



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CT-01422-SCT

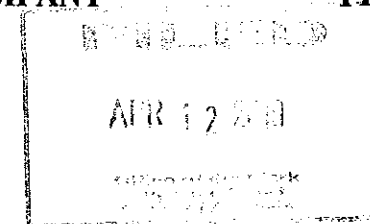
AMFED COMPANIES, LLC AND AMERICAN
FEDERATED INSURANCE COMPANY

PETITIONERS-APPELLANTS

VS.

JENNIFER BROWN JORDAN

RESPONDENT-APPELLEE



APPEAL FROM THE CIRCUIT COURT OF
JONES COUNTY, MISSISSIPPI

PETITIONERS' SUPPLEMENTAL BRIEF
UPON GRANT OF WRIT OF CERTIORARI

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LLC and American Federated Insurance Company*

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners-Appellants, AmFed Companies, LLC, and American Federated Insurance Company ("AmFed"), file this Supplemental Brief upon the Court's Grant of Writ of Certiorari.

I. INTRODUCTION

AmFed is in the peculiar position of facing another hearing regarding punitive damages on a claim that it **voluntarily paid from its inception**. While Mrs. Jordan suggested in her Response to the Petition for Writ of Certiorari that this is a case of wrongful termination of benefits, it is not. The Court of Appeals correctly noted that "it is undisputed that AmFed **never denied** any of Jennifer's claims. Jennifer's claims are based on the concept that AmFed's *delay* in resolving her claims constituted bad faith." (Op. at ¶23, emphasis added.) AmFed did not wrongfully terminate benefits due to Mrs. Jordan and did not require her to retain an attorney to obtain payment. As demonstrated below, upon notification of Mrs. Jordan's remarriage, AmFed ceased payment of widow's benefits. This was pursuant to Mississippi statute (§71-3-25) – not the result of any arbitrary decision by AmFed. Consequently, while the Court of Appeals mentioned this occurrence once, in passing (Op. at ¶ 6), cessation of widow's benefits was not – as it should not have been – something that formed a basis of the Court of Appeals' opinion that a jury could reasonably find bad faith.

Upon notification from Mrs. Jordan that she had obtained a lump sum order for workers compensation death benefits, AmFed moved forward to verify that the order existed. AmFed did this without regard to the separate issue that, by statute, widow's weekly benefits were no longer payable. Upon verification that the lump sum order existed, AmFed moved forward to determine how much it owed Mrs. Jordan. During that process, AmFed discovered that a computer keypunch error had resulted in a prior underpayment of benefits to Mrs. Jordan and her children. AmFed

moved forward to correct that error, which – per the record in this case – was undisputedly nothing more than an error that did not constitute bad faith.

On May 27, 2003, **two days before Mrs. Jordan filed this lawsuit**, AmFed’s counsel wrote to the Mississippi Workers’ Compensation Commission requesting a calculation of benefits due to Mrs. Jordan and her children, **stating in no uncertain terms that AmFed would pay them**. Contrary to Mrs. Jordan’s contention that the lawsuit caused payment of benefits, her original complaint for payment of the lump sum was filed May 29, 2003. (R. 3-12). Her amended complaint including allegations about the mistake in weekly benefits was filed October 24, 2003. (R. 33-48.) AmFed paid on June 26, 2003, after receiving the Commission’s calculation of benefits owed. Following that, on August 13, 2003, AmFed voluntarily paid penalties to Mrs. Jordan in an amount greater than that requested by her own counsel.

There is nothing in this case that amounts to bad faith or that supports awards of punitive damages, attorneys’ fees, or extracontractual damages against AmFed. While counsel for Mrs. Jordan repeatedly claims AmFed’s actions demonstrate “utter indifference” to Mrs. Jordan and a lack of regard for the rights of her and her children, exactly the opposite is true. AmFed’s actions demonstrate those of a company that desired (1) to make payments it properly owed and (2) to rectify any errors it found in past payments. The timing of AmFed’s actions versus the **subsequent** filing of Mrs. Jordan’s suit demonstrates that AmFed’s actions in this regard were voluntary.

This case is, in fact, comparable to those in which this Court has previously found that some short delay in payment does not constitute bad faith, when there is no attendant, repeated wrongful denial or attempted coercion. The delay in payment in this case was only one day longer than that in *Universal Life Ins. Co. v. Veasley* and was some 27 days shorter than that involved in *Caldwell*

*v. Alfa Ins. Co.*¹ Respectfully, just as with the companies in *Veasley* and *Caldwell*, AmFed's conduct in this matter is not such as to warrant punishment. A careful review of the claim in its various stages demonstrates that AmFed has, in this case, been unfairly subjected to exposure to extracontractual damages, punitive damages, and attorneys' fees.

II. REVIEW OF THE STAGES OF THE CLAIM DEMONSTRATES A COMPLETE LACK OF BAD FAITH AND, ON THE CONTRARY, GOOD FAITH

A. The Claim From Its Inception Through April 11, 2003

Jennifer Brown's husband died after electrocution at work on May 4, 2001.² AmFed, the workers compensation carrier for the employer was notified of the claim on May 11, 2001, and immediately began paying it voluntarily. There was no controversy or petition to controvert concerning the claim. (T. 136, 144-147; Exh. P-2, D-8.)

AmFed's adjuster, Stacy Stuart set up the claim in AmFed's computer to issue the required biweekly checks. However, Mrs. Stuart inadvertently made a keypunch error. She erroneously did not direct the computer to multiply the weekly benefit owed by two, for biweekly checks. (T. 148-49.) For example, Mrs. Brown's weekly benefit was to be \$170.39. The keypunch error resulted in Mrs. Brown being issued biweekly checks for \$170.39, rather than twice that amount (\$340.78).³

¹

Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 293-94 (Miss. 1992) (75 days to pay after initial wrongful denial; "no protracted delay;" no bad faith); *Caldwell v. Alfa Ins. Co.*, 686 So. 2d 1092, 1094-95, 1098-99 (Miss. 1996) (103 days to pay claim; payment made 6 weeks after company completed its investigation; claim paid after suit filed by insured; "short delay;" no bad faith).

²

Mrs. Brown remarried on August 10, 2002 and became Jennifer Jordan. (Exh. P-10 at p. 27.)

³

When this error was ultimately discovered two years later, Stacy Stuart "felt awful" she had committed it. (T. 149, 153.) It is absolutely undisputed by the parties that this was nothing more than an error and was not done in bad faith. (T. 323, Quoting Plaintiff's Counsel: "Now, is that a bad faith case up to that point? Probably not. And I'll concede that point.")

Unbeknownst to AmFed, Mrs. Brown went to the Commission on June 5, 2001. She applied for and obtained a lump sum order for widow's death benefits. As noted by the Court of Appeals, there is absolutely no evidence that this lump sum order was ever forwarded to AmFed. AmFed never received it and was completely unaware of it. (Op. at ¶¶ 4, 24.) Consequently, AmFed continued to send biweekly benefit checks to Mrs. Brown. Mrs. Brown then retained attorney Glenn White and filed a third-party liability claim regarding her husband's death. AmFed retained attorney T.G. Bolen to protect its interests with regard to any subrogation claim in the third-party suit. (T. 112, 263-65, 267.) White never informed Bolen of any lump sum order.

In February 2002, AmFed's adjuster -- Daron Perkins -- called Mrs. Brown to see how her children were doing. Mrs. Brown never mentioned any lump sum order or questioned why she was still receiving biweekly checks. (T. 113-14.) AmFed continued paying on a biweekly basis, unaware of the lump sum order. Attorney Glenn White then wrote to AmFed and instructed it not to communicate directly with Mrs. Brown in the future, as he represented her regarding all matters arising out of her husband's death. AmFed complied. (Exh. D-14.) In September 2002, AmFed received a computer-generated request from the Commission for a B-31 form regarding Mrs. Brown's claim. AmFed responded that it was continuing to pay death benefits. (Exh. 7.) The Commission did not advise AmFed that this should not be the case.

B. April 11, 2003, Through April 16, 2003

As of April 11, 2003, Mrs. Jordan (formerly Mrs. Brown) was advised by Glenn White that the third-party liability claim was fruitless. (T. 94.) Mrs. Jordan testified she understood she could not get her lump sum award until the third-party liability claim was concluded. (Op. at ¶4 and note 2.) On April 11, 2003, she called AmFed to determine whether the lump sum order was still valid and whether AmFed would pay it. Her call was referred to Nita Cox, the adjuster then assigned to

the claim. Cox informed Mrs. Jordan that AmFed did not have a lump sum order on file and would have to verify that one existed. Although Jennifer Jordan had a copy of the order, she did not send it to Mrs. Cox. (T. 115, 188-89.)

Mrs. Jordan also told Nita Cox that she had remarried. Mississippi's workers compensation law provides that widow's benefits are not payable after a remarriage. Miss. Code Ann. §71-3-25. (T. 187, 190.) Mrs. Cox proceeded to investigate whether a lump sum order existed. Cox contacted attorney T.G. Bolen, who was handling the subrogation aspect of the third-party liability claim, to ask if he was aware of such an order. Bolen was not. Bolen stated he would go to the Commission, check Mrs. Jordan's file, and determine whether it contained such an order. (T. 188-89, 192, 269.) Bolen found that the file did contain a lump sum order dated June 5, 2001. On April 16, 2003, he transmitted the order to AmFed. This was AmFed's first receipt of the lump sum order. (Exh. D-19.) It is undisputed in the record of this case that there was no bad faith on AmFed's part through April 16, 2003. In that regard, Mrs. Jordan's counsel stated on the record: "Now, is that a bad faith case up to that point? Probably not. And I'll concede that point." (T. 323.)

C. April 16, 2003 Through May 27, 2003

When the lump sum order arrived at AmFed, Nita Cox was out of the office for her previously scheduled wedding and honeymoon. Her supervisor saw the order but awaited Ms. Cox's return to deal with it as the person most knowledgeable about the claim. Ms. Cox returned on April 30, 2003. (T. 327-28.) Contrary to the suggestion of Mrs. Jordan's counsel, Ms. Cox did not ignore the order or act with indifference to it. Rather, Cox made it a priority and dealt with it that very day. (T. 215.) On April 30, Ms. Cox contacted T.G. Bolen and asked him to prepare and send a letter to the Commission to obtain a calculation of how much AmFed owed Mrs. Jordan. (T. 215.) Cox then followed up with Bolen, making status requests concerning the letter to the Commission on May 5,

May 12, and May 16. (T. 215, 217, 218-19, 224-25; P-10 at pp. 29-31.) On May 16, Bolen advised Cox that, in the course of reviewing the claim and preparing the letter, he had found an error. The amount of benefits previously paid to Mrs. Jordan and her children were only one-half of what they should have been.⁴ Ms. Cox advised Bolen to get the correct payment figures to make up the mistaken underpayments for the children as well.⁵ (T. 217-19; Exh. P-10 at p. 29; Exh. D-20.)

On May 27, 2003, Bolen sent a letter to the Mississippi Workers Compensation Commission. It was not just a request for a computation of benefits. **The letter demonstrates AmFed's investigation and agreement to continue voluntary payment of the claim, as follows:**

Dear Chairman Smith:

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 that 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 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.**

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This was due to the computer error made by Stacy Stuart, discussed *supra*.

⁵

The correction of the underpayment to Mrs. Jordan would be taken care of by the computation on the lump sum order, since AmFed would receive credit only for amounts actually paid.

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.

(Exh. D-21, emphasis added.)⁶

D. May 29, 2003 Through June 26, 2003

On May 29, 2003, Mrs. Jordan – through her new counsel, Bill Jones – filed suit against AmFed seeking payment of benefits under the lump sum order. (R. 3-12.) Mrs. Jordan had first consulted Mr. Jones in late April or early May 2003. Mr. Jones did not call AmFed or write to AmFed to determine its position on payment under the order before filing suit. However, AmFed’s May 27 letter, two days earlier, demonstrates the claim was already going to be paid. The lawsuit was, in fact, unnecessary to obtain payment.

The Commission performed a computation of benefits based on Bolen’s letter and mailed it to Bolen on May 30, 2003. It was stamped received in Bolen’s office on or about June 3, but he was out of the office on vacation when it arrived. Bolen returned to his office on June 10, 2003. (T. 275, 277-78.) Contrary to the suggestion by Mrs. Jordan’s counsel, Bolen did not act with

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Any suggestion that AmFed tried to hide its discovery of the initial error in weekly payments is meritless. AmFed directly acknowledged the error and placed a letter about it of public record with the Commission.

indifference to the communication from the Commission. That very day – June 10 – he transmitted the calculation of benefits to AmFed. AmFed proceeded to order checks. (T. 277.) The checks, dated June 23, 2003, were forwarded to Bolen. On June 26, 2003, Bolen forwarded them to Mr. Jones for payment to Mrs. Jordan.⁷ (Exh. D-25.)

E. June 26, 2003, Through August 13, 2003

Bill Jones wrote to Bolen in July 2003 and requested that AmFed pay a 10% late payment penalty calculated on the discounted lump sum. The Commission's calculation of benefits owed did not include any penalty. However, on August 8, AmFed advised a penalty check would be forthcoming. (D-29.) On August 13, 2003, AmFed forwarded a check for an additional \$17,808.35 as a 20% late payment penalty. It was calculated at a higher percentage than that requested by Mr. Jones. It was also calculated based on the higher total award to Mrs. Jordan, rather than on the lesser discounted lump sum as requested by Mr. Jones. (T. 301; D-26; D-30.)

III. THE COURSE OF THIS CLAIM DOES NOT EVINCE ANY BAD FAITH, BUT RATHER, GOOD FAITH EFFORTS TO PAY

It is clear from the course of AmFed's conduct that there was never any intent to do anything other than pay what was owed and correct any errors. Upon notice of the lump sum order, AmFed investigated and took the steps to determine what was owed. AmFed paid and corrected its errors. AmFed agreed to do so before this suit was ever filed.

Mrs. Jordan's counsel contends that it was, in itself, bad faith that AmFed did not notify her of its intent to pay before she filed suit. This was, unfortunately, the result of an error by AmFed's counsel, T.G. Bolen, in failing to copy Glenn White on the letter to the Commission agreeing to pay

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AmFed had been served with process in this suit in the interim and thereby became aware that Mrs. Jordan was now represented by Bill Jones. (R. at 16, 18.)

and seeking a computation of what was owed. It was not, however, bad faith, and Mrs. Jordan was actually paid within 30 days of that letter, without regard to whether she had filed suit, or not. Had Mrs. Jordan's counsel – Bill Jones – contacted Ms. Cox before filing suit, he would have learned that AmFed was obtaining a computation and that payment would be forthcoming. With all due respect, the duty of good faith and fair dealing runs both ways, and a simple call or letter by Mr. Jones would have gleaned the information that payment was already in the works and that suit was not necessary to obtain it.

The Court of Appeals erroneously criticizes AmFed for abdicating the claim to Bolen. Both Cox and Bolen testified they had never previously dealt with any such situation before. (T. 190, 273.) Under these unusual circumstances, it cannot be held wrong for Ms. Cox to have sought assistance of counsel. Moreover, she did not abdicate the claim to Bolen. She consistently followed up and worked to move the claim along. The Court of Appeals also criticizes AmFed for time frames that occurred while personnel involved in the claim were out of their offices for a previously scheduled wedding, honeymoon, and a vacation. However, this is no basis for a finding of bad faith. Both Cox's actions and Bolen's actions show that they made Mrs. Jordan's situation a priority. When Ms. Cox returned from her wedding and honeymoon and learned that a lump sum order existed, she made it a priority that very day to act on it and request that Bolen obtain a computation of benefits owed. When Bolen returned to his office on June 10 and found the computation had arrived while he was out, he did not wait to act on it. That very day, June 10, he transmitted it to AmFed so that checks to Mrs. Jordan could be prepared and sent to her. And they were.

AmFed respectfully asks that this Court correct an injustice. It voluntarily paid Mrs. Jordan's claim from its inception. Despite that this is so, AmFed is faced with another evidentiary hearing exposing it to punitive damages. This is completely inconsistent with this Court's previous

CERTIFICATE OF SERVICE

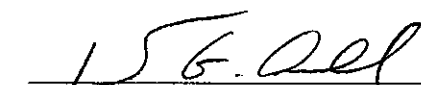

I, Janet G. Arnold, one of the attorneys for the Petitioners-Appellants in the above-referenced action, hereby certify that I have this day caused to be delivered, via United States mail, first class, postage prepaid, a true and correct copy of the foregoing Petitioners' Supplemental Brief Upon Grant of Writ of Certiorari to:

Hon. Billy Joe Landrum
Circuit Court Judge
P.O. Box 685
Laurel, Mississippi 39441

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

The Supplemental Brief has also this day been filed with Ms. Kathy Gillis, Clerk of the Mississippi Supreme Court, via hand-delivery to the Office of the Clerk, Gartin Justice Building, 450 High Street, Jackson, Mississippi 39201.

This, the 12th day of April, 2010.


JANET G. ARNOLD (MBN )