

CAUSE NO. 2007-WC-01717-COA

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SUPREME COURT OF MISSISSIPPI

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MELISSA WINTER,

APPELLANT

v.

WAL-MART SUPERCENTER and AMERICAN  
HOME ASSURANCE COMPANY,

APPELLEES

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ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF  
UNION COUNTY, MISSISSIPPI

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BRIEF FOR THE APPELLEES

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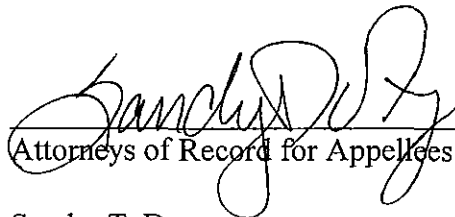
APPELLEES

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 the justices of the Supreme Court may evaluate their possible disqualification or recusal.

1. Wal-Mart Supercenter, Employer/Appellee
2. American Home Assurance Company, Carrier/Appellee
3. Melissa Winter, Claimant/Appellant
4. John P. Fox, Fox Law Firm, attorney representing the Appellant
5. Sandra T. Doty and Roxanne P. Case, Wilkins, Stephens & Tipton, P.A., attorneys for the Appellees
6. Honorable Andrew K. Howorth, Circuit Court Judge for the Circuit Court of Union County, Mississippi issued the Order Appellants now appeal from.

Dated this the 12<sup>th</sup> day of December, 2008.

  
Attorneys of Record for Appellees  
Sandra T. Doty  
Roxanne P. Case

## TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES .....	iv
STATEMENT OF THE ISSUES .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	6
I.    STANDARD OF REVIEW .....	6
II.   THE FINDING OF THE ADMINISTRATIVE JUDGE, AFFIRMATION BY THE FULL COMMISSION AND AFFIRMATION BY THE CIRCUIT COURT, THAT THE APPELLANT'S CLAIM SHOULD BE DISMISSED IS BASED ON SUBSTANTIAL EVIDENCE AND CONTROLLED BY STATUTE, PROCEDURAL RULE AND CASE LAW .....	7
A.   The only issue that has been properly preserved on appeal is whether a mistake in fact existed under the continuing jurisdiction provision of § 71-3-53; all other issues raised have not been properly preserved for appeal and cannot be considered, but even if considered, are without merit. ....	7
B.   The Appellant's Reinstatement is barred because the Appellant failed to demonstrate a mistake in determination of fact to support her request for reinstatement as set forth in Mississippi Code Annotated § 71-3-53 (Supp. 2003) .....	14
CONCLUSION .....	19
CERTIFICATE OF SERVICE .....	20

## TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

### STATUTES

Page

Miss. Code Ann. § 71-3-37 (Supp. 2003) .....	10
Miss. Code Ann. § 71-3-47 (Supp. 2003) .....	7, 10
Miss. Code Ann. § 71-3-53 (Supp. 2003) .....	1, 2, 3, 4, 5, 7, 8, 10, 14, 18, 19

### CASES

<u>Aetna Cas. &amp; Sur. Co. v. Espinosa,</u> 469 So.2d 64 (Miss. 1985) .....	15
<u>Broadway v. International Paper,</u> 982 So. 2d 1010 (Miss. 2008) .....	12
<u>Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings,</u> 419 So.2d 211 (Miss. 1982) .....	6
<u>Harper v. N. Miss. Med. Ctr.,</u> 601 So.2d 395 (Miss. 1992) .....	6
<u>Jackson County Sch. Dist. v. S. Miss. Workers' Comp.,</u> 749 So.2d 962 (Miss.1999) .....	8
<u>McCrary v. City of Biloxi,</u> 757 So. 2d 978 (Miss. 2000) .....	13, 14
<u>Pilate v. Int'l Plastics Corp.,</u> 727 So.2d 771 (Miss.Ct.App. 1999) .....	6
<u>Reed v. Horseshoe Casino &amp; Hotel,</u> MWCC No. 01-13092-H-2608-A (June 18, 2003) .....	7, 17
<u>Russell v. City of Vicksburg,</u> MWCC No. 98-04704-G-8395 (June 17, 2003) .....	7
<u>Sawyer v. Head, Dependents of.,</u> 510 So.2d 472, 474 (Miss.1987) .....	8

<u>Smith v. Jackson Constr. Co.,</u> 607 So.2d 1119 (Miss. 1992) .....	6
<u>Tupelo Public School District v. Parker,</u> 912 So. 2d 1070 (Miss. 2005) .....	13
<u>Tyson Foods, Inc. v. Thompson,</u> 765 So.2d 589 (Miss.Ct.App. 2000) .....	6
<u>Wagner v. Hancock Med. Ctr.,</u> 825 So.2d 703 (Miss.Ct.App. 2002) .....	6
 <b><u>RULES:</u></b>	
Mississippi Rules of Appellate Procedure 4(a) .....	8
Mississippi Rules of Appellate Procedure 28(a)(6) .....	8

### **STATEMENT OF THE ISSUES**

Whether all the arguments raised by Mrs. Winters in her brief were properly preserved on appeal.

On the arguments that are determined to have been properly preserved for appeal, the issue is whether the Workers' Compensation Commission was correct in its denial of Mrs. Winters' Motion to Reopen and Reinstate her case based upon the position that she has not established that a mistake in fact occurred, and, as such, Mrs. Winters failed to satisfy the continuing jurisdictional requirement pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003).

## STATEMENT OF THE CASE

Mrs. Winters filed a Petition to Controvert on September 23, 2002, alleging a work-related injury occurred on February 25, 2002. (*See Appellant Record Excerpt No: 5-8*). The Employer and Carrier (hereinafter collectively referred to as "Wal-Mart") filed their Answer wherein the injury was admitted. (*See Appellant Record Excerpt No: 14-17*).

On November 10, 2003, an Order Dismissing Claim for Appellant's Failure to File a Completed Pre-hearing Statement was entered by Administrative Judge Deneise Turner Lott. (*See Appellant Record Excerpt No: 18*). No appeal of this Order was sought and the Order became final on November 30, 2003. On October 26, 2004, the Mrs. Winters filed a Motion to Reopen and Reinstate Claim with the Mississippi Workers' Compensation Commission. (*See Appellant Record Excerpt No: 20-25*). In conjunction therewith, Mrs. Winters also filed a Pre-hearing Statement, which was deemed incomplete. (*See Appellant Record Excerpt No. 20-25*). On November 12, 2004, Wal-Mart filed their Response to Appellant's Motion to Reopen and Reinstate, and asserted that Mrs. Winters failed to demonstrate a change in circumstance or mistake in material fact in support of her Motion for Reinstatement as required pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003). (*See Appellee Record Excerpt No: 1*). On December 3, 2004, Mrs. Winters filed an Amended Motion to Reopen and Reinstate. (*See Appellant Record Excerpt No: 38-40*). On December 14, 2004, Wal-Mart filed their Response to Appellant's Amended Motion to Reopen and Reinstate, wherein Wal-Mart re-asserted its previous objections and argued that despite the Amended Motion, Mrs. Winters still failed to demonstrate a change in circumstance or a mistake in material fact to support her claim for reinstatement. (*See Appellee Record Excerpt No: 2*).

This cause came on for hearing on March 9, 2004, before Administrative Judge Wilson. After hearing arguments of counsel and considering the evidence presented in the filings made by both parties, Judge Wilson found that Mrs. Winters had failed to sufficiently demonstrate, as required by Miss. Code Ann. § 71-3-53 (Supp. 2003), a change in circumstance or a mistake in determination of material fact in support of her Motion to Reinstate. Thus, the Judge dismissed the matter in an Order entered March 9, 2005. (*See Appellant Record Excerpt No: 27-28*).

From this Order, Mrs. Winters appealed to the Full Commission. This Appeal was heard by the Full Commission on June 27, 2005. The Full Commission affirmed the Order entered by Administrative Judge Wilson in its Order of December 16, 2005. (*See Appellant Record Excerpt No: 32-37*). Mrs. Winters next appealed the Order of the Full Commission to the Circuit Court of Union County, Mississippi on January 24, 2007. This Appeal was heard by the Honorable Andrew K. Howorth of the Circuit Court of Union County, Mississippi on August 21, 2007, and the Full Commission decision was affirmed on this date. (*See Appellant Record Excerpt No: 2*).



## **SUMMARY OF THE ARGUMENT**

The only issue that has been preserved for appeal is whether, under the continuing jurisdiction pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003), Mrs. Winters established that there was a mistake in determination of fact which would justify further review of this matter. In that Mrs. Winters is seeking to reopen this issue, it is her burden to prove such a mistake. Mrs. Winters attempts to meet this burden by arguing numerous issues which have not been preserved for appeal and, therefore, cannot be considered. This includes a discussion of the employer and carrier's B-31 form filing, employer and carrier's payment of ongoing medical treatment, and the medical treatment itself, based all upon the grounds of estoppel. Mrs. Winters failed to preserve any of these issues on appeal and, therefore, her failure to do so precluded these issues from consideration by this Court.

Even if Mrs. Winters had appropriately preserved the issue of the B-31 form for appeal, it is without merit. Whether or not this Form B-31 was filed properly or improperly does not relate in any way to Mrs. Winters' failure to timely file a completed Pre-Hearing Statement, or her failure to file a motion to reinstate her claim within the twenty days following the initial order of dismissal, which thereby rendered it a final order. Beyond this, the time frame in which Mrs. Winters asserts that the B-31 was required to be filed was erroneous. As such, this argument is wholly and completely without merit and cannot be considered by this court.

The second issue raised by Mrs. Winters, which has not been properly preserved on appeal, relates to payment of ongoing medical treatment. The evidence provided by Mrs. Winters in support of this position shows that one doctor's visit, which took place within the twenty day time frame from the entry of the initial order of dismissal on November 10, 2003, was the only medical

treatment paid for. This fact has no significance whatsoever on Mrs. Winters' own requirement to adhere to the procedural rules and file the required Pre-Hearing Statement which led to the dismissal of her case. In addition, the payment of this one doctor's bill certainly had no impact on Claimant's failure to seek reinstatement within the twenty day time frame from the initial order of dismissal which rendered the dismissal a final order. As such, this argument must be completely disregarded by this Court.

Mrs. Winters was obligated to either file a Pre-Hearing Statement or request a discovery extension at the time that the discovery period expired with the Mississippi Workers' Compensation Commission. Instead, Mrs. Winters took no action at all. As a result, her case was dismissed. The actions or inactions of Wal-Mart, whether correct or not, are irrelevant to the fact that Mrs. Winters took no action when action was required of her. It is based on Mrs. Winters' own inactivity that the Administrative Judge, upon her own volition, dismissed her case. Mrs. Winters did not seek reinstatement inside the twenty day period following this order. The Order of Dismissal was, therefore, a final Order as of November 30, 2003. The only way this case can be properly reinstated, pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003), is for a showing of a mistake in fact. In her Motion to Reopen and Reinstate and Amended Motion to Reopen and Reinstate and Place on Docket, Mrs. Winters simply references the passing away of her prior counsel. She does not mention any mistake in fact, which would provide for the proper reinstatement of her workers' compensation case. Mrs. Winters has been unable to provide any evidence establishing that a mistake in fact occurred which will allow for reinstatement of this case. In that Mrs. Winters cannot meet this burden, the dismissal of her case must be affirmed.

## ARGUMENT

### **I. STANDARD OF REVIEW**

It is well settled under Mississippi law that the Mississippi Workers' Compensation Commission is the ultimate trier of fact in Workers' Compensation cases. *Tyson Foods, Inc. v. Thompson*, 765 So.2d 589 (¶10) (Miss.Ct.App. 2000), (citing *Pilate v. Int'l Plastics Corp.*, 727 So.2d 771 (¶12) (Miss.Ct.App. 1999). See also *Harper v. N. Miss. Med. Ctr.*, 601 So.2d 395 (Miss. 1992); *Day-Brite Lighting Div., Emerson Elec. Co. v. Cummings*, 419 So.2d 211 (Miss. 1982). As long as the Commission's decision is supported by the substantial weight of the evidence, it should be binding upon the Appellate Court. *Wagner v. Hancock Med. Ctr.*, 825 So.2d 703 (¶10) (Miss.Ct.App. 2002), (citing *Smith v. Jackson Constr. Co.*, 607 So.2d 1119, 1124 (Miss. 1992)).

The Appellees assert that the denial of the Administrative Judge, affirmation of this denial by the Full Commission, and subsequent affirmation of this denial by the Circuit Court of Union County, of Mrs. Winters' attempt to reopen her claim, on the basis that she failed to demonstrate the requisite mistake in determination of a material fact, is supported not only by substantial evidence, but also statutory mandate and procedural rules, as well as case law, and accordingly, should be upheld and affirmed by this Supreme Court.

**II. THE FINDING OF THE ADMINISTRATIVE JUDGE, WITH AFFIRMATION BY THE FULL COMMISSION AND CIRCUIT COURT, THAT THE APPELLANT'S CLAIM SHOULD BE DISMISSED IS BASED ON SUBSTANTIAL EVIDENCE AND CONTROLLED BY STATUTE, PROCEDURAL RULE AND CASE LAW.**

- A. The only issue that has been properly preserved on appeal is whether a mistake in fact existed under the continuing jurisdiction provision of § 71-3-53; all other issues raised have not been properly preserved for appeal and cannot be considered, but even if considered, are without merit.**

The original dismissal Order in this case was entered on November 10, 2003 by Administrative Judge Deneise Turner Lott as a result of Claimant's failure to file a Pre Hearing Statement. According to Miss. Code Ann. § 71-3-47 (Supp. 2003), an Order dismissing a claim becomes final when no appeal is taken within twenty days after the date of the Order. Miss. Code Ann. § 71-3-47 (Supp. 2003); *Russell v. City of Vicksburg*, MWCC No. 98 04704-G-8395 (June 17, 2003); *Reed v. Horseshoe Casino & Hotel*, MWCC No. 01-13092-H-2608-A (June 18, 2003). In this case, no appeal was sought and the Order became final on November 30, 2003. Once the Order dismissing her claim had become final pursuant to Miss. Code Ann. § 71-3-47 (Supp. 2003), and hence unappealable, Mrs. Winters' only remaining avenue of recourse to reinstate the case was to invoke the Commission's continuing jurisdiction pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003). *Id.* Specifically, the statute states the following:

Upon its own initiative, or upon the advocacy of any party in interest **on the ground of a change in conditions or because of a mistake in determination of fact, the Commission may, . . .** at any time prior to one year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, **reinstate**, increase, or decrease such compensation or award compensation.

Miss. Code Ann. §71-3-53 (Supp. 2003) (emphasis added).

The only issue properly preserved for appellate purposes is whether a mistake in fact occurred, which would allow for the reinstatement of Mrs. Winters' workers compensation case. However, in her Brief before this Supreme Court, the Appellant attempts to argue additional issues that have not been properly preserved on appeal. This includes issues raised pertaining to the requirement of Employer and Carrier to file a B-31 form, as well as her argument that the lower court's decisions should be reversed on an equitable basis, due to the Appellant's alleged payment of some medical bills after the initial Order of Dismissal was entered at the Mississippi Workers Compensation Commission.

Arguments advanced on appeal must "contain the contentions of the appellant with respect to the issues presented, and the reasons for those contentions, with citations to the authorities, statutes and parts of the record on." M.R.A.P. 28(a)(6). The Supreme Court does not have jurisdiction to hear issues not preserved on appeal. M.R.A.P. 4(a). In discussing the preservation of appellate issues to the Supreme Court, it has been found that issues must be preserved at all levels - "[i]n order to preserve a point for review by the Supreme Court, the point MUST be presented not only to the Commission but also to the Circuit Court..."(emphasis added) *Sawyer v. Head, Dependents of*, 510 So.2d 472, 474 (Miss.1987); *Jackson County Sch. Dist. v. S. Miss. Workers' Comp.*, 749 So.2d 962 (Miss.1999).

The only issue preserved for appeal is whether the mistake component of § 71-3-53 was satisfied, the satisfaction of which would be required before reversal of the lower court's decisions could be considered. None of the other issues that Mrs. Winters attempts to raise in her brief have been properly preserved for appeal and, therefore, cannot be considered by this Court. Rather, their

presence do nothing but present a red herring to distract the Court from the issues that it is presented with, and has jurisdiction over, regarding this appeal. Any other issues, such as the ones she is attempting to improperly argue before this Court, should have either been raised by Mrs. Winters no later than twenty days after the dismissal of her action by the Administrative Judge, or in her Motion to Reinstate, which was filed on October 27, 2004. At the very least, the arguments she attempts to put forth to this Court should have been raised in her appeal to the Full Commission. Her failure to do so precluded the preservation of these issues for appellate purposes and, therefore, eliminates them from consideration by this Court.

However, even if this Court should find that these issues raised by Mrs. Winter have been properly preserved on appeal and are worthy of consideration, her arguments must fail, as they are without merit. Accordingly, in the event this Court finds any of these issues have been preserved and are properly before it, Wal-Mart will address each and illustrate why they are of no consequence to the issues being considered.

The first issue raised by Mrs. Winter, that has not been properly preserved upon appeal, is the issue relating to Wal-Mart's filing of a Form B-31 with the Mississippi Workers Compensation Commission. Mrs. Winter states that Wal-Mart failed to comply with Rule 17 and § 17-3-37(7) because it had not filed a Form B-31 prior to the Mississippi Workers Compensation Commission's dismissal of this matter on November 10, 2003. Rather, Wal-Mart filed this form on May 26, 2004.

What this Court will notice is that Mrs. Winter does not address how the timing and content of the filed Form B-31 relates in any way to her failure to timely file a completed Pre Hearing Statement; or her failure to file a motion to reinstate her claim within the twenty days following the dismissal Order of November 10, 2003. It also does not establish a mistake in fact, which is the only

way this case can be reinstated pursuant to § 71-3-53 (Supp. 2003). The reason Mrs. Winters does not address this is because any such form B-31 filing did not have, and does not have, any impact on her duty and obligation to adhere to the procedural rules. This includes filing a Pre Hearing Statement at the conclusion of the discovery period at the Mississippi Workers Compensation Commission, or to file a Motion to Reinstate with a completed Pre Hearing Statement within twenty days of the entry of the order of dismissal, as required by § 71-3-47. The fact that a B-31 had not been filed at the time of the dismissal on November 10, 2003 is completely irrelevant to the obligations Mrs. Winters failed to meet.

Beyond the fact that the filing of a B-31 by Wal-Mart is irrelevant to Mrs. Winters' obligation, and failure, to file a Pre Hearing Statement within the procedural time constraints she was required to adhere to, her argument that such a filing was required prior to the dismissal of this action is wholly incorrect. A B-31 is to be filed on a Workers Compensation matter within thirty (30) days after the final payment of compensation has been made. § 71-3-37(7). Up and until the dismissal of her case on November 10, 2003, Mrs. Winters' case was an actively litigated file. Certainly, had the matter proceeded to a hearing, more benefits could have been ordered and/or paid. Wal-Mart would not have been expected, nor permitted, to file a B-31 prior to the dismissal of this action. As such, not only does Mrs. Winters fail to address how the timing and content of the filed Form B-31 relates in any way to her failure to timely file a completed Pre Hearing Statement or a motion to reinstate her claim within the twenty days following the dismissal Order of November 10, 2003; her assertions regarding the requirements of Wal-Mart to file the Form B-31 are completely false. It is for these reasons that Mrs. Winters' issues raised concerning the Form B-31 are wholly without merit and must be completely disregarded.

The second issue raised by Mrs. Winter, that has not been properly preserved upon appeal, is the issue relating to alleged payment of ongoing medical treatment. Mrs. Winters' own brief proves that this issue has never previously been properly raised during the appellate process and, thus, has not been properly preserved for appeal. Mrs. Winters was unable to reference a record excerpt when discussing the medical bills in her brief. Instead, she had to attach the medical documents as Exhibits 1 and 2, respectively, to her brief. This is wholly improper and provides uncontroverted evidence that preservation of this argument has not been maintained. This provides ample proof that this portion of Mrs. Winters' brief has not been preserved and must be completely disregarded.

However, even if this issue had been properly preserved for appeal, it still would not provide any basis for the lower courts rulings to be overturned. Specifically, "Exhibit 1" to Mrs. Winters' brief shows payment was made for an office visit with Dr. Harkey on February 17, 2003. This was a time frame in which Mrs. Winters' case was still active, but was months before her Pre Hearing Statement was due. Payment of this visit can in no way be construed as evidence sufficient to establish that the necessity of Claimant's Pre Hearing Statement was premature. The next indication is for an office visit with Dr. Harkey on November 17, 2003. This visit, which took place during the twenty day period prior to the finalization of the November 10, 2003 dismissal Order, was paid for. A subsequent visit with Dr. Harkey on November 29, 2004 was not paid and, in fact, shows Mrs. Winters as the party responsible for payment. In addition, the prescription receipts attached to Mrs. Winters' brief as "Exhibit 2" offer no indication whatsoever as to who the payor was.

Based on Mrs. Winters' own exhibits, she illustrated that one doctor's visit conducted within the twenty day period following the entry of the Order of dismissal, therefore prior to the Order being



final, was paid for. The payment of this doctor's visit has no impact at all on the obligation she had to properly pursue her claim, which included her obligation to timely file a Pre Hearing Statement when one was due. Mrs. Winters' attempts to rely upon the case of *Broadway v. International Paper*, 982 So. 2d 1010 (Miss. 2008), as it relates to medical payments, has no significance nor probative value at all to the issues before this Court. The *Broadway* case relates to the tolling of the statute of limitations based upon continued payment of medical prescriptions. *Id.* As illustrated, Mrs. Winters' exhibits only show that payment of only one doctor visit within a week of the entry of the dismissal Order was paid for by Wal-Mart. There certainly is no evidence as to the payor source of her prescriptions. Moreover, this appeal does not relate to a statute of limitations issue, which is what the *Broadway* case speaks to. *Id.* As such, the *Broadway* case is completely irrelevant to the issues currently pending before this Court and, like Claimant's whole argument, must be disregarded.

Finally, Mrs. Winters attempts to argue that the lower court decisions should be reversed based on the grounds of estoppel. Again, this argument has not been preserved on appeal and should not be considered by this Court. However, should it be determined that this issue was properly preserved, it, too, has no merit and should be disregarded.

Mrs. Winters' states that Wal-Mart should be estopped from asserting a lack of knowledge and preclusion of consideration of her ongoing medical treatment at the time of and subsequent to the November 10, 2003 dismissal. Again, any issues relating to Mrs. Winters' position that she was receiving medical treatment at the time her Pre Hearing Statement was due have not been properly preserved on appeal. However, even if it was an issue properly preserved, it is of no import that she may have been receiving treatment at the time her Pre Hearing Statement was due. She was

obligated to either file a Pre Hearing Statement or request a discovery extension. Mrs. Winters instead, took no action at all. As a result, her case was dismissed. The actions or inactions of Wal-Mart, whether correct or not, are irrelevant to the fact that Mrs. Winters took no action when action was required of her.

Mrs. Winters attempts to rely on the case of *McCrory v. City of Biloxi*, 757 So. 2d 978 (Miss. 2000) to support her argument that the doctrine of estoppel should be applied to the case before this Court. The facts of the *McCrory* case are completely separate and distinct from the facts currently before this Court in Mrs. Winters matter. In *McCrory*, the issue pertained to the Claimant's failure to file a Petition to Controvert within the two year statute of limitations period. *Id.* at 980. The City of Biloxi was estopped from asserting a statute of limitations defense due to the fact that it failed to file a notice of controversy after knowledge of the injury. *Id.* at 981. Moreover, in *McCrory*, the employer told the Claimant that it would file his claim for him and then engaged in settlement negotiations with the Claimant for a substantial period of time. *Id.* at 982. The Court found that the Claimant relied on the employer's representations to his detriment. *Id.*

The *McCrory* case was considered by the Court of Appeals of Mississippi in the case of *Tupelo Public School District v. Parker*, 912 So. 2d 1070 (Miss. 2005). *Parker* distinguished *McCrory* by stating that the *McCrory* decision did not apply in that case because neither the employer nor the carrier made any misrepresentations to Parker. *Id.* at 1072. This is the same analysis that must be utilized in this matter. Wal-Mart has made no representations, nor misrepresentations, to Mrs. Winters. Moreover, Mrs. Winters has not established that any such misrepresentations or representations have taken place. The mere fact that one doctor's visit was paid for, which took place within the twenty day appeal time from the initial dismissal by the

Administrative Judge, cannot meet this burden. The dismissal that was entered by the Administrative Judge was done on her own accord. It was not based upon a motion or any other action on the part of Wal-Mart. Accordingly, there is no proof whatsoever in the record that misrepresentations were made by Wal-Mart upon which Claimant relied as justification for not filing her Pre-Hearing Statement when same was due. Moreover, Mrs. Winters cannot rely on a position that representations or misrepresentations were made to her which would provide justification for her failure to request reinstatement of her case within the twenty day time frame of the dismissal Order. It is for all these reasons that the *McCrory* decision must be disregarded as having any influence on this matter.

**B. The Appellant's Reinstatement is barred because the Appellant failed to demonstrate a mistake in determination of fact to support her request for reinstatement as set forth in Mississippi Code Annotated § 71-3-53 (Supp. 2003).**

In this case, Mrs. Winters is not making a claim that a change in condition occurred, instead, she is arguing that her claim should be reinstated under the "mistake" component of § 71-3-53. Accordingly, the only issue before this Court pertains to the Commission's continuing jurisdiction pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003). The threshold question then becomes whether Mrs. Winters can demonstrate any mistake in fact which would support the reinstatement of her original action. Mrs. Winters has repeatedly failed to establish any proof that any such mistake occurred to allow this case to be reinstated.

As stated above, Miss. Code Ann. § 71-3-53 (Supp. 2003), provides that, if timely filed, reinstatement can only be granted upon a satisfactory showing that there has been a change in

condition justifying further review or that there has been a mistake in determination of fact justifying further review. The party seeking to reopen, whether this be the employer or the employee, must meet the burden of proving a mistake within the stated rule. *Aetna Cas. & Sur. Co. v. Espinosa*, 469 So.2d 64, 67 (Miss. 1985). The mistake in determination of fact must be supported by appropriate evidence. *Id.*

In her brief to the Full Commission, Mrs. Winters alleged - for the first time - that Wal-Mart continued to provide medical treatment to her through July 2004. For the first time in her brief to the Full Commission, Mrs. Winters made the assertion that her Pre-hearing Statement was not due to be filed at the time the Administrative Judge first dismissed her claim. Obviously, in light of the fact this issue was not raised in her Motion to Reinstate filed on October 27, 2004, it has not properly been preserved on appeal and, therefore, cannot be considered. On this basis alone, Mrs. Winters' appeal must be denied.

However, even if this issue had been properly preserved for consideration, Mrs. Winters contradicts herself in her Brief before this Court. Initially, she tries to argue that she was absolved of the responsibility to file a Pre Hearing Statement because she was continuing to receive treatment and payment for medications subsequent to the dismissal of her case on November 10, 2003. (See Appellant Brief P. 4) Then, later in her brief, Mrs. Winters attempts to justify her failure to file her Pre-hearing Statement by asserting that she did not receive notice that her Pre Hearing Statement was deficient. (See Appellant Brief P. 6) This would assume that one was ever filed in the first place, but there has been no proof established that she filed one. Regardless, both of these arguments are incorrect and, even if either of them were correct, these issues would still be wholly irrelevant to the issues properly before this Court.

This appeal is based solely on the Claimant's failure to adhere to the procedural requirement as set forth by the Mississippi Workers Compensation Commission and the Mississippi Code. Mrs. Winters cannot explain nor justify her failure to timely file a Pre Hearing Statement when same was due. Prior to the dismissal of this action on November 10, 2003, if Mrs. Winters was still receiving medical treatment and felt that discovery had not been completed, thereby making her Pre Hearing Statement premature, she should have requested an extension to the discovery period. Requests to extend the discovery period are typically submitted via letter and are routinely granted if a Claimant is still receiving medical treatment for the workers compensation injury claimed. No such request was ever submitted nor filed by Mrs. Winters.

In light of the fact that no discovery extension was requested by Mrs. Winters, upon the cessation of the discovery period, her Pre Hearing Statement was due. She failed to file one. She cannot claim lack of notice regarding either a deficiency of her Pre Hearing Statement, or failure to file one altogether, because she admits in her own brief that she received Wal-Mart's Pre Hearing Statement. The receipt of this Pre Hearing Statement was certainly sufficient to put her on notice of the need for her to file a Pre Hearing Statement on her own behalf. Again, by her own admission, the Order dismissing her case was not entered until approximately 2.5 weeks after Wal-Mart's Pre Hearing Statement was filed. This provided ample time for Mrs. Winters to either file her own Pre Hearing Statement or to seek an extension to discovery, if she felt her ongoing medical treatment rendered a Pre Hearing Statement premature. Mrs. Winters failed to take any action at all. There is no mistake in fact present here. Rather, it was based solely on Mrs. Winters' inaction, despite proper notice, that her claim was properly dismissed on November 10, 2003. This dismissal must now be affirmed.

In an attempt to try and support her position that medical treatment rendered would be sufficient to reinstate a dismissed claim, Mrs. Winters cited the case of *Reed v. Horseshoe Casino & Hotel*, MWCC No. 01-13092-H-2608-A (June 18, 2003). However, the Full Commission distinguished the facts in *Reed* from the ones presently before the Court in this action.

In the case of *Reed v. Horseshoe Casino & Hotel*, the Mississippi Workers' Compensation Commission stated that ongoing medical treatment may render the filing of a Pre-Hearing Statement premature and satisfy the requisite showing of good cause for reinstatement. *Id.*

In *Reed*, the claim was reinstated because the Claimant made an adequate showing that he was undergoing medical treatment at the time the Pre-Hearing Statement was due, and, hence, a Pre-Hearing Statement would have been premature, and incomplete. Slip op at 3. By contrast, the Full Commission in this case was correct in surmising that at the time Mrs. Winters submitted her incomplete Pre-Hearing Statement, she did not claim to be undergoing medical treatment. Mrs. Winters had twenty (20) days from the entry of the dismissal to appeal it on the substantive issues. She failed to do so. Moreover, Mrs. Winters failed to raise the issue of ongoing medical treatment in her Motion and Amended Motion to Reopen and Reinstate. Accordingly, the Full Commission was correct in their statement that they had no choice but to deny reinstatement on this basis, and the Circuit Court was correct in its affirmation of the Full Commission's decision.

This same logic holds true for this Court's analysis of this Appeal. The Motion to Reopen and Amended Motion to Reopen, along with the attached incomplete Pre-Hearing Statements did not provide any evidence of ongoing medical treatment. The incomplete Pre-Hearing Statement only provided an expert witness list of medical providers and the dates the medical providers' records were filed with the Commission. The witness list and filing dates in the incomplete Pre-Hearing

Statement did not establish that she had been seeking continued medical treatment during the dismissal period. As such, even if the accompanied incomplete Pre-Hearing Statements could have been considered, they did not establish proper evidence of Mrs. Winters claim of ongoing medical treatment. Therefore, she failed to meet the required burden of proving a mistake in determination of fact as required by Miss. Code Ann. § 71-3-53 (Supp. 2003).

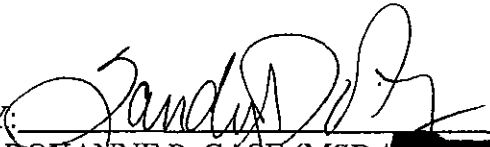
Absent a showing of the required proof, the Administrative Judge, the Full Commission, and the Circuit Court were all correct in their determination that Mrs. Winters did not sustain a mistake in fact which would support reinstatement of the claim. Thus, the Administrative Judge's dismissal of Mrs. Winters case, pursuant to Miss. Code Ann. § 71-3-53, and the affirmation of this ruling by the Full Commission and the Circuit Court, must be affirmed by this Supreme Court.

### CONCLUSION

For good cause shown, the Appellees respectfully request that this Honorable Court affirm the dismissal of this claim with prejudice because, of the evidence offered that can be considered by this Court, Mrs. Winters fails to meet her burden of demonstrating that a mistake in determination of fact existed which would support her request for reinstatement, as set forth in Miss. Code Ann. § 71-3-53 (Supp. 2003). Absent the required proof, the Administrative Judge, the Full Commission, and the Circuit Court were proper in their rulings to dismiss this claim and, therefore, these decisions must be affirmed.

WAL-MART STORES, INC., Employer, and AMERICAN  
HOME ASSURANCE COMPANY, Carrier

BY: WILKINS, STEPHENS & TIPTON, P.A.

BY:   
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ROXANNE P. CASE (MSB # [REDACTED])  
SANDRA T. DOTY (MSB # [REDACTED])

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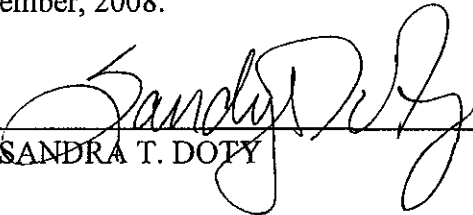
**CERTIFICATE OF SERVICE**

I, SANDRA T. DOTY, attorney for the Employer and Carrier, do hereby certify that I have this day served via United States mail, postage prepaid, a true and correct copy of the above and foregoing to: **BRIEF FOR THE APPELLEES**, to:

John P. Fox, Esquire  
Fox Law Firm  
P. O. Box 167  
Houston, Mississippi 38851

Honorable Andrew K. Howorth  
Circuit Court Judge  
Circuit Court of Union County, Mississippi  
1 Courthouse Square, Suite 201  
Oxford, MS 38655

THIS the 12<sup>th</sup> day of December, 2008.

  
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SANDRA T. DOTY