

NO. 06-60528

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

JIMMY BULLOCK

PLAINTIFF/APPELLANT

VS.

2007-FC-01859-SC T

AIU INSURANCE COMPANY; THE GOTTFRIED  
CORPORATION; AND AIG CLAIM SERVICES,  
INC.

DEFENDANTS/APPELLEES

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION

**BRIEF OF APPELLEES, AIU INSURANCE COMPANY  
AND AIG CLAIMS SERVICES, INC.**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.


1. Jimmy Bullock • Appellant.
2. Lance L. Stevens, Esq. and Roderick D. Ward, III, Esq. and Stevens & Ward, P.A. • Attorneys for Appellant Bullock.
3. David M. Ott, Esq., Bryan Nelson, P.A. • Attorney for Appellee, Gottfried Corporation.
4. Gottfried Corporation • Defendant/Appellee.
5. Karl Gottfried, III, Owner of Gottfried Corporation • Appellee.
6. Edward J. Currie, Jr., Esq., Rebecca B. Cowan, Esq., William E. McKinley, Jr., and Currie Johnson Griffin Gaines, & Myers, P.A. • Attorneys for Appellees, AIU Insurance Company and AIG Claims Services, Inc.


7. AIU Insurance Company • Appellee


8. AIG Claim Services • Appellee.

This, the 6<sup>th</sup> day of October, 2006



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Rebecca B. Cowan (MSB# )

William E. McKinley, Jr. (MSB# )

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## **STATEMENT REGARDING ORAL ARGUMENT**

AIU Insurance Company and AIG Claims Services submit that oral argument is unnecessary in this matter because the issue on appeal can be resolved by an examination of the express provisions of *Miss. Code Ann.* § 71-3-47(1990).

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .....	i
STATEMENT REGARDING ORAL ARGUMENT .....	iii
TABLE OF CONTENTS .....	iv
TABLE OF AUTHORITIES .....	vi
STATEMENT OF THE ISSUE .....	1
STATEMENT OF THE CASE .....	2
I.    Nature of the Case .....	2
II.   Relevant Course of Proceedings .....	3
STATEMENT OF THE FACTS .....	5
SUMMARY OF ARGUMENT .....	7
ARGUMENT .....	8
I.    Bullock's bad faith claim is barred by the three-year statute of limitations found in <i>Miss. Code. Ann.</i> § 15-1-49 (1990) .....	8
A.    Statutory and procedural law concerning the finality of the October 12, 1999, decision by the ALJ establishes that Bullock exhausted his administrative remedies on the compensability issue addressed by his bad faith complaint on October 12, 1999 .....	8
B.    Applicable case law on the exhaustion of administrative remedies before the filing of a bad faith suit demonstrates	

that Bullock exhausted his administrative remedies with regard to compensability on October 12, 1999 .....	15
---	----

II. Counsel for AIU and Gottfried could not have altered the finality of the ALJ's October 12, 1999, compensability decision through any subsequent pleading filed more than twenty days after the date of that decision .....	22
---	----

CONCLUSION .....	23
------------------	----

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS .....	25
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ADDENDUM .....	26
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CERTIFICATE OF SERVICE .....	31
------------------------------	----

## TABLE OF AUTHORITIES

<i>Andrews v. Waste Control, Inc.</i> , 409 So.2d 707 (Miss. 1982) .....	12
<i>Bickman v. Department of Mental Health</i> , 592 So.2d 96 (Miss. 1991) .....	
<i>Brewington v. Employers Fire Ins. Co.</i> , 992 P.2d 237 (MT 1999) .....	20
<i>Copeland v. Wasserstein , Perella &amp; Co., Inc.</i> , 278 F.3d 472 (5 <sup>th</sup> Cir. 2002) .....	8
<i>Cunningham Enterprises, Inc. v. Vowell</i> , No. 2005-WC-01261-COA, 2006 WL 2256853 (Miss.App.Ct. August 8, 2006) .....	12, 13
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938) .....	4, 15
<i>Ford v. KLLM</i> , 909 So.2d 1194 (Miss. 2005) .....	22
<i>H.K. Porter Co., Inc. v. Board of Supervisors of Jackson County</i> , 324 So.2d 746 (Miss. 1975) .....	12
<i>Harper v. North Miss. Med. Center</i> , 601 So.2d 395 (Miss. 1992) .....	14
<i>Howe v. State</i> , 53 Miss. 57 (1876) .....	12
<i>Kitchens v. Liberty Mut. Ins. Co.</i> , 659 F.Supp. 467 (S.D. Miss. 1987) .....	15
<i>Liberty Mutual Ins. Co. v. McKneely</i> , 862 So.2d 530 (Miss. 2003) .....	19
<i>Masonite Corporation v. State Oil and Gas Board</i> , 240 So.2d 446 (Miss. 1970) .....	12
<i>McCain v. Northwestern National Ins. Co.</i> , 484 So.2d 1001 (Miss. 1986) .....	16, 17
<i>McGowan v. Orleans Furniture, Inc.</i> , 586 So.2d 163 (Miss. 1991) .....	14

<i>Mississippi Power and Light Co. v. Cook</i> , 832 So.2d 474 (Miss. 2002) .....	19
<i>O'Connor v. National Union Fire Ins. Co. of Pittsburgh, PA</i> , 87 P.3d 454 (MT 2004) .....	21
<i>Oktibbeha County Bd. of Educ. Town of Sturgis</i> , 531 So.2d 585 (Miss. 1988) .....	12
<i>Powers v. Travelers Ins. Co.</i> , 664 F. Supp. 252 (S.D. Miss. 1987) .....	15
<i>Southern Farm Casualty Insurance Co. v. Holland</i> , 469 So.2d 55 (Miss. 1984) .....	9, 15
<i>State of Mississippi v. Board of Supervisors of Warren County</i> , 102 So.2d 198 (Miss. 1958) .....	12
<i>Walls v. Franklin Corp.</i> , 797 So.2d 973 (Miss. 2001) .....	16, 17, 19
<i>Whitehead v. Zurich American Insurance Co.</i> , 348 F.3d 478 (5 <sup>th</sup> Cir. 2003) .....	17, 18
<i>Young v. Southern Farm Bureau Life Ins.</i> , 592 So.2d 103 (Miss. 1991) .....	20
<u>Other</u>	
28 U.S.C. § 1332 .....	3
<i>Bullock's</i> Appellate Brief .....	10, 17, 18, 22
<i>Miss. Code Ann.</i> § 15-1-49 (1990) .....	7, 8, 14, 22
<i>Miss. Code Ann.</i> § 71-3-17(b)(1990) .....	20
<i>Miss. Code Ann.</i> § 71-3-47 (1990) .....	1, 3, 6, 7, 9-14, 22, 23
<i>Miss. Code Ann.</i> § 71-3-51 (1990) .....	13
<i>Miss. Code Ann.</i> § 71-3-53 (1990) .....	19
<i>Miss. Code Ann.</i> § 71-3-85(1)-(5) (1990) .....	12
Workers' Compensation Act .....	16
Mississippi Workers' Compensation Commission Procedural Rule 10 (1993) .....	11



Mississippi Workers' Compensation Commission Procedural Rule 10  
(Amend. 2001) ..... 12

## **STATEMENT OF THE ISSUE**

Whether the Mississippi statute of limitations applicable to a bad faith claim concerning compensability in a workers' compensation case, *i.e.*, an entitlement to benefits, accrues on the date an Order by an Administrative Law Judge on compensability becomes final as provided for in *Miss. Code Ann.* § 71-3-47 (1990).

## **STATEMENT OF THE CASE**

### **I. Nature of the Case**

This appeal arises from an action for alleged bad faith denial of workers' compensation benefits filed by Jimmy Bullock (hereinafter "Bullock") against AIU Insurance Company (hereinafter "AIU"), The Gottfried Corporation (hereinafter "Gottfried")<sup>1</sup>, and AIG Claims Services, Inc. (hereinafter "AIGCS"), on August 26, 2004, in the Circuit Court of Hancock County, Mississippi. (R.p. 18-24). AIU and AIGCS removed the case to the United States District Court for the Southern District of Mississippi, Southern Division, and Gottfried joined in the removal. (R.p. 13-16, 25). The defendant, Gottfried, filed a Motion to Dismiss Bullock's case, asserting that the statute of limitations on Bullock's bad faith claim had run before his suit was filed. (R.p. 1-2). AIU and AIGCS filed a Joinder in Gottfried's Motion to Dismiss, and, in the alternative, filed a Motion for Summary Judgment, asserting the same statute of limitations defense. (R.p. 225-276). Gottfried, AIU, and AIGCS argued that the statute of limitations began to run against Bullock's bad faith claim on November 1, 1999, twenty days after Bullock received a favorable decision by the Administrative Law Judge ("ALJ") assigned to his case allowing him workers'

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<sup>1</sup> Bullock initially sued two Gottfried companies in his complaint. During remand proceedings, he agreed that he was unable to establish a cause of action against the non-diverse Gottfried company, so that company was dismissed from the suit. (R.p. 117).

compensation benefits from AIU. Specifically, these parties argued that the ALJ decision became final after they did not appeal it to the Full Commission within twenty days as required in *Miss. Code Ann.* § 71-3-47. And, as a result, Bullock had exhausted his administrative remedies as to the bad faith cause of action he described in his complaint at that time. Bullock responded to the Motions, arguing that the statute of limitations against his bad faith claim did not begin to run until May 25, 2004, when remaining workers' compensation issues unrelated to his bad faith claim of compensability found in his complaint were settled. The Court granted AIU and AIGCS' Motion for Summary Judgment, and Bullock appealed. (R.p. 662-667).

## **II. Relevant Course of Proceedings**

On August 26, 2004, Bullock filed his complaint in the Circuit Court of Hancock County, Mississippi, and sued the defendants for bad faith denial of workers' compensation benefits. (R.p. 20). Bullock alleged that he had received an on-the-job injury while performing work for Gottfried, and that AIU and Gottfried wrongfully denied him workers' compensation benefits for that injury. The defendants, AIU and AIGCS, removed the case to the United States District Court for the Southern District of Mississippi, Southern Division, pursuant to 28 U.S.C. § 1332. (R.p.13-16). The defendant, Gottfried Corporation of Mississippi, joined in the notice of removal. (R.p. 25). Bullock filed a Motion to Remand, but later admitted

that he was unable to establish a cause of action against the non-diverse defendant, Gottfried Corporation. As a result, the Motion to Remand was denied. (R.p. 35, 117-18).

The defendant, Gottfried, filed a Motion to Dismiss Bullock's case, asserting that the statute of limitations had run against Bullock's bad faith claim before he filed suit. (R.p. 1-2). AIU and AIGCS filed a Joinder in Gottfried's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, asserting the same statute of limitations defense. (R.p. 225-276). At the hearing on the dispositive Motions, the Court explained that it was not comfortable with deciding the issue surrounding the defendants' statute of limitations defense without a ruling from a Mississippi court or the passage of a statute by the Mississippi Legislature directly addressing the issue. Therefore, the Court denied AIU and AIGCS' Motion for Summary Judgment and Gottfried's Motion to Dismiss. (R.p. 577, 595).

AIU and AIGCS filed a Motion to Reconsider, asserting that the Court was duty-bound to make an "*Erie* guess" on how a Mississippi court would rule if confronted with this particular issue. (R.p. 584-88). The Court granted the Motion to Reconsider and accepted additional briefs on the issue. (R.p. 607). The Court then granted the Motion for Summary Judgment filed by AIU and AIGCS, holding that the statute of limitations for Bullock's bad faith claim began to run on October

12, 1999, when the ALJ for the Workers' Compensation Commission determined that Bullock was entitled to workers' compensation benefits under the policy issued to Gottfried by AIU. (R.p. 662-667). Specifically, the Court held:

Bullock's argument is unpersuasive. Requiring *all* potential bad faith claimants to wait until their workers' compensation cases are finally concluded is not currently supported by Mississippi case law or statute. In the context of "exhaustion of remedies" prior to the filing of a bad faith claim, the Mississippi Supreme Court has never equated exhaustion of remedies with exhaustion of the workers' compensation process. Instead, exhaustion occurs upon the final adjudication of the underlying workers' compensation issue that establishes the plaintiff's "entitlement to contractual damages." Indeed there may be circumstances in which claimants must await final adjudication of their workers' compensation case before a disputed issue ripens into a cognizable bad faith case. In this case, however, the issue of Bullock's entitlement to workers' compensation benefits was "exhausted" when the Mississippi Workers' Compensation Commission conclusively determined through its administrative process that Bullock was entitled to the workers' compensation benefits that had previously been denied. Thus, the statute of limitations began to run on Bullock's bad faith claim on October 12, 1999.

(R.p. 666-67).

### **STATEMENT OF THE FACTS**

On or about November 8, 1996, Bullock was working as a subcontractor for Gottfried at the Stennis Space Center in Bay St. Louis, Mississippi. (R.p. 20). He twisted and injured both of his knees when he stepped off a ladder while working pursuant to the subcontract with Gottfried. (R.p. 20). Bullock filed a claim for

workers' compensation benefits with Gottfried's workers' compensation insurer, AIU. (R.p. 20). However, a dispute arose between Gottfried and Bullock as to whether premiums had been deducted from Bullock's pay prior to the accident to pay premiums for workers' compensation coverage on behalf of Bullock under the AIU policy. (R.p. 239-249). To resolve this "threshold issue" of compensability, the parties agreed to litigate only this issue before the ALJ in the workers' compensation case. At the same time, they agreed to reserve any litigation of the issues of temporary and permanent disability pending a ruling on the issue of coverage. (R.p. 239).

The ALJ found in favor of Bullock on October 12, 1999, finding that he was an insured and entitled to workers' compensation benefits under the Gottfried's policy with AIU. (R.p. 249). Gottfried and AIU chose to allow the October 12, 1999, decision by the ALJ to become final by not appealing it to the Full Commission within the twenty-day appeal period specified in §71-3-47 (1990). At the same time, AIU and AIGCS paid all back benefits owed to Bullock. The amount of benefits to which Bullock was entitled and other issues unrelated to Bullock's bad faith claim were then litigated before the ALJ. The Commission ultimately approved payment of a lump sum settlement to Bullock on May 25, 2004.

On August 26, 2004, Bullock filed suit against Gottfried, AIU and AIGCS,

claiming: "Defendants AIU, Gottfried, and AIG and their agents and/or employees, without legitimate or arguable reason, refused to provide and/or denied workers' compensation coverage and benefits **until after October 12, 1999 . . .**" (emphasis added)(R.p. 20). Because the decision by the ALJ on the issue of coverage and compensability to Bullock was not appealed, that decision became final on October 12, 1999. Bullock's bad faith claim arose only from conduct and issues litigated on that date, the three-year statute of limitations of *Miss. Code Ann.* §15-1-49 (1990) began to run against his bad faith claim on October 12, 1999. Therefore, the statute of limitations applicable to his bad faith claim expired before he filed suit against AIU, AIGCS, and Gottfried.

### **SUMMARY OF ARGUMENT**

A workers' compensation claimant must first establish that he is entitled to benefits through the administrative process before pursuing a bad faith suit against his employer and its carrier. In the present suit, the ALJ decided this issue in favor of Bullock on October 12, 1999. Pursuant to the express statutory language of §71-3-47 (1990), unless AIU and Gottfried appealed this decision within twenty days, the decision "shall be final." AIU and Gottfried did not appeal the decision, and, therefore, the ALJ's order became final. AIU and Gottfried also immediately paid Bullock back benefits and no longer challenged his right to compensability under



Gottfried's policy with AIU. Thus, Bullock's bad faith claim accrued when he obtained a favorable decision on compensability from the Commission on October 12, 1999, ordering AIU to pay him the benefits he claimed he was entitled to receive under his contract with Gottfried. As a result, Bullock should have filed his action for bad faith refusal to pay benefits within three years after October 12, 1999. Because he waited until August 26, 2004, to file his action, his claim is time-barred by the three-year statute of limitations of *Miss. Code Ann.* § 15-1-49 (1990).

### **ARGUMENT**

On appeal, a district court's decision to grant a motion to dismiss or a motion for summary judgment is subjected to a *de novo* review. *Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 477 (5th Cir. 2002). With regard to a motion to dismiss, the issue is whether the complaint states a valid claim for relief when viewed in the light most favorable to the plaintiff. *Copeland*, 278 F.3d at 477. With regard to a motion for summary judgment, the appellate court looks beyond the pleadings in order to determine whether there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Id.*

- I. Bullock's bad faith claim is barred by the three-year statute of limitations found in *Miss. Code Ann.* § 15-1-49 (1990).**
  - A. Statutory and procedural law concerning the finality of the October 12, 1999, decision by the ALJ establishes that Bullock**

**exhausted his administrative remedies on the compensability issue addressed by his bad faith complaint on October 12, 1999.**

A workers' compensation claimant must first establish that he is entitled to benefits through the administrative process before pursuing a bad faith suit against his employer and its carrier. *Southern Farm Casualty Insurance Co. v. Holland*, 469 So.2d 55, 59 (Miss.1984). In the present suit, the ALJ found in favor of Bullock and determined that he was entitled to workers' compensation benefits on October 12, 1999. (R.p. 249). AIU and Gottfried chose not to appeal the ALJ's decision within the statutory twenty-day appeal period of § 71-3-47 (1990), paid all back benefits owed to Bullock, and did not challenge his right to compensability under the AIU policy again. Other issues that are wholly unrelated to Bullock's bad faith claim described in his complaint were then litigated before the ALJ and the full Commission on appeal. And, although the Commission eventually approved payment of a lump sum settlement to Bullock on May 25, 2004, Bullock's workers' compensation case still remains open. (R.p. 637).

Therefore, the issue before this Court is whether Bullock's bad faith claim concerning compensability accrued upon his receipt of the October 12, 1999, ALJ final Order, or whether his claim accrued when the parties ultimately settled on the amount of benefits he should receive under Gottfried's policy with AIU on May 25,

2004. To decide this issue, this Court must examine Mississippi's procedural rules and statutes pertaining to the finality of ALJ decisions in workers' compensation cases.

As Bullock correctly explains:

An Administrative Law Judge, formerly referred to as an "attorney referee," conducts the evidentiary hearings at the "trial" level (MWCC Procedural Rule 7) and enters his/her decision at a reasonable time thereafter. Each party is notified of the result in writing, pursuant to *Miss. Code Ann.* § 71-3-47 (1990).

(See Bullock's Appellate Brief at 10). However, while addressing the role an ALJ plays while conducting these evidentiary hearings, Bullock fails to address the importance of the ALJ's decision at these hearings under § 71-3-47(1990), which provides:

**Informal conferences and hearings** in contested cases may be conducted by a duly designated representative of the commission. Upon the conclusion of **any such hearing**, the commission's representative shall make or deny an award, and file the decision in the office of the commission. Immediately after such filing, a notice of decision shall be sent to all interested parties. **This decision shall be final unless within twenty (20) days a request or petition for review by the full commission is filed.**

*Miss. Code Ann.* § 71-3-47(1990)(emphasis added). Bullock argues, "An ALJ enters no binding Orders. The Orders are all temporary until the MWCC has ruled upon them." (See Bullock's Appellate Brief at 12). Section 71-3-47, however, clearly and

unequivocally states otherwise. It states that a decision from **any** hearing, even an informal one, before the administrative law judge is **final** unless a request or petition for review by the Full Commission is filed. And, it provides that the decision of the ALJ shall be final unless within twenty (20) days a request or petition for review by the full commission is filed.” AIU and AIGCS respectfully submit that this Court’s acceptance of Bullock’s position in this matter on the importance and finality of an ALJ decision under § 71-3-47 would void the explicit language of the Statute.

Additionally, Bullock’s position directly contradicts Mississippi Workers’ Compensation Commission Procedural Rule 10 (1993), which provided:

REVIEW HEARINGS. In all cases where either party desires a review before the Full Commission from the decision rendered at the evidentiary hearing, the party desiring the review shall **within twenty (20) days of the date of said decision** file with the Secretary of the Commission a written request or petition for review before the Full Commission.

MWCC Procedural Rule 10 (1993).<sup>2</sup> Therefore, Procedural Rule 10 also provides that the parties have only twenty days to appeal a decision of the ALJ.

Bullock discusses at length the 2001 amendment to Procedural Rule 10 as well as the above-quoted version of the Rule that was in effect when the 1999 ALJ Order

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<sup>2</sup>Bullock’s assertion that AIU and AIGCS relied upon the 2001 version of MWCC Procedural Rule 10 rather than the 1993 version of MWCC Procedural Rule 10 in the lower court proceedings is incorrect. (R.p. 513).

was issued, but neither of these versions can possibly be construed to be in conflict with § 71-3-47. The Mississippi Workers' Compensation Commission, which was created by statute, only has the power to adopt detailed rules and regulations **for implementing the purposes of Workers' Compensation chapter in the *Mississippi Code Annotated***. See *Miss. Code Ann.* § 71-3-85(1)-(5)(1990)(emphasis added).<sup>3</sup> And, these rules are only binding if they are not inconsistent with Mississippi law. See *Miss. Code Ann.* § 71-3-85(5). Therefore, if Bullock's interpretation of Procedural Rule 10 is accepted, that interpretation is irreconcilable with Mississippi statutory law on the right to appeal from an ALJ's decision, codified at § 71-3-47(1990)(quoted *infra*).

Furthermore, Bullock cites the unpublished decision, *Cunningham Enterprises, Inc. v. Vowell*, No. 2005-WC-01261-COA, 2006 WL 2256853 at ¶ 2 (Miss. App. Ct. Aug. 8, 2006), for the proposition that a party is not required to appeal an ALJ order to preserve his or her rights determined by that order. Bullock incorrectly argues that the *Cunningham* court addressed the merits of the decision by the Commission to

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<sup>3</sup> The Mississippi Supreme Court has long held that state boards and commissions do not have any authority other than that expressly vested in it by statute. *Oktibbeha County Bd. of Educ. v. Town of Sturgis*, 531 So.2d 585 (Miss.1988); *Andrews v. Waste Control, Inc.*, 409 So.2d 707, 712 (Miss. 1982); *H. K. Porter Co., Inc. v. Board of Supervisors of Jackson County*, 324 So.2d 746, 754 (Miss. 1975); *Masonite Corporation v. State Oil and Gas Board*, 240 So.2d 446, 449 (Miss.1970); *State of Mississippi v. Board of Supervisors of Warren County*, 102 So.2d 198, 208 (1958); *Howe v. State*, 53 Miss. 57 (1876).

dismiss Cunningham's appeal as being interlocutory in nature. Instead, the court merely held that it lacked any jurisdiction to hear Cunningham's appeal under *Miss. Code Ann.* § 71-3-51(1990), which is a different statute from the one at issue in the instant action. *Cunningham Enterprises, Inc.*, 2006 WL 2256853 at ¶ 3. This distinction is easily recognized when § 71-3-51, the statute addressed in *Cunningham*, is compared with § 71-3-47, the statute at issue in the instant matter. In *Cunningham*, the Court of Appeals interpreted *Miss. Code Ann.* § 71-3-51(1990), not § 71-3-47 (1990). *See id.*

*Miss. Code Ann.* § 71-3-51(1990) provides:

The **final** award of the commission shall be conclusive and binding unless either party to the controversy shall, within thirty (30) days from the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the circuit court of the county in which the injury occurred.

*Miss. Code Ann.* § 71-3-51(1990). Meanwhile, § 71-3-47 (1990) provides: "This decision [of the ALJ] shall be final unless within twenty (20) days a request or petition for review by the full commission is filed." Section 71-3-47 requires multiple appeals from any ruling of an ALJ decision for issue preservation, while § 71-3-51 provides that any further appeal from the Full Commission of an ALJ decision is barred until the Commission determines all issues in a "final award." As a result, because the *Cunningham* decision vacated the appeal because of a lack of

jurisdiction, the decision does not have any precedential value in the present suit.<sup>4</sup>

Bullock also relies heavily on cases that state that the Commission is the ultimate finder of fact and may reject the findings of an ALJ. However, these cases merely discuss the standard of review during an appeal to the Commission, and do not pertain to the finality of a decision by an ALJ. *See, e.g., Harper v. North Miss. Med. Center*, 601 So.2d 395, 397(Miss. 1992); *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 165 (Miss. 1991). As a result, these cases are distinguishable and, therefore, have no bearing on the issues in the present suit.

Pursuant to § 71-3-47, Bullock had exhausted his administrative remedies with regard to his claim for compensability on October 12, 1999, and the three-year statute of limitations applicable to his bad faith claim began to run on that date. Because Bullock did not file suit until August 26, 2004, almost five years after the ALJ's ruling, the District Court correctly found that his bad faith claim is time-barred by *Miss. Code Ann. § 15-1-49* (1990), and its decision to grant AIU and AIGCS' Motion for Summary Judgment should be affirmed.

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<sup>4</sup>Another case relied upon by plaintiff, *Bickham v. Department of Mental Health*, 592 So.2d 96 (Miss. 1991), also has no precedential value in that it merely addressed § 71-3-51, not § 71-3-47-- the statute that is at issue in the present suit.

**B. Applicable case law on the exhaustion of administrative remedies before the filing of a bad faith suit demonstrates that Bullock exhausted his administrative remedies with regard to compensability on October 12, 1999.**

In *Southern Farm Casualty Insurance Co. v. Holland*, 469 So.2d 55 (Miss. 1984), the Mississippi Supreme Court specifically recognized that once the plaintiff obtained an administrative judgment entitling her to workers' compensation benefits, and began receiving those benefits without any appeal by the employer/carrier, she could bring her bad faith breach of contract action. *Holland*, 469 So.2d at 59. Accordingly, under *Holland*, once the ALJ in the instant case entered his Order requiring AIU to provide workers' compensation benefits to Bullock, and there was no appeal of that Order, Bullock's right to bring an action in tort for bad faith against Gottfried, AIU, and AIGCS accrued, and the controlling statute of limitations began to run.

Two federal district court cases, *Kitchens v. Liberty Mut. Ins. Co.*, 659 F. Supp. 467 (S.D. Miss.1987), and *Powers v. Travelers Ins. Co.*, 664 F. Supp. 252 (S.D. Miss.1987), also support this position. Both courts, while making an *Erie* guess under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), decided that the Mississippi Supreme Court would find that a workers' compensation claimant had to first establish his entitlement to benefits through the administrative process before



pursuing a bad faith suit against his employer and its carrier for a denial of those benefits. Both courts specifically relied on the decision in *McCain v. Northwestern National Ins. Co.*, 484 So.2d 1001, 1002 (Miss.1986), which held that in bad faith cases, “[a] prerequisite to the award of punitive damages is the determination that the plaintiff is entitled to contractual damages.” *Id.* Both district courts found that entitlement to compensation was the same legal issue that had to be decided by the administrative fact finder under the Workers' Compensation Act and by the trier of fact in a bad faith tort action.

Bullock relies upon *Walls v. Franklin Corp.*, 797 So.2d 973 (Miss. 2001), to support his lack of exhaustion of administrative remedies argument in the instant matter. But, the plaintiff in *Walls*, unlike the plaintiff in *McCain*, failed to obtain any determination from the Workers' Compensation Commission that she was “entitled” to the particular medical services and supplies at issue, *i.e.*, a determination that these benefits were “reasonable and necessary,” before she filed suit for the wrongful denial of these benefits. Specifically, the *Walls* court held that:

Based on this Court's decision in *McCain*, and on the Workers' Compensation Commission's continuing jurisdiction over such cases as provided by statute, we find that Walls could not maintain a bad faith action for refusal to pay for disputed medical services and supplies absent the Commission's prior determination that those services and supplies were reasonable and necessary.

a determination that he was entitled to the medical benefits at issue, *i.e.*, a determination that the benefits were reasonable and necessary. *Whitehead*, 348 F.3d at 482. Bullock argues that the *Whitehead* decision supports his position because the insurer in *Whitehead* “had already paid the medical bills and temporary disability benefits which were the subject of the bad faith lawsuit.” (See Bullock’s Appellate Brief at 18). However, the time-line of events in the *Whitehead* suit demonstrates that Bullock’s statement is incorrect. That time-line shows the following:

March 16, 2001	Whitehead filed a petition to controvert
April 9, 2001	The insurer filed an answer
<b>June 7, 2001</b>	<b>Whitehead filed his bad faith suit</b>
August 3, 2001	The insurer paid for the emergency room treatment of Whitehead
October 17, 2001	The insurer paid temporary total disability benefits.

(emphasis added).

See *Whitehead*, 348 F.3d at 480. The *Whitehead* decision, therefore, does not support Bullock’s position for two reasons: 1) *Whitehead* did not obtain a determination that he was entitled to benefits prior to filing his bad faith suit, while Bullock obtained such a determination on October 12, 1999, almost five years before he filed his bad faith suit; and 2) *Whitehead* only received payment of temporary total disability

benefits after he filed his bad faith suit, while Bullock's benefits were paid for almost five years before he filed suit.

The Mississippi Supreme Court has declined to require a workers' compensation claimant to exhaust all administrative remedies before filing a bad faith breach of contract claim against his employer and its carrier in other decisions since *Walls*. For example, in *Mississippi Power and Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002), the plaintiff and his employer/carrier entered into a settlement agreement of his work-related claims, which was approved by the Commission. In that agreement, the plaintiff reserved his right to bring a bad faith action against his employer and carrier, which he subsequently filed. *Id.* at 478. The employer/carrier argued in its answer to his lawsuit that the plaintiff was required to re-open his workers' compensation case under *Miss. Code Ann.* § 71-3-53 (1990) before bringing his bad faith claim. *Id.* at 479. The court rejected this argument, holding that the plaintiff was not required to exhaust additional administrative remedies before the Commission before filing his bad faith breach of contract action since he had already received a determination by the Commission that he was entitled to the benefits he claimed were wrongfully denied him. *Id.*

And, in *Liberty Mutual Ins. Co. v. McKneely*, 862 So.2d 530 (Miss. 2003), the employer/carrier began paying McKneely temporary disability benefits in May 1994,

but terminated these benefits in January 1995. *Id.* at 532 (¶ 4). McKneely obtained an Order from the ALJ awarding him temporary and total benefits in December 1996, and then immediately filed a bad faith lawsuit against his employer/carrier for wrongfully terminating these benefits. *Id.* at 532 (¶ 2). The employer/carrier argued that McKneely should have asked for an emergency hearing under *Miss. Code Ann.* § 71-3-17(b) (1990) when he learned that his benefits were being terminated instead of filing his bad faith action. The court held that McKneely's failure to seek this particular remedy under the statute did not bar his bad faith claim. Specifically, it held:

McKneely had exhausted his workers' compensation procedure **when he received a favorable decision from the Commission** which the insurer and the employer chose not to appeal.

*Id.* at 537 (¶ 21)(emphasis added).

Additionally, case law from other jurisdictions supports the position of AIU and AIGCS in this case. In *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237 (MT 1999), the Montana Supreme Court was asked to decide what must occur in a workers' compensation case before an underlying claim is "settled" or brought to "judgment," and the statute of limitations applicable to a bad faith action arising from the handling of that claim begins to run. Like the Mississippi Supreme Court in *Young v. Southern Farm Bureau Life Ins.*, 592 So.2d 103, 107 (Miss.1991), the

*Brewington* court held that a claim for bad faith exists or accrues once a right to maintain an action on the claim or cause is complete. *Id.* at 250 (§ 27). The *Brewington* court held that “[a]ll of the elements of [Brewington’s] claim . . . existed on April 27, 1987 when the Workers Compensation Court entered judgment in his favor which restored his total disability benefits.” *Id.* at 241 (§ 19). As a result, the court held that Montana’s three-year statute of limitations prevented Brewington from bringing his bad faith action more than three years after that date. *Id.*

The Montana Supreme Court applied this same reasoning in the case of *O’Connor v. National Union Fire Ins. Co. of Pittsburgh, PA*, 87 P.3d 454 (MT 2004), after being asked by the Ninth Circuit Court of Appeals to address the identical issue. In *O’Connor*, the Montana Supreme Court held that, for statute of limitations purposes, bad faith claims against an insurer predicated on actions taken in the adjustment of a workers’ compensation claim accrue when the Montana Worker’s Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit, even where the Compensation Court has left ultimate determinations of the extent and duration of the employee’s disability unresolved. *O’Connor*, 87 P.3d at 459.

An application of the cases discussed above to the facts in the instant case clearly supports the position by AIU and AIGCS that Bullock’s bad faith claim

accrued when he obtained a favorable decision on compensability from the Commission on October 12, 1999, ordering AIU and Gottfried to pay him the benefits he claimed he was entitled to receive under his contract with Gottfried. Under the aforementioned holdings of the Mississippi Supreme Court and courts in other jurisdictions, Bullock “exhausted his workers’ compensation procedure” and became “entitled” to benefits on October 12, 1999. As a result, Bullock should have filed his action for bad faith refusal to pay benefits within three years after October 12, 1999. Because he waited until August 26, 2004, to file his action, his claim is barred by the three-year statute of limitations of *Miss. Code Ann.* § 15-1-49 (1990).

**II. Counsel for AIU and Gottfried could not have altered the finality of the ALJ’s October 12, 1999, compensability decision through any subsequent pleading filed more than twenty days after the date of that decision.**

Bullock argues that a Pre-Trial Statement signed by counsel for Gottfried and AIU during the workers’ compensation proceedings “dispositively decide[s] the issue of what constitutes ‘exhaustion.’” (*See* Bullock’s Appellate Brief at 23). However, as explained previously, the following statute governs the finality of an ALJ decision:

Informal conferences and hearings in contested cases may be conducted by a duly designated representative of the commission. Upon the conclusion of any such hearing, the commissions’ representative shall make or deny an award, and file the decision in the office of the commission. Immediately after such filing, a notice of decision shall be sent to all interested parties. This decision shall be final unless within

ALJ's ruling. As a result, the present suit is barred by the statute of limitations, and the District Court's decision to the Motion for Summary Judgment filed by AIU and AIGCS should be AFFIRMED.

This, the 6<sup>th</sup> day of October, 2006.

Respectfully submitted,

**AIU INSURANCE COMPANY and  
AIGCS SERVICES, INC.**



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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS,  
AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of *Fed. R.App.P.* 32(a)(7)(B) because:

this brief contains 6,623 words, including the parts of the brief exempted by *Fed.R.App.P.* 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of *Fed.R.App.P.* 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Word Perfect 11, 14-point font in Times New Roman.

So certified, this the 6<sup>th</sup> day of October, 2006.



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Edward J. Currie, Jr. (MSB# 5546)  
William E. McKinley, Jr. (MSB# 9987)  
Rebecca B. Cowan (MSB# 7735)



## ADDENDUM

from the administrative expense fund upon the filing of the deposition with the Commission, together with a written request for reimbursement. Only one such reimbursement may be made to the claimant in each case, and the reimbursement counts as one of the two allowed by Procedural Rule 18.

7. The affidavits shall not contain opinions or other matters composed by attorneys for the signature of physicians. The Commission intends for this rule to pertain to narrative notes and reports composed and generated by the physician in the ordinary course of medical practice.

8. The affidavit used for the introduction of medical records shall be in the form prescribed by the Commission.

The Rule shall be in force and effect on and after September 1, 1993.

#### PROCEDURAL RULE 10

**REVIEW HEARINGS.** In all cases where either party desires a review before the Full Commission from the decision rendered at the evidentiary hearing, the party desiring the review shall within twenty (20) days of the date of said decision file with the Secretary of the Commission a written request or petition for review before the Full Commission. Any other party to the dispute may cross-appeal by filing a written cross-petition for review within ten (10) days after the petition for review is filed in the office of the Commission, except that in no event shall a cross-appellant have less than twenty (20) days from the date of decision or award within which to file a cross-petition for review.

Oral argument is not required but will be granted if one or more of the parties request same by filing a written request within fifteen (15) days after the date the petition for review is filed with the Commission. The Commission may also request the parties to give oral argument. Arguments of counsel will be limited to twenty (20) minutes for each party.

In any case pending for review before the Commission, a party may submit a brief of law and fact, which may be in the form of a letter or of the format required by the Supreme Court of Mississippi. The party filing a brief shall file the original and two copies and serve a copy to opposing parties. Briefs previously prepared for the administrative judge are not a part of the record on review and are not considered by the Commission.

If oral argument has been requested, and a party desires also to submit a written brief, he must file the brief not less than five (5) days before the hearing date. If oral argument is not requested, the petitioner shall have thirty (30) days following the date the record is mailed to the parties within which to submit a brief. The opposing party then has an additional thirty (30) days from that date (or a total of sixty days from the date the record is mailed to the parties) within which to submit a response, if desired.

The parties filing a petition for review, cross-petition for review or briefs shall certify that copies have been provided to the opposing party; provided, however, that failure to file such certification shall not be a bar to the review requested.

This Rule shall be in force and effect on and after September 1, 1993.

#### PROCEDURAL RULE 11

**AWARD.** Should either  
(30) days of the date of

an award of the Commission,  
of appeal with the Secretary

The notice shall set out the style of the case, the grounds upon which the appeal is taken, and certification that copies of the notice of appeal have been filed with the opposing parties.

When a notice of appeal to the Circuit Court is filed with the Commission, the Secretary shall, with a proper letter of transmittal, place the matters possessed by this Commission and pertaining to the appealed case in the hands of the Circuit Court within thirty (30) days after such notice of appeal is received by the Commission.

Following rendition by the Circuit Court or Supreme Court of any order

any matter over which

**§ 71-3-47. Determination for claims for compensation.**

Except as otherwise provided by this chapter, the details of practice and procedure in the settlement and adjudication of claims shall be determined by rules of the commission, the text of which shall be published and be readily available to interested parties.

The commission shall have full power and authority to determine all questions relating to the payment of claims for compensation. The commission shall make or cause to be made such investigation as it deems necessary and, upon application of either party or upon its own initiative, shall order a hearing, shall make or deny an award, and shall file the same in its office.

Informal conferences and hearings in contested cases may be conducted by a duly designated representative of the commission. Upon the conclusion of any such hearing, the commission's representative shall make or deny an award, and file the decision in the office of the commission. Immediately after such filing, a notice of decision shall be sent to all interested parties. This decision shall be final unless within twenty (20) days a request or petition for review by the full commission is filed.

**SOURCES:** Codes, 1942, § 6998-24; Laws, 1948, ch. 354, § 18; Laws, 1950, ch. 412, § 9; reenacted without change, 1982, ch. 478, § 24; reenacted without change, 1990, ch. 405, § 25, eff from and after July 1, 1990.

**§ 71-3-51. Court review of compensation award.**

The final award of the commission shall be conclusive and binding unless either party to the controversy shall, within thirty (30) days from the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the circuit court of the county in which the injury occurred.

Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall under its certificate transmit to the circuit court of the county where the injury occurred all documents and papers on file in the matter, together with a transcript of the evidence, the findings, and award, which shall thereupon become the record of the cause. Appeals shall be considered only upon the record as made before the commission. The circuit court shall always be deemed open for hearing of such appeals, the circuit judge may hear the same at term time or in vacation at any place in his district, and the same shall have precedence over all civil cases except election contests. The circuit court shall review all questions of law and of fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the commission should have entered. Appeals may be taken from the circuit court to the supreme court in the manner as now required by law. An appeal from the commission to the circuit court shall not act as a supersedeas unless the court to which such appeal is directed shall so direct, and then upon such terms as such court shall direct.

No controversy shall be heard by the commission or an award of compensation made therein while the same matter is pending either before a federal court or in any court in this state.

Any award of compensation made by the circuit court and appealed to the supreme court shall bear the same interest and penalties as do other judgments awarded in the circuit court.

**SOURCES:** Codes, 1942, § 6998-26; Laws, 1948, ch. 354, § 20; Laws, 1950, ch. 412, § 10; reenacted without change, 1982, ch. 473, § 26; reenacted without change, 1990, ch. 405, § 27, eff from and after July 1, 1990.

**§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for.**

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

**SOURCES:** Codes, 1880, § 2669; 1892, § 2737; 1906, § 3097; Hemingway's 1917, § 2461; 1930, § 2292; 1942, § 722; Laws, 1989, ch. 311, § 3; 1990, ch. 348, § 1, eff from and after passage (approved March 12, 1990).

**CERTIFICATE OF SERVICE**

I, Rebecca B. Cowan, attorney for Appellees, AIU Insurance Company and  
AIG Claim Services, Inc., do hereby certify that I have this day mailed a true and  
correct copy of the above and foregoing Brief of Appellees to the following listed  
counsel of record at their usual business mailing address:

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So certified, this the 6th day of October, 2006.



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