

**IN THE SUPREME COURT OF MISSISSIPPI  
CASE NO. 2007-WC-02291-COA**

**BERNITA J. WASHINGTON**

**APPELLANT/CROSS-APPELLEE**

**VERSUS**

**WOODLAND VILLAGE NURSING HOME  
d/b/a H.T. CAIN**

**AND**

**BRIDGEFIELD CASUALTY  
INSURANCE COMPANY**

**APPELLEE/CROSS-APPELLANT**

**Appeal from the Circuit Court of Hancock County, Mississippi  
Civil Action No. 2007-0037**

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**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT  
WOODLAND VILLAGE NURSING HOME d/b/a H.T. CAIN and  
BRIDGEFIELD CASUALTY INSURANCE COMPANY**

**Oral Argument Requested**

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**TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED**

**Cases**

1. Penrod Drilling Co. v. Etheridge, 47 So.2d 1330 (Miss. 1986) ..... 2
2. Keith v. Purvis, No. 2007-CA-00495 (Miss.App. 2008) ..... 5-6
3. Morris v. Lansdell's Frame Co., 547 So.2d 782, 785 (Miss. 1989) ..... 3
3. Smith v. Jackson Construction Co., 607 So.2d 1119 (Miss. 1992) ..... 2

**Other Authorities**

1. Dunn, *Mississippi Workers' Compensation*, (3d. ed. 1982) ..... 2
2. Rule 609, *Mississippi Rules of Evidence* ..... 3

**STATEMENT OF THE ISSUES ON CROSS-APPEAL**

- I. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT CLAIMANT SUSTAINED A WORK RELATED INJURY ON DECEMBER 14, 2001.
- II. THE PUBLIC POLICY OF THE STATE OF MISSISSIPPI MANDATES THAT THE CLAIMANT FORFEITED HER RIGHTS TO FUTURE BENEFITS BY COMMITTING THE CRIME OF WORKERS' COMPENSATION INSURANCE FRAUD.

## ARGUMENT

The Claimant misrepresents the Employer and Carrier's argument on cross-appeal. The Commission was not duty bound to accept this claim as compensable. Based upon the authorities cited in its Cross-Appeal, the Employer and Carrier would submit that the Commission erroneously found that this claim had to be accepted regardless of all the circumstances that cast doubt upon the claim. As such, the Commission's decision was not only against the substantial weight of the evidence but also based upon an error of law.

In addition, if this Court is not inclined to create a policy that a workers' compensation claimant forfeits his/her rights to workers' compensation benefits once they have been convicted of the crime of insurance fraud in obtaining those benefits, then at a minimum, this Court should announce its position on the issue so that the citizens of the State of Mississippi know what this Court of Appeals policy is with regard to fraud in the obtainment of insurance benefits.

**I. THE WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW IN FINDING THAT CLAIMANT SUSTAINED A WORK RELATED INJURY ON DECEMBER 14, 2001.**

The occurrence of an injury on December 14, 2001, as alleged by the Claimant, is uncorroborated by any witnesses, and the Claimant has been shown to have made statements inconsistent with the claim. Therefore, contrary to its Order, the Commission was not duty bound to resolve this doubtful claim in favor of the Claimant. Dunn, *Mississippi Workers' Compensation*, § 264 at 320-321 (3d.Ed.1982); Penrod Drilling Co. v. Ethridge, 487 So.2d 1330, 1333 (Miss. 1986). The Commission misapplied the law by finding they were duty bound to accept this claim. As such, this Court should reverse the Order of the Commission. In the alternative, this case must be remanded back to the Commission with instructions to apply the law correctly to the facts of this case.

In addition to misapplying the law, the Commission's Order was against the substantial weight of the evidence. Substantial evidence necessarily means substantial credible evidence. In this case, there is none. Where evidence is contradicted, inherently improbable, incredible, unreasonable, or untrustworthy, the claim may be denied. Morris v. Lansdell's Frame Co., 547 So.2d 782, 785 (Miss. 1989). In addition, when the Commission makes an error of law, this Court's review is *de novo*. Smith v. Jackson Constr. Co., 607 So.2d 1119, 1125 (Miss. 1992). The Commission made a clear error of law in this case by finding they were duty bound to accept this doubtful claim.

Plaintiff is the sole witness to the alleged work injury on December 14, 2001. Her testimony is not credible due to the fact of her fraud upon the Employer and Carrier. Under *Mississippi Rule of Evidence 609*, Impeachment by Evidence of Conviction of Crime, the fact that Claimant was convicted of a crime of dishonesty, insurance fraud, must be taken as impeachment evidence against the veracity of her testimony in this case. As set forth in the Committee Notes to Rule 609, such convictions are peculiarly probative of the witnesses credibility and are always to be admitted, not subject to the discretionary balancing by the Judge. Therefore, Claimant's conviction impeached her credibility to prove her claim.

In addition to the Claimant's testimony, the following substantial evidence appears in the record in support of a denial of her claim:

(1) Claimant obtained a medical release from Dr. Johnston, against his wishes that she continue medical treatment for a March 2000 automobile accident. (Ex. #11 at p. 14).

(2) When asked to retrieve her MRI films from Hancock Medical Center, the June 2000 films, evidencing pre-existing disc protrusions in her neck and back, were conveniently unable to be located. (Ex. #22).

(3) Claimant never disclosed to Dr. Wolfson, who conducted an Independent Medical Examination, that she had pre-existing neck and back problems which arose after her March 2000, automobile accident. (Ex. #19 at pp. 26-29).

(4) When the Employer made written inquiry to Dr. Smith whether it was safe for Claimant to be caring for elderly residents while taking pain medication, Dr. Smith replied that he has not given any pain medication to Claimant in many months and that the source of her medication should be explored. (Ex. #1 at p. 6).

(5) When Claimant was asked to obtain a certificate from her prescribing doctor before returning to work, Claimant never came back to work at Woodland Village.

(6) Claimant willfully and intentionally forged at least three medical records in order to remain at light duty and continue to receive workers' compensation benefits.

(7) Claimant pled guilty to and was convicted of the crime of Insurance Fraud in the procurement of workers' compensation benefits.

When set forth as itemized, it is inconceivable that the Commission found there was any evidence to support the fact of a work-related injury. All logical inferences show, and the substantial evidence in the record proves that Claimant did not suffer an injury as a result of an alleged December 14, 2001, work-injury, but rather as the result of a March 2000, automobile accident.

**II. THE PUBLIC POLICY OF THE STATE OF MISSISSIPPI MANDATES THAT THE CLAIMANT FORFEITED HER RIGHTS TO FUTURE BENEFITS BY COMMITTING THE CRIME OF WORKERS' COMPENSATION INSURANCE FRAUD.**

In a time when so many Mississippians are finding it difficult to afford and/or obtain health and homeowner's insurance, the Court needs to adopt this public policy and send a clear message to the citizens of Mississippi that insurance fraud will not be tolerated. Those who commit the crime

directly contribute to the ever increasing cost of insurance. Since the legislature has not enacted laws to support the public policy of the State of Mississippi, it is the judiciary's responsibility to see that the public policy is carried through. As set forth in their Cross-Appeal, this Court is not timid to rely upon policy considerations when making judicial decisions. It should not be timid in implementing the policy urged in this case.

Judge Ishee touched upon this policy in his concurring opinion in the recent child support case Keith v. Purvis, No. 2007-CA-00495-COA (Miss.App.2008). In Keith, the minor child received a lump-sum payment in the amount of \$20,164 as back-payment of disability benefits after she and her father, Jackie Keith, became eligible for disability benefits following Keith's stroke. (§3). Keith sought an offset of monthly disability benefits against his child support obligations and a credit for excess disability benefits against his future child support obligations, or alternatively, to reimbursement for overpayment of his child support obligations. (§2). The Court found that Keith was entitled to offset his ongoing monthly disability benefits against his child support obligations but that he was not entitled to credit excess disability benefits against future child support obligations or to reimbursement for overpayment of his child support obligations. (§§8, 10). Judge Ishee filed a concurring opinion in which he stated he agreed with the majority in theory, and legally in whole, but that "this case presents certain factors that I believe must be addressed." (§25). Judge Ishee had issues with turning over an amount in excess of \$20,000 to a single parent for the "use and benefit" of a minor child, since the parent who provided the funds had no control over how they were used. (§26). He evaluated the case in the context of providing a policy that serves the best interests of the minor child. (§§ 25-26).

If Keith had earned the \$20,000 on his own, decisions on how and when the money should be spent would be his to make, with no interference from the government. However, in the case at bar, the parties have brought the courts into their lives by



choosing to have a child out of wedlock and by receiving government assistance to compensate for Keith's medical disability. The government, therefore, has a vested interest in seeing that the money is indeed used in a way that serves the best interest of Keith and Purvis's minor child.

(¶27). Recognizing the real issues of waste and fraud which may arise on the part of the custodial parent, and the resulting deprivation to the child, Judge Ishee went on to propose that the lump-sum payment should be invested through a guardianship, for the purpose of paying future education and medical expenses. (¶28). Judge Ishee proposed this policy despite the federal and state statutory laws which control social security disability benefits and child support.

Likewise, when a claimant commits the crime of fraud upon her employer, the government has a vested interest in seeing that the employer is made whole to the exclusion of the Claimant. The government has an additional interest in seeing that the law abiding citizens of the State of Mississippi are not punished because of the lawlessness of others.

The Claimant contends that she has admitted to and "paid dearly" for her crime. She contends that the Employer and Carrier will receive monetary restitution for those indemnity benefits it paid during the period of time Claimant willfully and fraudulently revised the medical reports of her treating neurosurgeon in order to receive temporary total disability benefits. However, there is no guaranty the Employer will ever see that money. The Claimant may fall behind on her payments. The Employer may pay the Claimant benefits, just to have her turn around and use those same funds to make good on her restitution to the Employer. Something is awry with this picture. As such, this Court is urged to find that the Claimant forfeited her rights to workers' compensation benefits to which she may be entitled in this claim as a result of her conviction of the crime of insurance fraud with regard to this claim.

In the alternative, and at a minimum, this Court is urged to state that the public policy of the State of Mississippi requires the Claimant forfeit any and all benefits which she received as a direct result of her fraud.

### CONCLUSION

Based upon the foregoing, this Court should reverse the Order of the Commission and render judgment in this matter finding that the Mississippi Workers' Compensation Commission committed a prejudicial error of law in finding they were duty bound to accept this doubtful claim. In the alternative, this Court should render judgment in this matter finding that the Commission's Order was against the overwhelming weight of the substantial evidence in the record.

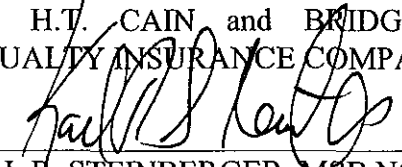
The Employer and Carrier further submit that it is this Court's duty to create a public policy exception to Section 71-3-69 of the Mississippi Code of 1972, as amended, and hold that Claimant forfeited her right to workers' compensation benefits with regard to this claim, by committing the crime of workers' compensation insurance fraud. In the alternative, this Court should hold that the Claimant forfeited her right to workers' compensation benefits directly emanating from her fraud.

However, in the event the Court is not inclined to reverse the decision of the Commission on Cross-Appeal, the decision should be affirmed as to the issues raised by the Claimant on appeal because the Commission based its decision upon substantial evidence and did not commit any errors of fact or law.

Respectfully submitted,

WOODLAND VILLAGE NURSING HOME  
d/b/a H.T. CAIN and BRIDGEFIELD  
CASUALTY INSURANCE COMPANY

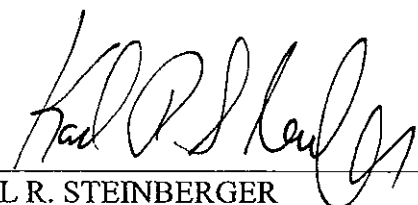
BY:

  
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STACIE E. ZORN, MSB NO. [REDACTED]

**CERTIFICATE OF SERVICE**

I, Karl R. Steinberger, of the law firm of Williams, Heidelberg, Steinberger & McElhaney, P.A., do hereby certify that I have this day mailed via United States mail, first-class, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee/Cross-Appellant to James K. Wetzel, Esquire, at his usual business address of Post Office Box I, Gulfport, MS 39502, and to the Honorable Virginia Mounger, Administrative Law Judge, Mississippi Workers' Compensation Commission, P.O. Box 5300, Jackson, MS 39296-5300 and to the Honorable Stephen B. Simpson, Hancock County Circuit Court Judge, P.O. Drawer 1570, Gulfport, MS 39502.

SO CERTIFIED this the 5 day of June, 2008.

  
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