IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R & K TIMBER — APPELLANTS

VERSUS — NO. 2007-WC-01212-COA

GEORGE LEE DUKES — APPELLEE

REPLY OF APPELLANTS

Oral Argument Requested

Appeal from: The Circuit Court of Newton County

STEVEN D. SLADE
POST OFFICE BOX 3490
MERIDIAN, MISSISSIPPI 39303-3490
TEL.:(601)483-1281
FAX :(601)483-1282
sdsaal@bellsouth.net
[redacted]

Counsel for Roy White and Kevin White, d/b/a R & K Timber

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SUMMARY OF THE REPLY

The Judiciary cannot affirm the Workers' Compensation Commission holding a newly established employer to immediate coverage standards absent legislation demanding immediate coverage. This appeal concerns the narrow issue of the minimum amount of time within which a new employer *must* secure compensation coverage as a *matter of law*. But the Appellee's Response relies only upon cases that address the character of type of job, or the number of employees which expose an employer to the Act. While the cases of *Jackson v. Fly*, *Mosley v. Jones* and *Falco Lime v. Mayor of Vicksburg* all discuss either the number of employees or the character and type of the job[s] performed which would obligate an employer to have coverage, none address how quickly a newly-established employer must secure such coverage. Absent a statute demanding immediate coverage, it was error for the Commission to do so.

The Appellee suggests that the owners of R & K admitted that coverage was available through their testimony. But the Whites' testimony does not have the legal effect of establishing the Legislature's intended time frame. In the absence of a statute, this application criteria provides the only useful information. But the burden is upon the Appellee to support his argument that no "grace" period (See page 16, Brief of Appellee) exists. The Commission's adopted forms and other statutes clearly contemplate time elapsing for underwriting information to develop. Again, it was error for the Commission to create an immediate coverage standard for R & K.

REPLY

1. The "liberal construction" standard is exclusive to cases falling within the margins of the Act and cannot apply until the Commission's jurisdiction is firmly established.

The Appellee successfully persuaded the Commission to shift the burden upon R & K to

disprove its eligibility for coverage. This burden was rightfully that of the Appellee. "The burden of proof is upon the claimant to establish his claim before the Workers' Compensation Commission." *Capital Broadcasting Co. v. Wilkerson*, 240 Miss. 64, 69, 126 So.2d 242, 244 (1961), citing *T. H. Mastin & Co. v. Mangum*, 215 Miss. 454, 61 So.2d 298 (1952) ; *Oatis' Estate v. Williamson & Williamson Lumber Co.*, 230 Miss. 270, 92 So.2d 557 (1957); *Franks v. Goyer Co.*, 234 Miss. 833, 108 So.2d 217 (1959); *Smith v. St. Catherine Gravel Co.*, 220 Miss. 462, 71 So.2d 221 (1954). Before applying the "liberal construction" standard of construing facts, it was first necessary for the Appellee to prove with "clear and convincing" evidence that R & K was eligible for coverage and subject to the Act (See, generally, Section "B", principal Brief). The converse is also true; i.e., if R & K was not yet eligible to apply, then it could not yet be held subject to the Act. No statute exists stating otherwise.

As the Appellee confirms, both he and the Commission applied the "liberal construction" standard *in the process* of making the coverage-eligibility determination. So liberal was this construction that the Commission forgot that successive payroll criteria is required to complete an application form. In fact, this factual construction was so liberal that the Commission forgot that employers, long-subjected to the Act, are granted no less than thirty (30) days within which to secure subsequent coverage after a policy cancellation.[1] This makes clear the legislative contemplation of time elapsing in order for underwriting information to develop. It also provides

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The Legislature provided such an employer this specific time frame by stating "[n]o such cancellation shall be effective until thirty (30) days after the service of such notice, unless the employer has obtained other insurance coverage, in which case such policy shall be deemed cancelled as of the effective date of such other insurance, whether or not such notice has been given." Obviously, had the Legislature envisioned that "immediate" coverage was possible, it would not have granted this thirty (30) day grace period. It is illogical to assume that newly established employers could secure coverage more quickly, yet this was the standard the Commission held R & K to in this case.

an explanation for the use of the term "regular" within §71-3-5.

A. In the absence of a statute, the Commission-adopted forms constitute the only evidence addressing the fundamental issue on appeal.

"The standard of review for jurisdictional questions is *de novo*." *Yatham v. Young*, 912 So.2d 467, 469 (Miss. 2005); *McCain Builders, Inc. v. Rescue Rooter, LLC*, 797 So.2d 952, 954 (Miss. 2001). "In reviewing questions of jurisdiction this Court is in the same position as the trial court, since all facts are set out in the pleadings *or exhibits*." *Yatham*, citing *McDaniel v. Ritter*, 556 So.2d 303, 308 (Miss. 1989) (emphasis added). R & K saw no point in illustrating to the Commission its own coverage-application "exhibits" prior to the erroneous ruling. However, such "exhibits" were provided to the Circuit Court when an appeal became necessary.

The Circuit Court's affirmation of the Commission, in view of these exhibits, was thus clearly erroneous. "A finding is clearly erroneous when, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and it in its application of the Act." *Barber Seafood, Inc. v. Smith*, 911 So.2d 454, 461 (Miss. 2005) citing *Hardaway Co. v. Bradley*, 887 So.2d 793, 795 (Miss. 2004). This is such a case. Only the application of the erroneous legal standard could result in these criteria being ignored.

It is notable that of all R & K's business records found within the record, the Commission seized upon only one (1) such document to support its conclusion that R & K "regularly" employed five (5) workers prior to the injury date (tt. Gen. Ex. 12). Specifically, the Commission examined the application form for the AIG policy which was prepared *before work had begun* to determine that R & K was eligible, presumptively on the date of the application, to

be issued an insurance policy for compensation coverage[2]. But only in application of the "liberal construction" standard could the Commission ignore Mr. White's testimony as to this form. Under direct examination, Mr. White explained (tt. pp. 61 - 62) that AIG required the names of all *possible* workers who *might* work for him *before work began*. Thus, unlike compensation coverage, the insurance issued by AIG did not require successive payroll data. It was clearly error for the Commission to construe this application form as credible evidence for eligibility for compensation coverage. This is especially so when the Commission simultaneously regarded the AIG policy irrelevant for any other purpose in this case.

The Commission's use of the AIG application as support for its ruling against R & K - at best - legally constitutes the "slight evidence" referred to in *Barber Seafood*. This is especially true considering that all of the other documents in the record plainly show that R & K did not yet have enough information to complete a compensation application prior to July 16th. No *de novo* review can affirm the use of this lone document, prepared for a different form of coverage, as evidence of eligibility to be underwritten compensation insurance.

2. The Appellee's contention that the penal standards of §71-3-83 are immaterial to this case, by definition, ignores the legal requirement that statutes within a particular chapter be interpreted *in pari materia*.

The Appellee's assertion that this Court should distinguish (or ignore) the clear language of §71-3-83 as it interacts with §71-3-5 (Brief of Appellee, p. 8) defies Mississippi's law on statutory construction. The entire effort is clearly made so as to avoid the requirement that facts

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Though clearly exceeding the scope of this appeal, it would be interesting in analyzing this question to compare how quickly the Commission ordinarily responds to, and grants, an application by an employer to be approved as a "self insurer" under the applicable statutes of the Act, with the time frame in which the Commission expected R & K to secure insurance coverage.

must be legally construed in R & K's favor. But Mississippi law is absolutely clear in requiring that statutes within a particular Act be interpreted *in pari materia* (See, e.g., *Miss. Dep't of Transp. v. Allred*, 928 So.2d 152, 155-56 (Miss. 2006)). It is irrelevant whether the Appellee personally *seeks* §71-3-83's penalties be imposed or not. He, like the Whites, have no legislative power by either his desires or testimony. Instead, it is the Legislature which chose to include these penal provisions within the Act. Thus, the strict construction and "clear and convincing" evidentiary standards must be applied in analyzing whether R & K was subject to the Act. What a claimant "seeks" or "desires" is irrelevant to the standards of statutory construction.

The Appellee attempts to blur the distinction between the standards used in determining a claimant's eligibility for benefits, and that used in making a jurisdictional determination of employers subject to the Act. But if the standards were not different, the language of §71-3-5 (identifying the requisite number and regularity of employees) would not have been included in the Act. A clear reading of §71-3-5 illustrates the Legislature's intent that some employers be exempt. If those exempt were subject to the"liberal construction" standard in making the determination for the exemption, then those employers having but one (1) employee or having worked for one (1) day would carry the burden of proving their exemption. Applying such a standard in those circumstances would not only render the Legislature's intent for an exemption pointless, it would create a practical and impossible legal situation for those who are exempt.

The Commission's own rules give rise to applying the "clear and convincing" evidentiary standard. When issues of non-coverage arise, even where cancellations are concerned, General Rule 5 states

> Failure on the part of the employer to file such evidence within the

> thirty (30) days *shall* be considered by the Commission as prima facie evidence of violation of Code Section 71-3-9 (Section 5 of the Act) ***and*** *subject the employer to the penalties prescribed under Code Section 71-3-83* (Section 36 of the Act).

Gen. Rule 5, Rules of the MWCC (emphasis added). As recited in the cases contained in the Brief of Appellant, Mississippi's administrative law *requires* application of the "clear and convincing" evidence standard whenever the potential for penalties exists.

The Appellee attempts to distinguish the cases applying this standard by focusing upon their difference in subject matter (facts). But whenever statutory penalties were at stake, the rule of "strict construction" was not limited to the facts of *Miss. Trans. Comm'n v. Deweese* (691 So.2d 1007 (Miss. 1997))or *McFadden v. Miss. State Bd. of Medical Licensure* (735 So.2d 145 (Miss. 1999)), which applied that standard regardless of their facts or the agency involved. The best the Appellee can argue with respect to *Delchamps v. Baygents* (578 So.2d 620 (Miss. 1991), is that - on its facts - it was not a compensation case dealing with the issue of how quickly a new employer must secure coverage. While this might be true, it does not change the standard applied.

3. Appellee bears the burden of proving that R & K *should* and *could* have had coverage as of July 16th.

Fundamental to a valid §71-3-5 claim against a newly-established employer is proof that it not only *should* have had coverage as by the date of a claimant's injury, but also that it *could* have procured insurance by that time. Contrary to his objection, the Appellee has always shouldered this evidentiary burden. As illustrated above, it is unfortunate for his burden that the applicable statutes attach a penalty. But he suffers no injustice or surprise to this issue merely because of the compensation/insurance application process.

The Act yields to the Commission the authority to adopt forms and criteria (See §71-3-

85(6)). The critical forms and criteria are attached to the Appellants' Brief in the Addendum. The Commission cannot claim ignorance to what these forms require. But the Appellee's brief offers nothing to explain how R & K should have applied for, and then obtained, compensation coverage as of July 16th. Because §71-3-5 fails to establish a jurisdictional time frame, the burden rests upon the Appellee to prove that R & K fell within the Act's margins. These Commission-adopted forms not only offer him no assistance, they also render false his statement that "[b]ased upon [§71-3-7] there is no waiting period, no grace period, allowable to the employer" (Brief of Appellee, p. 16). Nothing from any source supports this contention.[3]

4. Appellee's failure to take a position on the dismissal of Linden Lumber Company is self-effacing to his desire for benefits.

According to his brief, the Appellee merely wants compensation benefits. Yet when the only avenue for those benefits (through application of the "statutory employer" theory under §71-3-5) existed, he failed to appeal the dismissal of the only "covered" entity. R & K's position, as well as the Commission's inconsistencies in that regard, are fully developed in its Brief. If indeed R & K was subject to the Act, then (again) the burden was that of the Appellee to pursue this "statutory employer" more vigorously. The purpose of the "statutory employer" theory is that compensation responsibility transcends an "uninsured employer" otherwise subject to the Act. His reason for not actively pursuing these "compensation" benefits, if this was truly a compensation case, is now his own personal issue.

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Appellee does cite *Pascagoula Crab Co. v. Holbrooks*, 94 So.2d 233 (Miss. 1957), in which the uninsured employer never contested the Commission's jurisdiction. The case of *Jackson v. Fly* (60 So.2d 782)(Miss. 1952) defines §71-3-5 only in terms of the character of job descriptions "within the same business", oddly enough for "statutory employer" purposes, but does not even attempt to address §71-3-5's time component inherent in the term "regularly."

5. The Appellee's position on the Occupational Accident Policy repeat the same misunderstandings expressed by the Commission.

The Appellee's brief does not even mention his prior receipt of benefits under AIG's Occupational Accident Policy before filing his Petition. He does, however, liken these benefits to others such as "disability", "medical", or "vacation" benefits (Brief of Appellee, p. 15). Unlike such benefits, AIG's policy lapsed when R & K became eligible for compensation coverage. Its existence is conditional upon the non-existence of compensation eligibility. The mutual exclusivity of these two types of policies, and how one inversely exists only in the absence of the other, define "in lieu of compensation." The Appellee either received AIG benefits or not. His reason for not actively pursuing further AIG benefits is his own personal issue, but not one involving compensation law. But he cannot claim entitlement to these AIG benefits in addition to compensation benefits if the AIG policy's terms (like its application form) are given any relevance whatsoever.

CONCLUSION

Until the Legislature states otherwise, the Commission committed error and overstepped its authority by establishing an "immediate coverage" standard for R & K holding it responsible for workers' compensation benefits to the Appellee.

Respectfully submitted, this the 5th day of February, 2008.

Roy White and Kevin White, d/b/a R & K TIMBER, Appellants

BY: _____
STEVEN D. SLADE, their attorney

CERTIFICATE OF SERVICE

I, Steven D. Slade, attorney for the stated Appellants, do hereby certify that I have delivered by U.S. Mail, postage prepaid, the foregoing Reply Brief for Appellants to:

Thomas L. Tullos, Esq.
Post Office Drawer 567
Bay Springs, Mississippi 39422
(Attorney for the Appellee)

Honorable Marcus D. Gordon
Circuit Court Judge
Post Office Box 220
Decatur, Mississippi 39327

This the 5th day of February, 2008.

STEVEN D. SLADE

STEVEN D. SLADE
POST OFFICE BOX 3490
MERIDIAN, MISSISSIPPI 39303-3490
(601) 483-1281 (phone)
(601 483-1282 (fax)
[redacted]
sdsaal@bellsouth.net