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

BRIEF OF THE APPELLANT JIMMIE BULLOCK

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 28, Local Rule 28.3 and 5th Cir. R. 28.2.4, the Appellant Bullock requests oral argument on the grounds that this appeal involves state law, state procedural law and state administrative rules which this Court may have never experienced in practice or addressed in prior rulings. Further, certain elements of practice before the Mississippi Workers' Compensation Commission may generate questions by the panel which could be promptly and succinctly addressed by counsel in oral argument. Finally, this Court will be asked to rule on what constitutes a "final order" in a state administrative proceeding, an adjudication which requires particular scrutiny due to its federalism implications.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

STATUTES

OTHER AUTHORITY

BASIS FOR THE COURT OF APPEALS' JURISDICTION

The Fifth Circuit Court of Appeals has jurisdiction of this appeal by virtue of the jurisdiction conferred upon the lower court, pursuant to 28 U.S.C.A. §§ 1332 and 1441, and the timely appeal of that Court's final judgment, pursuant to Federal Rule of Civil Procedure 54(b) and Federal Rule of Appellate Procedure 3.

The parties herein stipulate to Federal jurisdiction in this matter.[1]

The Court entered its Rule 54(b) Final Judgment on April 28, 2006 (R. 668). The Plaintiff timely filed his Notice of Appeal on May 10, 2006 (R. 669).

Due to an oversight, the Court then entered its subsequent Rule 54(b) Final Judgment on July 17, 2006 (R. 690). The Plaintiff timely filed his Notice of Appeal on the subsequent Judgment on July 17, 2006.[2]

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Accrual of cause of action; bad faith denial of workers' compensation benefits

Are the administrative remedies afforded by the Mississippi Workers' Compensation Act and the Mississippi Workers' Compensation Commission "exhausted" at the time an

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[1]This Plaintiff timely filed a Motion to Remand this claim (R. 35), originally filed in the Circuit Court of Hancock County, Mississippi, and timely removed to Federal Court by these Defendants (R. 13); however, based upon the clarification of the residency of the appropriate Defendants soon thereafter, the Plaintiff conceded that removal was appropriate and federal jurisdiction was similarly appropriate.

[2]The District Court, after Motion by the Defendants, recognized that a cross-claim between the Defendants was not addressed in the original Final Judgment. The subsequent Final Judgment is, therefore, identical to the first, except that it adjudicates the cross-claim. The Appellant Bullock has filed a Motion to Consolidate Appeals, with no objection by the Defendants, on or about August 22, 2006, which has yet to be decided. The Notice of Appeal of the "subsequent Judgment" is not included in this record and is docketed with the Fifth Circuit as Case No. 06 60724.

intermediate ruling by the Administrative Law Judge is made or at the time the order on the merits of the claim becomes final?

II. Accrual of cause of action; bad faith denial of workers' compensation benefits

What constitutes "exhaustion" of the administrative remedies afforded by the Mississippi Workers' Compensation Act and the Mississippi Workers' Compensation Commission for purposes of determining the time when a litigant has a right to file a claim against his employer and/or insurance carrier for bad faith denial?[3]

STATEMENT OF THE CASE

The Appellant Bullock filed this lawsuit, alleging the tort of "bad faith" in the denial of his workers' compensation benefits, in the Circuit Court of Hancock County, Mississippi, on August 26, 2004 (R. 18). The Appellee Defendants timely filed their Notice of Removal, based upon the diversity of citizenship of the parties, on November 18, 2004 (R.13). The Appellant Bullock filed his Motion to Remand on November 24, 2004 (R. 35), but withdrew his Motion and conceded to federal court jurisdiction upon reliable documentation of the correct parties in interest. The trial judge entered his Order denying remand on May 11, 2005 (R. 117).

The Appellee Defendants requested, without objection of the Appellant Bullock, that dispositive motions be heard prior to discovery being initiated. As a result, the Appellee Defendants filed their Motions to Dismiss or, in the alternative, for summary judgment on or

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[3]These "two" issues are identical. They are stated in two different manners simply to address each context (when does one process end; when does another begin) in which the issue may arise.

about December 7, 2004 (R. 67) and June 7, 2005 (R. 121). The Appellee Defendants contend that the subject lawsuit was filed beyond the applicable statute of limitations. The Appellant Bullock timely filed his response on July 1, 2005 (R. 344).

The trial judge, Honorable Louis Guirola, Jr., requested oral argument on the motions and the argument was heard in the U.S. District Courthouse in Hattiesburg on February 6, 2006. The Court entered its Order denying the Appellee Defendants' motions on February 6, 2006 (R. 577). The Appellee Defendants timely filed their Motion for Reconsideration or, Alternative, for Certification, on February 16, 2006 (R. 584), to which the Appellant Bullock responded on or about March 10, 2006 (R. 608) and March 13, 2006 (R. 645).

The Court reconsidered its previous ruling, reversed its previous holding and entered a Memorandum Opinion and Order granting the Appellee Defendants' motions and entering Final Judgment on April 28, 2006 (R. 662-668). The Court dismissed the claim on the grounds the lawsuit was filed beyond the three years statute of limitations.

Due to a technical error, the Court revised its order and Final Judgment on July 7, 2006 (R. 690).[4]

The Appellant Bullock timely appealed each Final Judgment, by Notice of Appeal dated May 10, 2006 (R. 669), and July 26, 2006.[5]

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[4]See footnote 2 *supra*.

[5] The subsequent appeal is not a part of this record and has been assigned Case No. 06 60724. The issues are identical and such establishes the grounds for the Motion to Consolidate filed herein by Appellant Bullock.

STATEMENT OF FACTS

The salient facts in this appeal[6] are largely procedural and, thus, virtually beyond dispute. Even those few facts which are not procedural, are beyond contest.

Jimmie Bullock (hereinafter "Appellant Bullock" or "Bullock") was injured while performing work for The Gottfried Corporation (hereinafter "Gottfried" or "the employer"), a Louisiana corporation, on or about January 9, 1997. At the time of this injury, Gottfried was covered by a workers' compensation insurance policy issued by AIU Insurance Company (hereinafter "AIU Insurance" or "the carrier"). The employer and carrier denied coverage for the injuries for reasons which the employee, Bullock, now alleges were illegitimate and lacking good faith.[7]

Bullock filed a Petition to Controvert with the Mississippi Workers' Compensation Commission which was answered by the employer and carrier, AIU and Gottfried, in a timely manner. The Administrative Law Judge (ALJ) conducted an intermediate hearing on the issue of compensability only in 1999. No medical or wage related testimony was offered at this hearing. The ALJ entered her order, sometimes referred to as a "static" order due to its intermediate

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[6]Because this matter was dismissed, prior to discovery, solely on the issue of the statute of limitations, the facts which constitute the basis for the lawsuit are necessarily irrelevant. The Appellant Bullock will strive to limit the "facts," largely procedural facts, to those impacting the Court's decision on the date the "exhaustion of remedies" occurred and the facts which support that the lower court's finding was in error.

[7]The "facts" of the bad faith are not at issue. No discovery has been conducted on the issue. The procedural background of the current litigation, which details the motion to dismiss filed before any discovery was conducted, is addressed *supra*.

status, awarding Bullock compensability and outlining the Judge's findings on October 12, 1999. (R. 356-366).[8]

The final hearing on the merits of the claim was scheduled in 2003. Consistent with the MWCC Procedural Rule 5,[9] the parties filed Pre-Trial Statements. The lawyer for the employer and carrier submitted their Pre-Trial Statement, specifically addressing the contested issues. That Pretrial Statement (R. 367-371) was signed by counsel for Gottfried and AIU Insurance on May 3, 2001, and filed some time thereafter.

In Section I of that pleading, titled "Contested Issues," every issue is contested by the employer and carrier except "whether a work-related injury/accident occurred on or about the date alleged in the petition to controvert." Among the "contested" issues specifically listed by these Defendants are "whether employer and carrier herein are the responsible employer and carrier regarding this claim." (R.367)

In Section II, titled "Stipulations," the employer and carrier failed to stipulate to coverage (R. 367). Among the list of proposed exhibits of Section VI, this employer and carrier listed the "1. Contract between Bullock Sheet Metal and Gottfried Corporation regarding building 3202-attached" and "2. Certificate of Insurance-attached." (R.369)

In Section X of the Defendants' Pretrial Statement, titled "Other matters which may aid in the disposition of the case," it is stated that "The parties have discussed the potential of having

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[8] Throughout this memoranda, the October 12, 1999, intermediate order will be referred to as "the 1999 Order."

[9] These Rules is discussed at some lengthy in Section C of Appellant Bullock's "Argument," *infra*

a bifurcated hearing in this matter, with the issue of whether or not the Gottfried Corp. is the responsible employer being the only issued *[sic]* to be decided at the first hearing." (R.370)

The workers' compensation claim of the Plaintiff was then finally decided by the Administrative Law Judge ("ALJ") on December 1, 2003. The Order declared the claim compensable, once again, and awarded Bullock additional workers' compensation benefits (R.373-381).

The Plaintiff's bad faith claim was filed on August 26, 2004, less than one year after the final Order became final. This claim was filed *well* within the three (3) year period allowed, after the exhaustion of administrative remedies.

SUMMARY OF THE ARGUMENT

The Appellant Bullock contends that his workers' compensation claim, arising from an injury on or about November 8, 1996, was denied for approximately three (3) years without legitimate, arguable reason and with such attending insult, gross negligence or malice as to constitute the independent tort of "bad faith." The claim was dismissed, prior to litigation or discovery on any other issues, on the grounds that the bad faith claim was filed beyond the three year statute of limitations prescribed by Miss. Code Anno. §15-1-49(1) (1972).

The parties jointly concede that such a bad faith claim cannot be filed until the administrative remedies provided by the Mississippi Workers' Compensation Act (hereinafter "the Act") and the Mississippi Workers' Compensation Commission (hereinafter "MWCC") are "exhausted." This dispute, in its most succinct terms, surrounds the definition of the phrase "exhaustion of remedies" or, more particularly, the definition of the word "exhaust."

In short, the Administrative Law Judge ("ALJ") assigned to the MWCC matter entered an intermediate order on the issue of compensability of the claim on October 12, 1999 (the "1999 Order"). The decision, which Bullock contends could not be appealed, was not appealed to the Full Commission of the MWCC. The final hearing on the merits of the claim was heard by the ALJ in 2003 and that final order on the merits was entered on December 1, 2003. With no appeal filed in the twenty (20) days after the final order, the decision became final on or about December 22, 2003.

Appellant Bullock filed his bad faith action in August of 2004, approximately eight (8) months after the ALJ's Order became final. [10]

The controversy herein can be encapsulated to this query: Did the Appellant Bullock exhaust his remedies in October of 1999 or in December of 2003?[11]

ARGUMENT

A. STANDARD OF REVIEW

This Court is *Erie*-bound to apply Mississippi substantive law on the issues which are the subject of this summary judgment motion. *Blase Industries, Corp. v. Anarod Corp.*, 2006 LEXIS 5273, 5275 (5th Cir. 2006).

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[10] The Appellant Bullock actually filed a petition for lump sum payment of the award after the final order, which was granted on May 25, 2004 (R.382). The Appellant Bullock, out of an abundance of caution, did not file the bad faith lawsuit until after that date. The lawsuit was filed a mere three (3) months after the lump sum order.

[11] All parties have conceded that if remedies were exhausted in 1999, the bad faith claim expired before it was filed and the trial court's dismissal must be affirmed. If the remedies were exhausted in 2003, the bad faith lawsuit was timely filed and the trial court's dismissal must be reversed.

The standard of review for both a motion to dismiss and a motion for summary judgment is *de novo*. "In the former, the central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. In the latter, we go beyond the pleadings to determine whether there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Copeland v. Wasserstein*, 278 F.2d 472, 477 (5th Cir. 2002).

B. APPLICABLE STATUTE OF LIMITATIONS

Bullock's claim against these Defendants is governed by the general statute of limitations prescription contained in Miss. Code Anno. §15-1-49(1) (1972) which states, "(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." This section sets out the three year limitation period quite clearly.

C. MWCC PROCEDURE IN *BULLOCK*

In order to reach the ultimate conclusion on the appropriate date of the "exhaustion of remedies in this claim," we must begin with some elemental background regarding MWCC procedure, move to more advanced procedural issues, then address those issues in the context of the applicable Mississippi case law on "exhaustion of remedies."

1. Basic Procedural Process of the Mississippi Workers' Compensation Commission (MWCC)

In order to understand the unfamiliar procedure of the applicable administrative agency (MWCC), it is best to first address the basics. Of course, most such insurance claims are resolved long before any administrative action must be filed and the process below addresses

only those claims where the parties have a controverted issue submitted to the MWCC for decision.

The Mississippi Workers' Compensation Act can be found at Miss. Code Anno. §71-3-1 (1972), *et. seq.* The Act consists of a thorough outline of the statutory rights and duties of the parties to a workers' compensation claim and creates the MWCC to administer those claims. The Commission is authorized, pursuant to Miss. Code Anno. §71-3-85(5) (1972), to create certain general and procedural rules "for implementing the purposes of this chapter at hearing" and "shall be binding upon those participating in the responsibilities and benefits of the Workmen's Compensation Law." Subsection (6) of that section provides for the Commission to "adopt and approve the forms required for administering the chapter...."

Consistent with that mandate, the Commission has adopted, does publish and occasionally amends a set of procedural rules which will become important in this appeal.

The administrative claim process[12] typically begins with the employee (frequently called "the claimant") filing a Petition to Controvert (Form B-5, 11; MWCC Procedural Rule 2).[13] The employer and carrier then files an Answer (on Form B-5, 22) within twenty-three days (MWCC Procedural Rule 4).

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[12] Prior to engaging the process that resolves these controversies, the parties have already filed numerous documents with the Commission, including the Notice of Injury (Form B-3), all medical records received and possibly even a Notice of Final Payment (Form B-31), indicating that the insurance carrier believes that all benefits have been paid in full and outlining those expenditures made.

[13] An employer that disputes compensability of a claim, or even a specific benefit being demanded, has the availability of filing their own Notice of Controversion (Form B-52) *prior* to the claimant's filing. This filing affords the employer and carrier some relief from interest or penalties, and may be interpreted as a measure of good faith where the defense is legitimate.

The Commission has only adopted certain portions of the discovery provisions of the Mississippi Rules of Civil Procedure 26 through 37 (MWCC Procedural Rule 9). Prehearing statements (MWCC Procedural Rule 5), notices of that hearing (MWCC Procedural Rule 6) and "relaxed" evidentiary rules (MWCC Procedural Rule 8) are also components of this procedure.

MWCC Procedural Rule 9 declares that "All cases shall be completed at one hearing on the merits, and all lay, expert, and documentary evidence, including medical depositions, shall be introduced at such hearing." Procedural Rule 9 will be relevant to the current appeal.

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 Anno. § 71-3-47 (1972).

Miss. Code Anno. §71-3-47 (1972) outlines the general powers of the MWCC to hear appeals from the Administrative Law Judge, as well as reiterating the Commission's authority to publish binding rules on "the details of practice and procedure in the settlement and adjudication of claims...the text of which shall be published and be readily available to interested parties." In response, MWCC Procedural Rule 10 was created to clarify the rights and obligation of parties on appeal.[14]

Further court review and enforcement actions are detailed in later sections of the Act, but have no bearing on the current appeal.

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[14]Caveat: Procedural Rule 10 was amended on April 1, 2001, and the change in the text, as discussed herein, has great bearing on the understanding of the issues currently on appeal.

2. Advanced procedural and practical issues

(a) The ALJ at the MWCC

The Administrative Law Judge (ALJ) is an interesting player in the workers' compensation system. The ALJ is hardly like a Circuit or District Judge conducting a bench trial. The ALJ's findings have no evidentiary effect once they are appealed to the Mississippi Workers' Compensation Commission (often referred to as the "Full Commission"), which is the three Commissioner tribunal that hears all such appeals. Those appeals are heard *de novo* from the record created at the ALJ level. The Full Commission, and *only* the Full Commission, is the finder of facts in an MWCC proceeding. The ALJ is merely a facilitator of the written record for the Commission to decide.

> Under Mississippi law, the Workers' Compensation Commission is the ultimate finder of facts in the compensation cases, and as such, its findings are subject to normal, deferential standard upon review. *Olen Burrage Trucking Co. v. Chandler*, 475 So.2d 437, 439 (Miss. 1985). The ALJ is not the ultimate finder of fact, but rather 'the individual who conducts the hearing and hears the live testimony, such as it is.' *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1245 (Miss. 1991). The Commission is free to accept or reject the ALJ's findings, so long as the Commission's actions are based on substantial evidence. *Day-Brite Lighting v. Cummings*, 419 So.2d 211, 213 (Miss. 1982).

Natchez Equipment Co., Inc. v. Gibbs, 623 So.2d 270, 273 (Miss. 1993).

This exact holding was also reinforced in *Harper v. North Miss. Med. Center*, 601 So.2d 395, 397 (Miss. 1992), when the Mississippi Supreme Court stated:

> The Commission is the ultimate finder of fact, and thus **may accept or reject the findings of an Administrative Law Judge**. *Hardin's Bakeries v. Dependent of Harrell*, 566 So.2d 1261, 1264 (Miss. 1990); *R.C. Petroleum, Inc. v. Hernandez*, 555 So.2d 1017, 1021 (Miss. 1990); *Day-Brite Lighting Div., Emerson Electric Co. v. Cummings*, 419 So.2d 211 (Miss. 1982). 'The administrative judge, in this respect, is no more than a facility for conducting the business of the Commission and for all practical purposes the Commission is the actual trier of the facts.' Dunn, MISSISSIPPI WORKERS COMPENSATION, § 284 (3d Ed. 1982). In such a factual setting, it is, therefore, the Commission, not the Administrative Law Judge, which is entitled to deference upon review. [*emph. added*]

It is, therefore, often stated that "the Workers' Compensation Commission is the trier and finder of fact in a compensation claim, the finding of the Administrative Law Judge to the contrary notwithstanding." *See* Dunn, MISSISSIPPI WORKERS COMPENSATION, § 284 (3d Ed. 1982)." *McGowan v. Orleans Furniture, Inc.*, 586 So.2d 163, 165 (Miss. 1991), *also citing Smith v. Container General Corp.*, 559 So.2d 1019, 1021 (Miss. 1990); *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988).

This is a procedural scenario which might be foreign to those practitioners outside of the workers' compensation field. An ALJ enters no binding Orders. The Orders are all temporary until the MWCC has ruled upon them. An ALJ is just a referee, as the position was called some decades ago, to create a record for the Full Commission to review and decide upon. As such, despite an Order or Orders entered by the ALJ during the lower level administrative procedures, all of the ALJ's decisions may be reviewed by the MWCC upon appeal from the final Order on the merits.

(b) Interlocutory appeals at the MWCC

On the other hand, there are a few similarities between the ALJ and the judges in common law courts. Decisions made by an ALJ in the course of the litigation, like, for instance, a trial court judge's ruling on a partial summary judgment, do not require an immediate (interlocutory) appeal in order to remain reviewable by the Full Commission. Even today,[15] the Commission will hear interlocutory appeals only on very, very narrow grounds. In *Cunningham*

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[15]This "even today" qualifier will become moderately important because, as you will see, the rule today which allows that an interlocutory appeal may sometimes be heard (a fact that supports Bullock's position) was changed in April of 2001. The rule at the time the 1999 Order in Bullock was filed did not allow such appeals at all (a fact that also supports Bullock's position and explains why AIU and Gottfried did not even attempt such an appeal).

Enterprises v. Vowell, 2006 Miss. App. LEX 561 (C.A. Miss. August 8, 2006), the Court addresses those grounds:

> The Commission listed in its order the following situations in which it may choose to review interlocutory orders by administrative law judges: where such review may materially advance the final resolution of the claim, avoid unnecessary delay or expense to the parties, protect a party from substantial and irreparable injury, resolve an issue of general importance in the administration of the Mississippi Workers' Compensation Act, or serve some other purpose that the Commission in the exercise of its sound discretion considers appropriate.

Cunningham at 562.

The compelling point made by this line of authority is that, even today, a party is not required to make such an appeal in order to preserve his/her rights. The Full Commission at the MWCC may well deny an interlocutory appeal that does not meet that interlocutory criteria, but their failure to take up such an appeal is not dispositive of the issue.

In the Defendants' original motion, they relied upon the language of the current rules, as they pertain to appeals, in support of their position. The avenue for appeal under the MWCC Procedural Rules is Procedural Rule 10. It *currently* reads, in pertinent part:

> **RULE 10. REVIEW HEARINGS.** In all cases where either party desires a review before the Full Commission from any decision rendered by an Administrative Judge, 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. [*emph. added*]

But this Rule was amended to its current form in April of 2001.[16] The Rule, as it preceded this amendment, came into great controversy which, ultimately, required change. The

[16]The current Rule concludes with "This Rule shall be in force and effect on and after April 1, 2001."

previous Rule, which was applicable at the time the 1999 order was entered, stated in pertinent part:

> **REVIEW HEARINGS.** In all cases where either party desires a review before the full commission from **the** decision rendered at the initial hearing, the party desiring the review....[17] [*emph. added*]

In other words, at the time of the 1999 Order was entered, which these Defendants now allege was "final" or an "exhaustion of remedies," an aggrieved party was not even allowed such an interlocutory appeal. The only appeal was after **the** final order.[18] The details of the history of this controversy are not included in the record. But the history is obvious on the Rule's face: It was just patently unfair to prohibit an employee or an employer from appealing an interlocutory order if compelling circumstances were present.

Ironically, for purposes of the present debate, there is actually little difference in the outcome based upon whether AIU and Gottfried could have appealed, with the Full Commission having the discretion to deny the appeal and rule on the issue after the final hearing (the "new" Rule), or whether the AIU and Gottfried were not allowed an interlocutory appeal at all (the "old" Rule). The result is the same: The issue (compensability) which was decided in an intermediate order in 1999 was still one that could be finally determined in the final hearing or, at an absolute minimum, on as appeal from the final ALJ order in 2003.

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[17]The old rule is published at Dunn, Vardaman, MISSISSIPPI WORKER'S COMPENSATION, Appendix, p. 595-596 (3rd Ed. 1984). The use of the term "initial hearing" should not be confusing - it is an acknowledgment in the old rules that only one hearing is contemplated.

[18]Even to this day, MWCC Procedural Rule 7 states, "All cases shall be completed at one hearing on the merits, and all lay, expert, and documentary evidence, including medical depositions, shall be introduced at such hearing." The 1999 hearing, of course, did not include all such evidence.

But the rule change does play an important role. It well explains WHY the very capable lawyer for AIU and Gottfried[19] did not appeal the intermediate decision. The reason is now obvious: The Rules did not allow such an appeal at that time.

The rule change also well explains why, years after the 1999 ruling, AIU and Gottfried, through their counsel, prepared a Pre-Trial Statement, prior to the 2003 final hearing, which included a full frontal assault on the compensability issue. That analysis is to follow.

(c) Appeals from a Full Commission Order

The appeal process from the MWCC to the Circuit Court and on to the Mississippi Supreme Court also bolsters the Appellant Bullock's determination of "exhaustion." Interlocutory orders by the MWCC are not appealable to the Circuit Court and beyond. *Bickham v. Department of Mental Health*, 592 So.2d 96, 98 (Miss. 1991). Hence, had AIU and Gottfried appealed the 1999 order and the Full Commission denied their relief, AIU and Gottfried would have been precluded from appealing the issue beyond the Full Commission *at that time*. And while the Appellant Bullock has previously conceded that a Full Commission order on interlocutory appeal (had it been allowed) would be binding on the Full Commission if the claim were appealed to the full commission after the ALJ's final order, certainly the finding would be reviewable by the appellate courts after that final order. Given this procedural bar to appeals from an interlocutory order of the MWCC, is it evident that the holding of the 1999 Order could not have possibly been final until *after* the ALJ's final order became final.

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[19]Defense counsel for AIU and Gottfriend at the MWCC level was Tony Anderson of Gulfport, Mississippi. He is a very capable lawyer specializing in workers' compensation defense.

No matter where one stands in the maze created by the 1999 Order, the compass always points to "N"–Not final.

D. ACCRUAL OF CAUSE OF ACTION; DATE OF "EXHAUSTION OF REMEDIES

A "bad faith" claim arising from the illegitimate denial of a workers' compensation claim presents an unconventional, but not unique, issue regarding the date of the accrual of the cause of action. Public policy requires that a plaintiff "exhaust" his administrative remedies before he is allowed to file a bad faith claim. It is upon that date of "exhaustion" that the claim "accrues." This accrual date is the core dispute in this appeal.

The issue of "exhaustion of administrative remedies" in bad faith workers' compensation claims was actually born in the federal system. *Powers v. Travelers Ins. Co.* 664 F. Supp. 252 (S.D. Miss. 1987); *Kitchens v. Liberty Mutual Ins. Co.*, 659 F. Supp. 467 (S. D. Miss. 1987). Both *Powers* and *Kitchens* were *Erie*-guesses of our Federal Court which pre-date the Mississippi Supreme Court's declaration in *Walls*, addressed below.

In *Powers*, the Plaintiff had completely failed to file a claim with the MWCC before filing his bad faith claim and, predictably, was precluded from going forward with the bad faith claim until the administrative procedure of the Commission established entitlement. *Powers*, at 8-9.

The *Kitchens* Court recognized the possibility ("frighteningly conceivable") that, without complete exhaustion of administrative remedies, a common law court could find a bad faith refusal, when the administrative tribunal later finds no entitlement to benefits whatsoever. *Kitchens* at 6-7.

The Mississippi Supreme Court conceded to the wisdom of the federal decisions in *Walls v. Franklin Corp.*, 797 So.2d 973 (Miss. 2001), holding that a worker may not maintain a bad faith claim for denial of workers' compensation benefits until the underlying administrative procedures are finally exhausted. As such, the Courts created that "accrual" date which would begin the running of the statute of limitations. Both parties herein agree that such is the holding in *Walls*, but disagree on the date that "exhaustion" occurred.

In *Walls*, the entire claim of Mr. Walls had been heard by an Administrative Law Judge and a "final order" by the ALJ had been entered, without appeal. *Id.* at 974. However, the *Walls* Court held that the benefits which were in dispute were subject to further review by the MWCC, because the 1992 Order of the ALJ was not "final" as to those benefits. *Id.* at 976-977. The procedural posture and the benefit request made after the final order and the nature of the benefits Walls claimed were quite different from the case *sub judice*. It is a strain to put those facts on parallel tracks with the present claim. But, two irrefutable conclusions must be reached. One, if a decision of the ALJ can be reviewed by the Full Commission, a bad faith claim based upon that ALJ's finding is premature and the bad faith claim has not accrued because administrative remedies have not been exhausted. Two, there is no finality until the final Order of the ALJ becomes final.

In order to "exhaust" a remedy, it must be brought to its final conclusion. This well explains the Federal Court's vocabulary in *Butler v. Nationwide Mutual Ins. Co.*, 712 F.Supp. 528, 529-530 (S.D. Miss 1989), when Judge Tom Lee reiterated that a bad faith action may only proceed after the underlying compensation claim "is **finally** adjudicated in accordance with the

Mississippi Workers' Compensation Act" and there must be a "**final** adjudication of the underlying workers' compensation claim...." [*emph. added*]

In *Whitehead v. Zurich American Ins. Co.*, 348 F.3d 478 (5th Cir. 2003), the Fifth Circuit recognized the *Walls* requirement of exhaustion and affirmed a dismissal without prejudice "because [the plaintiff's] workers' compensation claim was still pending before the Commission." *Id.* at 480. This result was warranted even through Zurich had already paid the medical bills and temporary disability benefits which were the subject of the bad faith lawsuit. *Id.* Citing *Walls*, the Fifth Circuit held that bad faith cannot be alleged "in the absence of a determination by the Commission...." *Id.* at 481 [*emph. added*].

Walls, decided by the Court in 2001, is noted by the Mississippi Supreme Court as one of "first impression" which "has not been addressed previously by this Court." *Walls* at 974. This makes any pre-2001 decisions unpersuasive, even misleading.

One of the only two state court decisions, post-*Walls*, alleged by AIU and Gottfried to address this issue, is *Mississippi Power and Light Co. v. Cook*, 832 So.2d 474 (Miss. 2002). In *Cook*, the Plaintiff filed his claim with the MWCC and settled it with Commission approval.[20] The administrative process was ended--exhausted.

The *Cook* defendants took the spurious position that Cook should have "re-opened" his workers' compensation claim, after its conclusion, though the allegations of bad faith being

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[20]For some procedural background, unlike a Circuit or Federal Court settlement, settlements at the MWCC require a Petition with the Commissioners and an Order allowing such settlement signed by those Commissioners (MWCC Procedural Rule 15). This sort of settlement is one of only two end products of the administrative litigation of a workers' compensation claim and, using anybody's definition, should constitute the final "exhaustion" of the administrative process. The other end product would be a final Order on the merits by the Full Commission without appeal *or* the exhaustion of the appeal process after a Full Commission award.

addressed occurred during the handling of the claim before the settlement was reached. The *Cook* Court acknowledged that "what distinguishes that case (*Walls*) from the present case is that Cook's settlement claim had been approved by the Commission and nothing was left pending before them." *Cook* at 480 [*emph. added*].

The second "post-*Walls*" state claim is *Liberty Mutual Ins. Co. v. McKneely*, 862 So.2d 530 (Miss. 2003).[21] But *McKneely* does not actually address the "exhaustion" issue. It does not even cite *Walls* for any proposition. The argument made by Liberty Mutual in *McKneely* was essentially that the Plaintiff should have filed a motion for emergency relief (a procedural avenue allowed by MWCC General Rule 9) before he can be allowed to claim damages from a bad faith delay in payment. The *McKneely* Court properly held that the failure to request such relief is not a prerequisite of recovery, but may be relevant to whether he "mitigate[d] his financial problems by seeking an immediate hearing." *Id.* at 537. In a statement of *dicta*, of sorts, the *McKneely* Court does mention that "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.* [*emph. added*][22]

Such is exactly the case herein. The employer and carrier had the right to address the coverage issue before the Full Commission, even as late as Christmas of 2003. If Bullock had

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[21]These Defendants also cited *McKneely* as a post-*Walls* "exhaustion" case at the trial court level. Bullock disagrees that this decision has any application to the *Walls* issue of exhaustion.

[22]The suggestion that one can file a bad faith claim before a final determination, simply because it appears McNeely filed his bad faith claim in 1996, while his MWCC order was not final until 1998, distorts the facts. This bench trial did not occur until August of 1999. For purposes of the holding in *McNeely*, the most important fact is that the Circuit Court verdict was not entered until after the MWCC's entered what the Court felt was its final order and the administrative process was over.

filed his bad faith claim after the 1999 order, while the MWCC claim was still going forward, irreconcilable decisions from the circuit court and the MWCC would be at risk. Without question, the bad faith claim and the MWCC claim would have been proceeding simultaneously.

The Appellee Defendants also grossly misinterpreted the case of *Southern Farm Cas. Ins. Co. v. Holland*, 469 So.2d 55 (Miss. 1984) before the trial judge, even calling *Holland* the "seminal case on this (exhaustion) issue." *Holland*, a pre-*Walls* case by over a decade, does not even address exhaustion. Most commentators would agree that *Holland* is a seminal case on whether the exclusive remedy of the Mississippi Workers' Compensation Act bars claims for bad faith, an issue entirely separate from exhaustion of remedies. But, for the sake of argument, even these Appellee Defendants' interpretation of the procedural history of *Holland* is inaccurate. The *Holland* Court specifically states that her bad faith suit was filed following "an order of the Mississippi Workers' Compensation Commission of September 8, 1981." *Id.* at 56 [*emph. added*]. Given the complete lack of detail as to procedural steps employed, likely because the exhaustion of administrative remedies was not an issue, this decision must be 'put in Bullock's corner' because it specifically mentions a Commission order, not an order of the Administrative Law Judge. As the *Walls* Court described *Holland*, "In all these cases (*Holland, Luckett, McCain* and *Leathers*) this Court found that the worker's bad faith suit was a viable cause of action. In none of these case *[sic]* did this Court require that the worker first exhaust administrative remedies under the Workers' Compensation Act, though it appears that this was done in *Holland* and *Leathers*, and may have been done in other cases." *Walls* at 976.

So, as stated before, none of the pre-*Walls* decisions can be expected to have the procedural detail needed to evaluate what constitutes an exhaustion of remedies, nor can they be

used as authority on the legal principle. It would be no different that this Plaintiff noting that in *Rogers v. Hartford Accident & Indemnity Co.*, 133 F.3d 309 (5th Cir. 1998), the Plaintiff did not file his bad faith claim until his claim had been decided by the Full Commission, appealed to the Circuit Court, then finally decided by the Supreme Court in *Quick Change Oil & Lube, Inc. v. Rogers*, 663 So.2d 585 (Miss. 1995). It is true, but it is not very insightful. Exhaustion was never an issue in *Rogers*.

Gleaning any binding authority from these pre-*Walls* decisions during this time period is tilting at windmills.

Again, the Defendants' analysis reveals a fundamental misunderstanding of workers' compensation procedure and even the allegations that their own counsel made at the MWCC level.

E. AIU AND GOTTFRIED'S MWCC PLEADINGS ADMIT NO EXHAUSTION

Prior to the final hearing on the merits in 2003, each party is required by file a Pretrial Statement which outlines the issues in controversy, the names of witnesses, lists of documents to be submitted, estimates the time such a hearing will last and so forth. MWCC Procedural Rule 5. The parties in this workers' compensation claim did so. And, despite AIU and Gottfried's statement to the District Court judge that "no one ever questioned whether the plaintiff was covered under Gottfried's policy again (after the 1999 order)," their Pretrial Statement filed and dutifully signed at the MWCC begs to differ.

That Pretrial Statement (R. 367-371) was signed by counsel for Gottfried and AIU Insurance on May 3, 2001, and filed some time thereafter. This *sworn pleading*, filed just prior to the final hearing on the merits, post-dates the ALJ's 1999 order by a year and half. In Section

I of that pleading, titled "Contested Issues," every single issue is contested except "whether a work-related injury/accident occurred on or about the date alleged in the petition to controvert." Among the "contested" issues specifically listed by these Defendants are "whether employer and carrier herein are the responsible employer and carrier regarding this claim." This *is the coverage issue* presently alleged to constitute bad faith.

In Section II, titled "Stipulations," the employer and carrier failed to stipulate to coverage. It is also informative to note that among the list of proposed exhibits of Section VI, this employer and carrier listed the "1. Contract between Bullock Sheet Metal and Gottfried Corporation regarding building 3202-attached" and "2. Certificate of Insurance-attached." These documents could only be offered on the subject of the coverage issue. They are irrelevant to every other point which would be argued in this workers' compensation claim.

Remarkably, in Section X of the Pretrial Statement, titled "Other matters which may aid in the disposition of the case," it is stated that "The parties have discussed the potential of having a bifurcated hearing in this matter, with the issue of whether or not the Gottfried Corp. is the responsible employer being the only issued *[sic]* to be decided at the first hearing."

So, the employer continued to contest the issue, refused to stipulate to the issue, would offer documents which are only relevant to that particular issue, then requested another separate hearing to exclusively address the coverage issue over a year and a half after the 1999 Order, which they now say was dispositive and "final." This Plaintiff would contend such pleadings were filed because Gottfried and AIU's very capable workers' compensation counsel recognized

that the MWCC Rules allowed him to continue his litigation of the issue through the administrative process.[23]

In sum, the sworn pleadings of AIU and Gottfried at the MWCC dispositively decide the issue of what constitutes "exhaustion"–the final order on the merits after it becomes a final order (all appeals exhausted).

The Act and the rules adopted by the MWCC are equally compelling on this issue.

CONCLUSION

It becomes quite clear that this Plaintiff, Mr. Bullock, very carefully followed the rule of law in *Walls*, by waiting until his administrative remedies were exhausted through the entire Mississippi Workers' Compensation Act requirements and Mississippi Workers' Compensation Commission procedure. And, with little delay on his part whatsoever, he filed this bad faith claim on August 26, 2004, less than one year after the final ALJ's Order became final. Bullock's position is supported by the applicable case law, the Procedural Rules of the MWCC and even the documents AIU and Gottfriend filed at the MWCC subsequent to the 1999 intermediate Order.

This claim was filed *well* within the three (3) year period allowed, after the exhaustion of administrative remedies.

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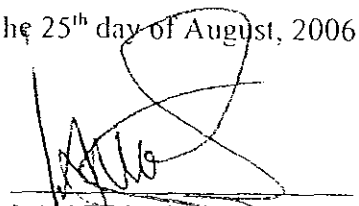
[23] And even presuming *arguendo* that the issue could not be re-visited by the ALJ, it was certainly ripe for appeal to the Full Commission after the final order on the merits. No MWCC rules requires a party to file an interlocutory appeal of an intermediate order.

SIGNATURE OF COUNSEL

Respectfully submitted, this the 25th day of August, 2006.



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CERTIFICATE OF SERVICE

I, Lance L. Stevens, attorney for Plaintiff, hereby certify that on August 25, 2006, I did mail to counsel opposite below, by U.S. Mail, postage prepaid, the BRIEF OF THE APPELLANT herein:

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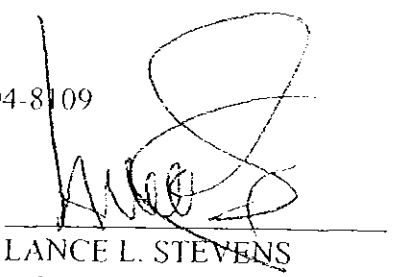

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