IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

JIMMY BULLOCK — PLAINTIFF / APPELLANT

VS. — CASE NO.: 06-60528

AIU INSURANCE COMPANY; THE GOTTFRIED CORPORATION; AND AIG CLAIM SERVICES, INC. — DEFENDANTS / APPELLEES

REPLY BRIEF OF THE APPELLANT JIMMY BULLOCK

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A. INTRODUCTION

I can recall like it was yesterday when I was a baby lawyer standing in front of the tall, distinguished, intimidating judge for the first time. Loaded for bear with my facts, my Uniform Rules of Circuit and County Courts and an arrogance that can only come with recently passing the Bar Exam, I explained to His Honor the procedure that was prescribed by the Rules. With a firm but understanding smile, he replied, "Son, that's not the way we do it around here."

He went on to explain that the Local Rules are a framework which his Court operates within. However, the "fine points" are left to his discretion based upon his experience and the demands of efficiency placed upon him by the system.

Now, almost eighteen years and heaps of humility later, I find myself offering this same lesson to a crowd much brighter and capable than I. It can be summed up using the exact statute which is the mantra of the Appellees' defense. Miss. Code Anno. §71-3-47 (1990) insightfully begins,

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

Just like the venerable old judge who put this neophyte on the correct path, Bullock insists to AIU and this Court that we must demonstrate "how it's done around here." One must focus on the Commission Rules, enabled by the above statute, and not cherry-pick a portion of the statute that does not apply to the current scenario, nor is it applied by the administrative body as a matter of practice.

The Commission Rules in 1999 did not require, or even allow, an appeal from an interlocutory or intermediate (also called "static") order. The Commission Rules in 1999 allowed a party to address that interlocutory finding at final hearing and still do. The Commission Rules also allow an aggrieved party to appeal that decision after the conclusion of the final hearing on the merits.

B. NOTORIOUS OMISSIONS

Before addressing what *is included* in the Brief of the Appellees, it is worthwhile to begin with what is *not included* in that brief.

First, and foremost, AIU fails to cite a single case–not one– which states that *an interlocutory or intermediate order* of the Administrative Law Judge (ALJ), which is not appealed, becomes a final, unappealable order after the expiration of twenty days. The only statute they cite as authority, quoted above, also contains the authority of the Commission to prescribe rules which do not make such an order final and unappealable.[1] Compare that dearth of law to the legion of cases for the past forty years holding that the failure of a party to appeal an ALJ's **final** order within twenty (20) days makes the order final and unappealable. *Williams v. Furniture Land*, 637 So.2d 191 (Miss. 1994); *Day Detectives, Inc. v. Savell*, 291 So.2d 716 (Miss. 1974); *Marlboro Shirt Company v. Whittington*, 195 So.2d 920, 920-921 (Miss. 1967). Federalism concerns aside, AIU is

[1]"The Commission has the authority to promulgate rules of practice and procedure including forms....The most prominent among these are the Commission General Rules and Commission Procedural Rules. The Commission may amend its rules or adopt new rules at any time." Bradley and Thompson, MISSISSIPPI WORKERS' COMPENSATION, §6:2, p. 6-6 (2006).

asking this Court to prescribe the local rules of the Mississippi Workers' Compensation Commission when our state Supreme Court has refused to do so.

Second, the trial judge seemed persuaded by the insurance carrier's argument that "extending" the date of the statute of limitations, to the final hearing, might result in the adulteration or loss of evidence. However, after Bullock pointed out that we are discussing matters in litigation and the employer/carrier's lawyer can gather and preserve evidence every bit as well as an employee's lawyer can,[2] AIU fails to even imply such an argument in their brief. As such, there is no compelling public policy argument offered by AIU to limit the exhaustion of remedies date to the interlocutory order.[3]

Third, AIU provides no explanation, not even a feigned one, as to why their highly qualified workers' compensation lawyer, Tony Anderson, filed a pre-trial statement years after the interlocutory or intermediate order contesting the issues which were addressed at that intermediate hearing. In fact, with ample notice of the position taken by Bullock in the original Motion to Dismiss/Summary Judgment, denied by Judge Guirola, it is insightful to ask oneself why AIU did not include an affidavit from Anderson explaining this circumstance. It is quite easy to conclude that Mr. Anderson, a workers' compensation practitioner of many years, knew how Mississippi workers' compensation

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[2]Citing *Taylor v. Standard Ins. Co.*, 28 F.Supp. 588 (D.C. Hawaii 1997) in support thereof. The U.S. District Court in Hawaii specifically discounted this speculation by emphatically declaring that a pending workers' compensation litigation before their administration body "provided (the defendants) with the opportunity to protect themselves against lost evidence, faded memories and vanished witnesses." *Taylor v. Standard Ins. Co.*, 28 F.Supp. 588, 592 (D.C. Hawaii 1997).

[3]The public policy arguments to the contrary are offered in subsection D herein.

procedure works and, as Bullock contends, knew that he could contest the issue at final hearing and on appeal. The documents/exhibits make that incontestable.

Finally, AIU failed to address the lengthy discussion regarding the change in the Procedural Rules of the MWCC, nor otherwise answer the question, "Why did the MWCC change Procedural Rule 10, which formerly (during the Bullock litigation) only allowed a party to appeal from "the decision rendered" to allowing (but not requiring) appeals from "any decision rendered by the Administrative Judge"? In fact, on page 11 of the Appellee's Brief, AIU cites the prior rules ("from the decision rendered"). In order to give this change in the Rules any meaning whatsoever, one must conclude that the Rules in place in 1999 only allowed an appeal from *the* final decision ("*the* decision") on the merits, not some intermediate or interlocutory order such as Bullock's.

C. CASE AUTHORITY

With the Rules and Rule changes clearly boding in Bullock's favor,[4] only a short analysis of the applicable case authority is warranted.

Of course, Bullock foreshadowed the improper use of cases like *Holland, Kitchens, Powers* and *McCain*[5] in his original brief. *Walls*[6], a 2001 decision, notes that

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[4]AIU's statement in footnote 2 that they never relied upon the 1993 version of Procedural Rule 10 in the lower court appears to be true. Bullock cannot ascertain from any of the briefs that AIU or AIGCS ever relied upon *any* version of Procedural Rule 10 and it was Bullock who brought this issue to the forefront.

[5]*Kitchens v. Liberty Mutual Ins. Co.*, 659 F.Supp. 467 (S. D. Miss. 1987); *Powers v. Travelers Ins. Co.* 664 F. Supp. 252 (S.D. Miss. 1987); *Southern Farm Cas. Ins. Co. v. Holland*, 469 So.2d 55 (Miss. 1984); *McCain v. Northwestern Nat. Ins. Co.*, 484 So.2d 1001 (Miss. 1986).

[6]*Walls v. Franklin Corp.*, 797 So.2d 973 (Miss. 2001).

the exhaustion of remedy issue in this context was one of "first impression" and had not been previously addressed. Each of those decisions above, relied upon by AIU to some tortured degree, pre-date *Walls* and were not "exhaustion" cases. Bullock here merely reiterates the analysis of his original brief and incorporates it in response.[7]

Cook[8], decided after *Walls*, was a claim filed after the decision on the merits (actually a settlement which is the functional equivalent of same). A final order was entered. The process had been exhausted. The *Cook* Court merely rejected a proposition by the employer and carrier that the employee was required to exhaust even more procedural avenues prior to suit being filed. It was rejected because a *final order of the Commission* was already entered.

McKneely[9], also decided after *Walls*, never even cites *Walls*, but does mention in *dicta* that "McKneely had exhausted his workers' compensation procedure when he received a favorable decision from the Commission...." *McKneely* at 537 [emph. added].

Bullock would beg this Court to be wary of the irresponsible lexicon that would equate the decision of the ALJ with the decision of the Commission. AIU's brief is infested with such misusage. And it ignores the stipulation which Bullock is happy to adopt: **If the 1999 ALJ order is a final order from the Commission, Bullock loses.**

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[7]One exception is noted. AIU is completely correct that *Whitehead v. Zurich American Ins. Co.*, 348 F.3d 478 (5th Cir. 2003) was misapplied and has no precedential value. The order of events was presented in the chronology offered by the Court text, when actually, as AIU contends, the bad faith claim was filed before the payment of benefits. Bullock admits and apologizes for this misreading of *Whitehead*.

[8]*Mississippi Power and Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002)

[9]*Liberty Mutual Ins. Co. v. McKneely*, 862 So.2d 530 (Miss. 2003)

However, it is not from the Commission and it is not final.

The point is made quite persuasively by the new authority cited by AIU from the Montana Court. In *Brewington*,[10] the Court held that a Commission ruling was final and marked the accrual date for the running of the limitations period for the bad faith claim. The benefits which Brewington alleged were denied in bad faith had been decided by the Court in "*Brewington I.*"[11] In other words, the Commission's "judgment" was just a reflection of the finding by their Supreme Court on the compensability issues in that case. Clearly, Bullock has no qualms with the suggestion that a Commission finding, affirmed, reversed or modified by the Supreme Court, constitutes a final order. In fact, if the present claim involved an order by either the Full Commission of the MWCC or the Supreme Court, this appeal would not be before the Court.

But additionally, as you might expect, the procedural rules in Montana's workers' compensation system are different and, though those differences cannot be exhaustively addressed, the appeal provision is worded extraordinarily differently. Rule 24.5.350 of the Montana Workers' Compensation Rules, addressing such appeals, is stated as follows:

> 24.5.350 APPEALS TO WORKERS' COMPENSATION COURT UNDER TITLE 39, CHAPTERS 71 AND 72, MCA (1) An appeal from a final decision of the department of labor and industry under Title 39, chapters 71 and 72, MCA, other than an appeal of a department order regarding payment of benefits pursuant to 39-71-610, MCA, shall be by filing a notice of appeal with the court or with the department. [emph. added]

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[10] *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237 (Mont. 1999) (also called *Brewington II*)

[11] *Brewington v. Birdenbuel, Inc*, 723 P.2d 938 (Mont. 1986)

"decision," but then clarifies the decision much better than the Mississippi Rule by using the word "final" to modify "decision." It is also not clear to this author whether ALJs exist in the Montana system and what weight their opinions are given. Nonetheless, the Montana Court ignores these semantic or grammatical nuances and answers the pivotal question in *O'Connor*[12], also cited by AIU, as follows:

> "...we restate and answer the reformulated certified question as follows: For statute of limitations purposes, do statutory and common law bad faith claims against an insurer, predicated on actions taken in the adjustment of a workers' compensation claim, accrue when the Montana Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit, but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability? Yes." *O'Connor* at 459.[13]

Again, Bullock has no qualms with this holding, though its precedential value in a Mississippi claim is certainly suspect. If their Montana Workers' Compensation Court enters a judgment, the claim accrues. In the claim *sub judice,* the Mississippi Workers' Compensation Commission did not enter a judgment.

D. PUBLIC POLICY CONCERNS

All the rules and regulations should be read in the context of sound public policy. The examples below, which might well be called anecdotal, provide ample evidence that the interpretation of the Rules insisted by Bullock are consistent with sound public policy in this workers' compensation arena and the interpretation by AIU is frightful.

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[12]*O'Connor v. National Union Fire Ins. Co. of Pittsburgh,* 87 P.2d 454 (Mont. 2004)

[13]Similar to *Brewington,* the claimant in *O'Connor* had also received a judgment by the Montana Workers' Compensation Court on May 19, 1995. The bad faith suit was filed years later. The case, therefore, has no precedential value in this Bullock claim.

1. Unappealable ALJ orders could cripple employers

Mississippi Workers' Compensation Commission General Rule 9[14] allows claimants to seek an immediate ruling on certain medical issues which are "urgent." ONLY FIVE DAYS NOTICE must be given to the employer before the hearing is held. There is no requirement that a Petition already be filed, meaning that employers and carriers must either scramble to obtain and educate counsel during that period or represent themselves at the hearing. Given the liberality of the Act and because employees are given virtually unlimited time before they decide to file for the hearing to gather the medical evidence necessary, employers predictably claim to be at a great disadvantage at these hearings.

In the event of a loss, employers would then not be allowed to appeal an interlocutory order (even with today's more liberal rules for appeals) unless that interlocutory appeal met the criteria of *Cunningham*[15], addressed in Bullock's original brief. Seldom would requiring medical care or past due disability benefits be such a novel issue of law to warrant the Commission accepting such an appeal.

If this Court finds, for the first time on record, that every ALJ order which is not appealed becomes a "final" order of the Commission, and cannot be collaterally attacked at the hearing on the merits or on a subsequent appeal from the hearing on the merits,

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[14]General Rule 9 states: "Any hearing required by the Commission or Administrative Judge under this Rule may, in the discretion of the Commission or Administrative Judge, be held no sooner than five (5) days after notice to determine (1) if compensation payments should be suspended for refusal or failure to submit to a medical examination or to proper medical treatment or (2) that the injured employee is suffering from improper medical attention or lack of medical treatment."

[15]*Cunningham Enterprises v. Vowell*, 2006 Miss. App. LEX 561 (C.A. Miss. August 8, 2006)

virtually any claimant can estop the issue on a Rule 9 "mini-hearing." The claimant will have ample preparation time, well-worded affidavits, specific medical records and sworn testimony of their client, while the employer will likely be caught with its pants down. The order will become final, as the Commission will not hear it, and employers across this state will be denied a large measure of due process.

Even this career plaintiff's lawyer finds that advantage unacceptable.

2. Unwary employer lawyers will be tortured

The Court in *O'Connor* talks about the potential impact on the attorney-client privilege created by a rule that allows a bad faith claim, and bad faith discovery, while any portion of the workers' compensation claim is still pending. Though that Court was unmoved by the potential for abuse and conflicts by and to lawyers, some thought should be given to it.

> "...the insurance company is put in a difficult position by having to defend a bad faith case before the underlying case has been determined. Discovery of the insurer's file in a bad faith cases raises difficult "work product" and "attorney-client" problems affecting the underlying case. The practice also allows for undue leverage to be exerted by forcing the insurer to face the prospect of two lawsuits with additional costs incurred for defense (at the same time)." *O'Connor* at 458.

This problematic result is easily put into the context of the Bullock claim. If this bad faith suit were filed immediately after the 1999 order, how would defense counsel, Mr. Anderson, feel about the subpoena for the insurance company's file or even his file[16] while he is still fighting both compensability and disability benefits? Or even if

[16]In the event the employer or carrier pleads "advice of counsel" in a bad faith claim, the lawyer's entire file becomes discoverable.

compensability were decided, what if he were only fighting disability benefits? No matter which issues were still at large, fighting the battle on two fronts while simultaneously laying out your battle plan wreaks havoc for the employer and carrier.

Allowing such a circumstance would be terrible policy and put defense lawyers in the Hobson's choice of obtaining intermediate relief, with a threat of creating a "window" for a bad faith claim while simultaneously defending the workers' compensation claim (and turning over the claims file and perhaps the lawyer's file), or allowing benefits to a claimant which should be immediately submitted to an ALJ for determination of their legitimacy. This is exactly the type of Catch-22 which *Walls* attempted to address with the "exhaustion of administrative remedies" requirement.

E. CONCLUSION

The law, the procedural rules, the pleadings filed by the adverse party and the public policy considerations addressed herein all support the trial judge's original decision to deny this motion to dismiss. None of these authorities or arguments supports the trial judge's decision to reconsider his prior ruling and declare the 1999 order final. We respectfully demand that this Court should not be the first to draw such a conclusion either.

SIGNATURE OF COUNSEL

Respectfully submitted, this the 23rd day of October, 2006.

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CERTIFICATE OF SERVICE

I, Lance L. Stevens, attorney for Appellant, Jimmy Bullock, hereby certifies that on October 23, 2006, I did mail to counsel opposite below, by first class U.S. Mail, postage prepaid, the REPLY BRIEF OF THE APPELLANT herein:

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