

**COPY**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CASE NO. 2007-WC-00155**

**GARY HOLLOWAY (Claimant)**

**FILED**

**APPELLEE**

**V.**

**JUN 26 2007**

**F&F CONSTRUCTION (Employer)**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**A MEMBER OF THE BUILDERS**

**AND CONTRACTORS ASSOCIATION**

**OF MISSISSIPPI SELF-INSURERS' FUND (Carrier)**

**APPELLANTS**

---

**APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI**

---

---

**REPLY BRIEF OF APPELLANTS (Employer)**

---

**(Oral Argument Requested)**

**Michael D. Young, MS Bar [REDACTED]**

**MARKOW WALKER, P.A.**

**P.O. BOX 13669**

**JACKSON, MS 39236-3669**

**(601) 853-1911**

**ATTORNEYS FOR APPELLANTS (Employer/Carrier)**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**CASE NO. 2007-WC-00155**

**GARY HOLLOWAY (Claimant)**

**APPELLEE**

**V.**

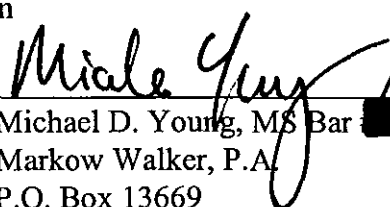
**F&F CONSTRUCTION (Employer)  
A MEMBER OF THE BUILDERS  
AND CONTRACTORS ASSOCIATION  
OF MISSISSIPPI SELF-INSURERS' FUND (Carrier)**

**APPELLANTS**

**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that an appropriate evaluation may be made regarding possible disqualification or recusal.

1. Gary Holloway, 1111 Fornier Ave Tr 8, Gulfport, Mississippi 39502, Claimant;
2. James K. Wetzel, Esq., P.O. Box 1, Gulfport, Mississippi 39502, Attorney of Record for the Claimant;
3. F&F Construction, P.O. Box 6097, D'Iberville, Mississippi 39540-6097, Employer;
4. The law firm of Markow Walker, P.A., P.O. Box 13669, Jackson, MS 39236-3633, attorneys of record for F&F Construction.
5. Honorable Linda Thompson
6. Honorable Stephen B. Simpson

  
Michael D. Young, MS Bar [REDACTED] *BY: B&B*  
Markow Walker, P.A.  
P.O. Box 13669  
Jackson, MS 39236-3633  
(601) 853-1911  
*MSBAR-101190*

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS ..... ii

TABLE OF CONTENTS ..... iii

REPLY ..... 1

CERTIFICATE OF SERVICE ..... .5

## **REPLY**

This reply brief of the appellant is in direct response to the brief of the appellee filed by claimant. After a thorough review of the brief of appellee, the employer would like to point out both some inconsistencies and some irrelevancies associated therewith.

In support of the compensability of the claim at hand, appellee has provided a brief. The first half of the brief of appellee simply deals with undisputed procedural history. There is absolutely nothing original or insightful which can help anyone understand the circumstances at hand in the first half of the brief of appellee. All documents referenced in the procedural history recitation are readily available for the review of any party and attached as exhibits to the briefs of both parties.

The last half of the brief of appellee is where their theory of compensability should be outlined. Unfortunately, after a thorough review of the "Argument" portion of this brief, no legitimate legal theory or actual evidence is outlined. Instead, appellee brings up three main points in support of his position. First, appellee reiterates the standard of review, which all parties agree on and this Honorable Court clearly understands. Secondly, the appellee avers that this claim should be found compensable based upon the self-serving premise that the testimony of claimant was "credible" before the Administrative Judge. Finally, appellee has once again unintentionally misled his audience by stating that appellant is attempting to have the evidence reweighed.

With regard to claimant's allegations associated with the standard of review, this Honorable Court is bound to the substantial evidence rule and its application as the standard of review in this situation. If it can be found that the findings of the Mississippi Workers' Compensation Commission are supported by substantial evidence, then those findings should be given deference.

However, appellant would also argue that the converse is true. For instance, in the event the findings of the Mississippi Workers' Compensation Commission are found to be unsupported by substantial evidence, then those findings should be given no deference whatsoever. I think all parties can agree on this interpretation of the appropriate standard of review. Obviously, counsel for appellant and counsel for appellee are going to disagree on whether or not substantial evidence exists. Conveniently, that is why this is not substantial conjecture or substantial theory, and is, rather, a substantial evidence test. One should be able to go back and put their finger on the "substantial evidence" relied upon by the Mississippi Workers' Compensation Commission in making their ruling. Appellant would invite this Honorable Court to go back and review the substance of pleadings, findings, and testimony and try to decipher what substantial evidence supports the finding of the Administrative Law Judge as adopted by the Mississippi Workers' Compensation Commission. Appellant would argue that no such substantial evidence exists. Furthermore, appellant would invite this Honorable Court to review all nine substantive pages of appellee's brief and try to determine where exactly they spell out what "substantial evidence" supports any theory of compensability.

Secondly, appellee relies upon the "credibility of the claimant" as their sole support of the compensability of this claim. As you can see on pages 7 and 8 of the brief of appellee, the credibility of claimant is discussed in depth. It appears as though appellee is arguing that no testimony or witness proved any modality of injury other than that as alleged by claimant. However, the claimant actually has the burden of proving each and every aspect of his workers' compensation claim. It is not the burden of the employer to discredit every theory proposed by claimant. However, in the case at hand, appellee is mistaken in his assertions that there was no testimony to contradict claimant's

allegations. Rather, the very testimony of claimant contradicts his own allegations. It has been shown that the two dates of injury alleged by claimant are a factual impossibility. It has been shown that claimant was incorrect with regard to his allegations associated with the physical geographic location where the injury occurred. Claimant has even changed the modality of his injury with regard to items he was lifting when he allegedly hurt his back. Furthermore, appellant has presented the highly plausible theory of claimant injuring his back associated with preparation for and/or cleanup efforts in the wake of Hurricane Ivan.

Third, and finally, appellee is once again arguing that the appellant is asking for this Honorable Court to reweigh the evidence. This could not be further from the truth. The issue is whether the substantial evidence supports and provides the basis of the Administrative Law Judge's findings. As such, the evidence must be evaluated, not reweighed, to determine if it supports the findings of the Administrative Law Judge, as adopted by the Full Commission. However, appellant would point out that there is no evidence whatsoever in the record to support the allegations of claimant. Appellant would ask that all physical evidence be reviewed, which consists of the medical records and the payroll records associated with this claim. None of these records support claimant's allegations of either a consistent date, time, place, or modality of injury. Furthermore, all fact witnesses provided testimony contradicting claimant's allegations, and this was dismissed by appellee because some of the employees of this employer provided said testimony. However, at least one of the witnesses to contradict claimant's allegations was not even an employee of this employer at the time his testimony was taken. Appellant is not asking that the evidence in this claim be reweighed. Instead, you are invited to review the record excerpts and transcripts as a whole.

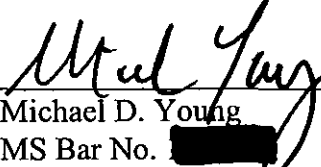

Appellant is not arguing that they have the best evidence or the most evidence. Instead, appellant is arguing that they have the only evidence.

In conclusion, appellant would ask this Honorable Court what is the point of the introduction of evidence if a claimant is simply going to be taken on his inconsistent and contradicted word? The Administrative Law Judge noted on page 11 of her order "it is certainly believable that he could have injured his back as he said he did because of the kind of work he regularly did as a pipe layer." One would certainly think that the fact that someone performed a manual laborer type job would not be prima facie evidence to support the occurrence of an alleged work injury. Furthermore, appellee's argument that they simply won at every lower level should not be a compelling enough argument to provide a basis for their success at this level of appeal. Appellant would respectfully request that this Honorable Court see through the hollow allegations set forth by appellee and actually review the evidence in the record and determine whether or not the finding of the Administrative Law Judge as adopted by the Mississippi Workers' Compensation Commission is supported by substantial evidence. In making that determination, please keep in mind that appellant is of the opinion that no evidence whatsoever (substantial or otherwise) exists which could support a finding of compensability. Accordingly, the appellant respectfully requests that the finding of the lower courts be reversed.

Respectfully submitted,

F & F CONSTRUCTION A MEMBER OF  
THE BUILDERS AND CONTRACTORS  
ASSOCIATION OF MISSISSIPPI SELF-INSURER'S  
FUND

BY: MARKOW WALKER, P.A.

BY:  /BY: BAB  
Michael D. Young  
MS Bar No.  MS BAR 101190

MARKOW WALKER, P.A.  
P.O. Box 13669  
Jackson, MS 39236-3669  
(601) 853-1911  
ATTORNEYS FOR EMPLOYER

**CERTIFICATE OF SERVICE**

I, Michael D. Young, attorney for the employer, does hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Employer to James K. Wetzel, Esq., P.O. Box 1, Gulfport, Mississippi 39502, attorney for the claimant.

This the 26<sup>th</sup> day of June, 2007.

 /BY: BAB  
Michael D. Young  
MS BAR 101190