

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS**

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

APPELLANT

VERSUS

CAUSE NO. 2007-CT-01432-SCT

JOYCE T. DOZIER

APPELLEE

SUPPLEMENTAL BRIEF OF THE APPELLANT

Mary Margaret Bowers
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, Mississippi 39201-1005
Telephone: (601) 359-3592
(601) 359-3680
Fax. No. (601) 359-2285
Mississippi Bar No. [REDACTED]

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
------------------------	---

TABLE OF AUTHORITIES	ii
----------------------------	----

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

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

CERTIFICATE OF SERVICE	8
------------------------------	---

TABLE OF AUTHORITIES

CASES

<i>Cole v. State</i> , 525 So. 2d 365 (Miss. 1989).....	1
<i>Coleman v. Reamser's Examiner</i> , 36 S.W. 2d 22 (Ky. App. 1931)	3
<i>Davis v. State</i> , 684 So. 2d 643 (Miss 1996).....	1
<i>Douglas v. Blackmon</i> , 759 So.2d 1217 (Miss. 2000)	2
<i>Green v. Holland</i> , 480 F. 3d 1216 (11 th Cir. 2007).....	6
<i>Harris v. Lewis</i> , 755 So. 2d 1199 (Miss. App. 1999).....	2
<i>Hayes v. Public Employees' Retirement System</i> , 960 So.2d 471 (Miss. 2007)	4
<i>Hollstein v. Contributory Retirement Appeal Board</i> , 710 N.E. 2d 1041 (Mass App. Ct. 1999).....	4
<i>Indiana Department of Public Welfare v. Chair Lance Service, Inc.</i> 523 N.E. 2d 1373 (Ind. 1988).....	3
<i>Jackson v. Fortis Benefits Insurance Company</i> , 245 F. 3d 748 (8 th Cir. 2001)	6
<i>Jackson v. State</i> , 845 So. 2d 727 (Miss. App. 2003).....	2
<i>Matson v. State</i> , 750 So. 2d 1234 (Miss. 1999)	3
<i>Mills v. Jones' Estate</i> , 57 So. 2d 496 (Miss, 1952)	5
<i>Public Employees' Retirement System v. Freeman</i> , 868 So. 2d 327 (Miss. 2004).....	1,2,5
<i>Public Employees' Retirement System v. Langham</i> , 812 So. 2d 969 (Miss. 2002).....	4
<i>Stevison v. Public Employees' Retirement System</i> , 966 So.2d 874 (Miss. App. 2007).....	4
<i>Weber v. Board of Retirement of Los Angeles County Retirement Association</i> , 62 Cal. App. 4 th 1440 (Cal. App. 1998).....	3

Statutes

Miss. Code Ann § 25-11-120 (Rev. 2006).....	5
Miss. Code Ann § 75-17-7 (Rev. 2000).....	3

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VS.

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APPELLEE

SUPPLEMENTAL BRIEF

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

I.

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

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

the statutes do not provide for the payment of interest.” The issue with regard to interest was not raised at the hearing before the Disability Appeals Committee which heard Ms. Dozier’s appeal of the denial of disability benefits by the PERS Medical Board. It was not raised in Ms. Dozier’s Notice of Appeal filed in the Circuit Court or argued in the brief filed on her behalf. This Court specifically held in *Freeman*, 868 So.2d at 331 that “[B]ecause he failed to raise the issue of interest in the proceedings before PERS and the court below, Freeman’s claim for interest is procedurally barred.” The issue of interest was not asserted at the administrative level nor was it argued before the Circuit Court nor the Court of Appeals and, thus, it is procedurally barred from being raised in a motion to amend the mandate.

In the Notice of Appeal filed in the Circuit Court counsel for Ms. Dozier merely stated that the Court should reverse and render PERS’ such decision or alternatively remand for a new hearing. Interest was not argued or asserted in any of the issues addressed by counsel for Ms. Dozier in the brief filed on her behalf. The first time interest is mentioned is in the conclusion in the brief filed in the Court of Appeals. Interest is not mentioned in the Court’s Opinion and Order.

In *Douglas v. Blackmon*, 759 So.2d 1217,1220 (Miss. 2000), this Court held that the “motorist was procedurally barred from raising the issue of whether the school district should be estopped... because the issue was not first raised at the trial level.” Also, in *Harris v. Lewis*, 755 So.2d 1199 (Miss. App. 1999), the Mississippi Court of Appeals held that “issues not raised at trial could not be raised on appeal.” The mere fact that the issue was not argued at the administrative hearing level prior to being appealed to the Circuit Court bars Ms. Dozier from raising the issue at a later date. See: *Jackson v. State*, 845 So. 2d 727 (Miss. App. 2003) This Court’s decision in *Freeman* also supports the position that an issue not raised at the lower level

is waived for purposes of appeal. Also See: *Matson v. State*, 750 So.2d 1234, 1237 (Miss. 1999).

The Court of Appeals properly denied the Motion to Amend the Mandate to include interest.

II.

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

This matter is purely an appeal of an administrative decision and not a civil suit wherein a money judgment was entered which may call for the entry of prejudgment interest pursuant to statutory authority i.e., Miss. Code Ann. §75-17-7(Rev. 2000). Interest is not warranted in any case similar to this wherein the basis for the appeal is whether the administrative decision to deny disability benefits was premised on substantial evidence or was arbitrary and capricious. In a somewhat similar argument in a request for an Attorney General's Opinion, the Office of the Attorney General has opined that "A county can pay interest only when it has been authorized by statute." MS AG Op., Stroud (November 1, 1989) PERS cites this only as persuasive authority realizing it is not binding on this Court. In *Coleman v. Reamser's Examiner*, 36 S.W.2d 22,24 (Ky. App. 1931), the Court held that unless authorized by statute interest is not collectible... nor is a county liable for interest except in cases of contract or statute allowing it to do so. Also, in *Weber v. Board of Retirement of Los Angeles County Retirement Association*, 62 Cal.App.4th 1440, 1446 (Cal. App. 1998) the Court stated that "administrative law judges may not award interest where the enabling statute does not authorize an award of interest."

In a somewhat analogous case from another jurisdiction in *Indiana Department of Public Welfare v. Chair Lance Service, Inc.*, 523 N.E. 2d 1373, 1379 (Ind. 1988) the Court

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

There is no provision in the law governing the administration of the Mississippi Public Employees’ Retirement System which provides for the payment of interest in such appeals. Interest was sought in *Hayes v. Public Employees’ Retirement System*, 960 So.2d 471 (Miss. 2007) Although, the issue was asserted and argued, this Court did not award interest in *Hayes* and distinguished *Public Employees’ Retirement System v. Langham*, 812 So.2d 969 (Miss. 2002), relied upon by Mr. Hayes, by stating that it was a civil action and not an appeal of an administrative decision. *Langham* involved a civil action being filed to collect certain death benefits under the Highway Safety Patrol Retirement System. Although the Court of Appeals in *Stevison v. Public Employees’ Retirement System*, 966 So.2d 874 (Miss. App. 2007) amended the mandate to include interest, PERS takes the position that the mandate should not have been amended in *Stevison*. PERS filed and was granted its Petition for Writ of Certiorari filed June 19, 2008. A second Order was entered December 4, 2008, finding the “petition was improvidently granted and should be dismissed.”

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

The issue before the Court of Appeals was not the monetary extent of recovery, but rather whether the member is entitled to a retirement benefit. If the decision is to award benefits, the calculation is made at the administrative level. The issue addressed by the Court of Appeals was whether PERS decision was upheld by substantial evidence. In *Mills v. Jones' Estate*, 57 So. 2d 496 (Miss. 1952) there was a motion to add interest on the judgment that was entered and this Court noted that the lower Court did not enter a monetary judgment, rather the judgment "simply adjudicated that the death was compensable without undertaking to fix the amount of such compensation. We cannot fix the amount here. That will be a matter for the Commission on remand." The case was originally before the Workers' Compensation Commission. The motion was overruled. The facts are very similar to those in this matter.

The legislature did not provide for the payment of interest in the laws governing the administration of the Retirement System. If individuals are allowed to collect interest following an appeal to Court, it would appear that they would then be entitled to appeal to Court to also

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

Although this matter clearly does not fall within the parameters of the Employee Retirement Income Security Act of 1974 (ERISA), the case of *Jackson v. Fortis Benefits Insurance Company*, 245 F. 3d 748 (8th Cir. 2001) provides guidance. In *Fortis* the United States Court of Appeals for the Eighth District noted that ERISA does not provide for an award of interest on back payments. The plaintiffs, alleging a breach of fiduciary duty and unjust enrichment, sought interest on an award of back benefits under long term disability the payments for which were allegedly delayed for three (3) years. The Court concluded that without showing the plan had breached its fiduciary duty there was no authority to pay interest.

In the case of *Green v. Holland*, 480 F.3d 1216 (11th Cir. 2007), although brought under ERISA, it also gives guidance on the issue of the imposition of interest in disability cases. The plaintiff, Green, filed suit seeking to recover accrued interest on disability benefits that were delayed but eventually paid under his pension plan. Summary judgment was granted to the Trustees of the Plan, the pension Trust and the Plan itself. Green then appealed to the United States Court of Appeals for the Eleventh Circuit. Green was finally awarded retroactive disability benefits and paid a lump sum benefit covering an eight year period of time. He was also advised

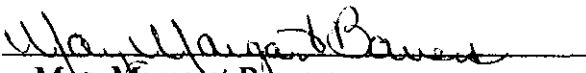
that he would receive future disability benefits on the first of each month. Green inquired as to whether he would receive interest on the retroactive payment. The Trustees informed Green that there was no provision in the Plan allowing for interest, thus, he would not receive interest. Thereafter, Green brought the instant action. Green filed suit for himself and all others similarly situated who had received retroactive benefit payments under the Plan but no interest. Regarding the claim for interest, the Court held that the Pension Plan did not provide for the payment of interest on retroactive benefits, thus, the payment of interest as a benefit was properly disallowed.


In this case it would constitute error to award interest when the issue was not raised or argued and further would be contrary to existing statutory and case law.

WHEREFORE, PREMISES CONSIDERED, the Appellant, the Public Employees' Retirement System, asserts that the Order denying the Motion to Amend the Mandate to grant prejudgment interest should be affirmed.

RESPECTFULLY submitted on this the **21** day of May 2009.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM

BY: 
Mary Margaret Bowers
Special Assistant Attorney General

Mary Margaret Bowers, MSB 
Special Assistant Attorney General
Public Employees' Retirement System
429 Mississippi Street
Jackson, Mississippi 39201-1005
Telephone: (601) 359-3592
Fax Number: (601) 359-2285


CERTIFICATE OF SERVICE

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

Honorable George S. Luter, Jr.
P. O. Box 3656
Jackson, MS 39207-3656

Honorable Tomie Green
Hinds County Circuit Court Judge
Post Office Box 327
Jackson, MS 39205-0327

So certified, this the 21 day of May 2009.


Mary Margaret Bowers, MSB # [REDACTED]
Special Assistant Attorney General