment of compensation payable without an award.” Subsection (6) provides for a 20% penalty for late payment of “any installment payable under the terms of an award.” On July 7, 2003, Jordan’s attorney wrote to attorney Bolen inquiring as to whether Jordan and the children were entitled to 10% penalty under the provisions of Miss. Code Ann. § 71-3-37(5). (Ex.D-26) The past due amount as reflected in the MWCC Calculation had already been paid in full. Bolen responded that the Commission’s May 29, 2003, calculation did not include any penalty and questioned whether the statute was intended to provide for penalty on a

Lump Sum Order. (Ex.D-28) Bolen indicated he was researching the matter. (Ex.D-28) He questioned whether subsection (5) or (6) should apply to a Lump Sum Order.

On August 8, 2003, Bolen wrote to Jones stating Amfed agreed to pay the penalty but that the check had to be reissued because of an error in the payee name. (Ex. D-29). By letter dated August 13, 2003, Bolen transmitted a check for \$17,808.35 in payment of the penalty and pointed out to Jones that the twenty percent (20%) penalty provision of Miss. Code Ann. § 71-3-37(6) applied, rather than the ten percent (10%) penalty under subparagraph (5), which Jones had asserted was applicable. (Ex. D-30) After a reasonable time for investigation Amfed paid an amount which exceeded both the MWCC calculation amount and the attorney's requested amount.

Again, Amfed gave a reasonable explanation for the short delay in payment – they were continuing their investigation. This short delay was no where near the long delay and magnitude of problems present in cases where punitive damages for delay have been shown. In *Sansone v. Liberty Mutual Ins. Co.*, 2006 WL 286779 (S.D. Miss. 2006), a thirty-four day delay of investigation was held to be not a denial and not bad faith. In *Dauro v. Allstate Ins. Co.*, 114 Fed.Appx. 130, 2004 WL 2538378 (5th Circ. 2004), a one month delay of payment was held to be not a denial and not bad faith. In *Pilate v. Amfed*, 865 So.2d 387 (Miss. App. 2004), a one month delay of payment was held to be not a denial and not bad faith. In *Caldwell v. Alfa*, 686 So.2d 1092 (Miss. 1996), a six week delay of payment was held to be not a denial and not bad faith. The exceptional case of *Travelers v. Wetherbee*, 368 So.2d 829 (Miss. 1979), involved an eight month delay of payment coupled with a breach of express policy provision to pay within sixty days and evidence that the carrier was aware of claimant's dire financial difficulties. The Court held that this constitute bad faith. All of Amfed's actions were reasonable and justified.

At the conclusion of the compensatory phase, the trial court erroneously gave Instructions P-1, P-2, P-6, P-8, and P-12 over Amfed's objections. This was in error. Instruction P-1 peremptorily instructs the jury to find for Jordan for the lump sum award and for the penalty which Amfed had paid some four years before the trial without informing the jury of the payment. This instruction was misleading and confusing to the jury, and prejudicial to Amfed by indicating that the amounts had not been paid. Instruction P-2 is an abstract statement of the purpose of the Workers' Compensation Act which has no relation to the issues or to the evidence, is not helpful to the jury in arriving at its verdict, and is calculated to infer that Amfed have somehow violated the purpose and intent of the Act.

Instruction P-6 submits Jordan's claim for extra contractual damages to the jury when there was no basis in the evidence for doing so. In addition, even if the claim should have been submitted to the jury, the instruction does not correctly instruct the jury on the elements of damages it may consider, but rather uses such vague and undefined terms as "all detriment," and "economic distress and loss" which have no legal meaning and are confusing and misleading to the jury.

Instruction P-8 is peremptory in nature and is an incorrect statement of the law as it applies to compensatory damages and the elements which the jury may consider in arriving at its verdict. Further, the reference in paragraph two to the loss of a loved one and the attendant financial affects are improper comments which have a very real potential to inflame the jury.

Instruction P-12 peremptorily instructs the jury to find for Jordan for the amounts previously paid to rectify the under payment of the biweekly benefits to the children, together with the penalty, without informing the jury that these amounts were paid some four years prior to trial. The instruction as given is confusing and misleading to the jury and is prejudicial to Amfed.

The trial court erred in attempting to orally instruct the jury on the issue of punitive damages and further erred in giving instructions P-15, P-21 and P-23 on this issue over Amfed's objection. The trial court attempted to orally instruct the jury on the law as it applies to punitive damages and incorrectly stated the law resulting in the jury being confused and misled on the this issue. Instruction P-15 is an abstract statement of the law which does not relate to the issues or the evidence and implies that Amfed violated the covenants of good faith and fair dealing. Thus, it is not only abstract but, but is also peremptory. Instruction P-21 is an incorrect statement of the law, and fails to place the burden of proof on Jordan, and fails to define the standard of proof required as "clear and convincing." Instruction P-23 incorrectly instructs the jury that the standard of proof on the issue of punitive damages is by "the preponderance of the evidence" rather than by "clear and convincing evidence." Jordan had the burden of bringing forth clear and convincing evidence of Amfed's bad faith conduct. Miss. Code Ann. § 11-1-65.

The trial court summarily refused to consider Amfed's instructions on the issue of punitive damages submitted as D-10, D-11, D-12, D-13 and D-16. These instructions would have correctly instructed the jury on this issue and it was error for the trial court to refuse them.

CONCLUSION

Jordan's evidence was totally insufficient to establish a claim of bad faith. The verdicts were the result of the Jury being confused or misled by various errors committed by the Circuit Court during the trial, including the Court's instructions on the law applicable to both the compensatory and punitive phases of the trial. Consequently, the verdicts are contrary to law and against the overwhelming weight of the evidence and the Judgment should be reversed.


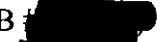

Respectfully submitted, this the 28th day of August, 2008.

AMFED COMPANIES, LLC and
AMERICAN FEDERATED INSURANCE
COMPANY, APPELLANTS

By: 

Lori Jordan Graham

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Lori Jordan Graham, one of the attorneys of record for Appellant in the above referenced action, do hereby certify that I have this day caused to be delivered, via United States Postal Service, first class, postage prepaid, a true and correct copy of the above and **BRIEF OF APPELLANTS** to the following:

William Harold Jones, Esq.
Post Office Box 282
Petal, Mississippi 39465

ATTORNEY FOR APPELLEE

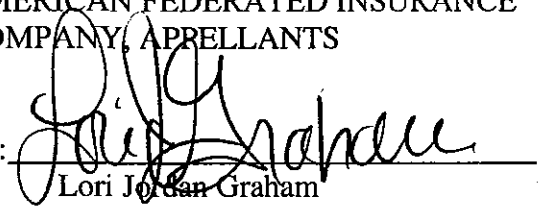
THIS the 28th day of August, 2008.


LORI JORDAN GRAHAM

Respectfully submitted, this the 29 day of August, 2008.

AMFED COMPANIES, LLC and
AMERICAN FEDERATED INSURANCE
COMPANY, APPELLANTS

By:


Lori Jordan Graham

OF COUNSEL:

Robert P. Thompson (MSB [REDACTED])
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AMENDED CERTIFICATE OF SERVICE

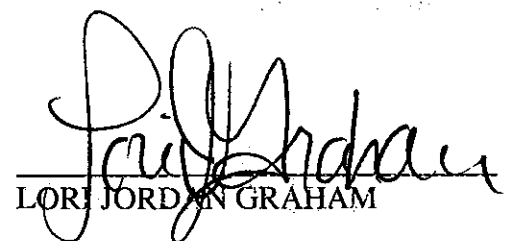
I, Lori Jordan Graham, one of the attorneys of record for Appellant in the above referenced action, do hereby certify that I have this day caused to be delivered, via United States Postal Service, first class, postage prepaid, a true and correct copy of the above and **BRIEF OF APPELLANTS** to the following:

William Harold Jones, Esq.
Post Office Box 282
Petal, Mississippi 39465

ATTORNEY FOR APPELLEE

Honorable Billy Joe Landrum
P.O. Box 685
Laurel, Mississippi 39441

THIS the 29 day of August, 2008.


LORI JORDAN GRAHAM