

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-00529

ROBIN HARPER, INDIVIDUALLY AND
ON BEHALF OF REIJAH HARPER, A MINOR

APPELLANTS

VS.

CAL-MAINE FARMS, INC. AND JOHN DOES 1-2

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE
SECOND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT

I. CAL-MAINE FARMS, INC. FAILED TO CITE ANY RELEVANT AUTHORITY TO SUPPORT ITS CONTENTION THAT ROBIN HARPER'S BAD FAITH CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

A review of Cal-Maine Farms, Inc.'s appellate brief indicates that it agrees with Robin Harper, hereinafter "*Harper*", that the three year statute of limitations applies to her claims against Cal-Maine Farms, Inc., hereinafter "*Cal-Maine*", and that her cause of action for bad faith accrued only after she exhausted her administrative remedies under the Mississippi Workers' Compensation Act. Consequently, the only remaining contested issue between the parties is when does a decision from the Mississippi Workers' Compensation Commission, hereinafter "*MWCC*", become final for purposes of determining when the statute of limitations begins to run on a bad faith claim arising from the mishandling of a compensation claim.

Harper, applying Mississippi law, asserts that the statute of limitations on a bad faith claim begins to run only after a decision from the MWCC becomes final and the administrative process is exhausted which is thirty days after the order is entered, *i.e.* the appeal period lapses, and no appeal is taken. On the other hand, Cal-Maine argues that the statute of limitation began to run on Harper's claims on July 9, 2003, the date the MWCC awarded her benefits without consideration of the appeal period. In support of its position, Cal-Maine relies on *Davis v. Aetna Cas. & Sur. Co.*, 843 S.W.2d 777 (Tex.App.Texarkana 1992), *Brennan v. Western Nat. Mut. Ins. Co.*, 125 F.Supp.2d 1152 (D.S.D.S. Div. 2001),

Brown v. Liberty Mut. Ins. Co., 513 N.W.2d 762 (Iowa 1994), and *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237 (Mont. 1999), cases from other jurisdictions that can be easily distinguished from the case at bar.

A. *Davis v. Aetna Cas. & Sur. Co.*, 843 S.W.2d 777 (Tex.App.Texas 1992) is distinguishable from the case *sub judice*.

In *Davis*, plaintiff filed a bad faith action against Aetna Casualty & Surety Company, hereinafter "*Aetna*", based on its denial of his workers' compensation benefits. Plaintiff, Wilbert L. Davis, hereinafter "*Davis*", received an on the job injury on September 18, 1994 and Aetna denied the claim on January 7, 1986. The Texas Industrial Board awarded benefits to Davis on September 28, 1987 and Aetna appealed. The case went to trial and the jury found for Davis.

Davis filed his bad faith action against Aetna on March 9, 1990. The trial court determined that plaintiff's claims were barred by the applicable statute of limitations and dismissed the case. Davis appealed. The appeals court, applying established Texas law which holds that the statute of limitations on bad faith actions begins to run when the insurer denies coverage, affirmed the decision of the trial court.

Despite Cal-Maine's reliance on *Davis* in support of its argument, it would be absurd for this Honorable Court to apply *Davis* to the case at bar since Texas law, unlike Mississippi law, does not require a claimant exhaust all administrative remedies before instituting a bad faith action. Under Texas law, a bad faith cause of action accrues immediately once the insurer denies coverage, *i.e.* the limitations runs two years after the denial of coverage. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1990).

Mississippi law, on the other hand, clearly establishes that an action for bad faith denial of workers' compensation benefits accrues only after all administrative remedies have been exhausted. *Butler v. Nationwide Mut. Ins. Co.*, 712 F.Supp. 528 (S.D. Miss. 1989)(an action against a workers compensation insurer for bad faith refusal to provide benefits may not be commenced prior to the conclusion of the administrative proceeding determining whether claimant is entitled to benefits); *Walls v. Franklin Corp. And Employers Ins. Of Wasusau*, 797 So.2d 973 (Miss. 2001)(workers' compensation claimant must first have to establish his entitlement to benefits through the administrative process before pursuing a bad faith suit); *Billingsley v. United Technologies Motor Systems*, 895 F.Supp. 119, 121 (S.D. Miss. 1995)(finding for plaintiff on bad faith claim would presume plaintiff's entitlement to all benefits claimed and if made prior to the exhaustion of administrative remedies, could prove inconsistent with the workers compensation determination); *Shepard v. Boston Old Colony Ins. Co.*, 811 F.Supp. 225, 232 (S.D. Miss. 1992)(holding that the opportunity to recover damages for a bad faith determination or denial of workers' compensation benefits exists only after a determination of entitlement to workers' compensation benefits).

Fundamentally, *Davis* is distinguishable from the case *sub judice* because it patently contradicts established Mississippi law that requires the exhaustion of all administrative remedies before filing a bad faith claim. As such, this Court should disregard *Davis* since it is inapplicable to the case at bar.

- B. *Brown v. Liberty Mut. Ins. Co.*, 513 N.W.2d 762 (Iowa 1994) is distinguishable from the case *sub judice*.

In *Brown*, plaintiff sustained an on the job injury on June 11, 1987 and Liberty Mutual Insurance Company denied the claim on July 20, 1987. Plaintiff filed a claim with the Iowa Industrial Commissioner seeking workers' compensation benefits. On May 18, 1989, the commissioner awarded plaintiff workers' compensation benefits. Plaintiff filed a bad faith action against Liberty Mutual Insurance Company in federal court on March 20, 1991, and the insurer moved to dismiss the action based on the statute of limitations. The trial court granted summary judgment in favor of the insurer. Plaintiff appealed and the United States District Court for the Northern District of Iowa certified the question – when does a cause of action for bad faith failure to pay workers' compensation benefits accrue – to the Supreme Court of Iowa.

The Iowa Supreme Court determined that the administrative exclusivity of workers' compensation law does not extend to bad faith actions. Specifically, the court held that “*a claimant's cause of action for bad faith failure to pay workers' compensation benefits accrues upon receipt of notification that the carrier had denied the claim.*” *Id.* at p. 764. Applying this standard, plaintiff's cause of action accrued on July 20, 1987, the date the insurer denied the claim.

Like *Davis*, it would be absurd for this Honorable Court to apply *Brown* to the case *sub judice* since it is clear that Iowa law, unlike Mississippi law, does not require that a claimant exhaust all administrative remedies before instituting a bad faith action. Under Iowa law, a bad faith cause of action accrues immediately once the insurer denies coverage.

As discussed *supra*, Mississippi law clearly requires a claimant to exhaust all administrative remedies before pursuing a bad faith claim.

In sum, *Brown* is distinguishable from the case *sub judice* because it is inconsistent with established Mississippi law that requires the exhaustion of all administrative remedies before filing a bad faith claim. Therefore, this Court should disregard *Brown* as it is inapplicable to the case at bar.

- C. Cal-Maine's reliance on *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237 (Mont. 1999) is misplaced since *Brewington* is inconsistent with established Mississippi law.

In *Brewington*, plaintiff sustained an on-the-job injury in 1974 and the workers' compensation carrier began paying temporary total disability benefits. In February 1983, the insurer ceased paying temporary total benefits and began paying permanent partial disability benefits. Plaintiff disagreed with this change and in June 1983, filed a petition with the Montana Workers' Compensation Court. The court determined that plaintiff was permanently partially disabled and awarded him 400 weeks of benefits. Plaintiff appealed the decision to the Montana Supreme Court which determined that plaintiff's disability was permanent and total rather than partial and the insurer's action in terminating his temporary total benefits was unreasonable. The Montana Supreme Court remanded the case back to the Workers' Compensation Court so that it could issue a mandate consistent with the ruling of the appellate court. The Workers' Compensation Court issued its order on or about April 27, 1987.

On February 17, 1998, plaintiff filed a bad faith action against the insurer and the trial court dismissed the case based on the applicable statute of limitation. Plaintiff appealed and the Supreme Court determined that the bad faith claim which was based on the insurer's wrongful reduction of plaintiff's benefits was time barred. The Montana Supreme Court determined that the bad faith claim accrued on April 27, 1987, when the Workers Compensation Court entered judgment, pursuant to the mandate of the Montana Supreme Court, restoring plaintiff's total disability benefits.

A detailed review of *Brewington* indicates that the bad faith claim only accrued after the appeal from the decision of the Workers Compensation Court was resolved by the Montana Supreme Court and the Compensation Court entered its mandate pursuant to the order of the Supreme Court. *Brewington* would appear to support Harper's position that the time for *appeal* from an administrative decision should be exhausted before the statute of limitations on a bad faith claim begins to run as evidenced by the fact that the *Brewington* court determined that the statute of limitations on the bad faith claim began to run only after the appeal was heard and the case was remanded back to the Workers Compensation Court for final disposition.

Conversely, the Montana Supreme Court in *O'Connor v. National Union Fire Insurance Company of Pittsburgh, P.A.*, 87 P.3d 454 (Mt. 2004) clarified its holding in *Brewington* and stated "we determine the accrual date of a bad faith claim arising out of a separate and independent disputed issue by determining whether that particular issue has

been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case." The decisions of the Montana Supreme Court are in direct contradiction to this Court's recent decision in *Bullock v. AIU Insurance Company*, 2008 WL 1970978 (Miss. 2008), which held that when deciding when a workers compensation order becomes final as to trigger the statute of limitations for a bad faith claim, the order must resolve *all* issues presented in the matter and can only become final after the twenty day appeal period ends and no appeal is taken by the parties.

In *Bullock*, claimant filed a petition to controvert before the Mississippi Workers' Compensation Commission and on or about October 12, 1999, the administrative law judge, determined only one issue and that was whether the employer and carrier were liable for payment of benefits to the claimant. *Bullock v. AIU Insurance Company*, 2006 WL 1195465 (S.D. 2006). The ALJ issued and entered an order finding that claimant was entitled to workers compensation benefits. Employer and carrier did not appeal the ruling. The case was closed on May 25, 2004, when an order approving a commuted lump sum settlement was entered by the Commission.

On or about August 26, 2004, plaintiff filed a bad faith action against the defendant for refusal to provide workers compensation benefits. Defendants filed for summary judgment alleging that the statute of limitation had expired on the claim. The trial court determined that the ALJ's determination that Bullock was eligible for benefits became a final order on October 12, 1999, since the employer and carrier did not appeal the determination, making the statute of limitations October 12, 2002, therefore barring plaintiff's bad faith

claims. Aggrieved by the decision of the trial court, plaintiff appealed the case to the Fifth Circuit Court of Appeals.

On or about October 4, 2007, the Fifth Circuit, after reviewing the appellate briefs in *Bullock*, certified the question to the Mississippi Supreme Court of whether under Mississippi law,

an unappealed order of the Commission ALJ finding compensability but clearly not addressing and instead leaving open the amount and duration of compensation to which the employee is entitled, sufficiently exhausts the employee's administrative remedies, after expiration of the time to appeal the referenced ALJ order, the employee may then prosecute a suit for bad faith failure to pay compensation or whether (or to what extent) that depends on whether the bad faith suit alleges bad faith action (or inaction) occurring after expiration of the time to appeal the mentioned ALJ compensability order.

The Mississippi Supreme Court, when deciding when the ALJ's order became final, determined that the order became final only after all issues were resolved and the twenty day appeal period ended and no appeal was taken by the parties. *Bullock v. AIU Insurance Company*, 2008 WL 1970978 (Miss. 2008). Following this rationale, the Court held that "until that order was final, the administrative remedies were not exhausted, and therefore, no bad-faith action could be filed." The Court concluded that Bullock's bad faith claim was timely filed since the final order of the ALJ was entered in 2003, not 1999.

It is clear that *Brewington* and *O'Connor*, Montana cases, are in direct conflict with *Bullock*: *Brewington* and *O'Connor* allow a claimant to bring a bad faith action against the worker's compensation insurer without resolving the compensation claim in its entirety whereas *Bullock* requires that the compensation claim is resolved in its entirety before a bad

faith action can be instituted. Considering the fact that *Brewington*, the Montana case relied on by Cal-Maine, is in direct contradiction to established Mississippi law, it is abundantly clear that *Brewington* is inapplicable to the case at bar and should be disregarded.

D. *Brennan v. Western Nat. Mut. Ins. Co.*, 125 F.Supp.2d 1152 (D.S.D.S. Div. 2001) is distinguishable from the case sub judice.

In *Brennan*, the United States District Court for South Dakota determined that under South Dakota law a bad faith action based on the denial of worker's compensation benefits does not accrue until after the worker's compensation proceedings are complete. The *Brennan* court was not asked nor did they determine when a worker's compensation proceeding is complete for purposes of determining when the statute of limitations on a bad faith begins to run. As such, Cal-Maine's reliance on *Brennan* is displaced and should be ignored by this Court considering the fact that the central issue in this case is when does an order of the Commission become final.

Cal-Maine, in error, argues that the "overwhelming weight of authority dictates that Harper's claim for bad faith accrued on July 9, 2003 – when she exhausted her administrative remedies," when in actuality the cases cited and relied on by Cal-Maine as discussed above are easily distinguishable from the case at bar and can not be used to effectively support Cal-Maine's argument. Without the support of these cases, Cal-Maine's argument lacks any substantive authority.

It is well established that the Mississippi Supreme Court is not required to review arguments which are not properly supported by reasons and authority. *Hoops v. State*, 681

So.2d 521, 535 (Miss. 1996). Miss. R. App. P. 28(a)(1)(6) requires that an argument contain the contentions of the party with respect to the issues presented and the reasons for those contentions, with citations to the *authorities, statutes* and parts of the record relied on. Failure to cite relevant authority obviates any obligation by this Court to review an argument. *Byrom v. State*, 863 So.2d 836, 862 (Miss. 2003). Applying Miss. R. App. P. 28(a)(1)(6), this Court should decline to review Cal-Maine's argument that Harper's claim for bad faith accrued on July 9, 2003, since the cases used by Cal-Maine to support its argument are distinguishable and irrelevant. As such, the trial court's grant of summary judgment should be reversed and the case remanded back to the Circuit Court of the Second Judicial District of Hinds County, Mississippi for further proceedings.

II. CAL-MAINE IS WRONG IN ITS ASSERTION THAT BULLOCK DOES NOT SUPPORT HARPER'S ASSERTION THAT HER BAD FAITH CLAIM ACCRUED ON OR ABOUT AUGUST 9, 2003.

Cal-Maine, in error, alleges that *Bullock* has no application in this case because the main point of contention in *Bullock* was whether the October 12, 1999, order could be considered a final order. Justice Dickinson in his dissent summarized the issues presented by the Fifth Circuit as "*when [does] the statute of limitations begin to run for bringing a tortious breach-of-contract action against an employer, a workers' compensation insurance carrier, and a third-party claims administrator.*" It is clear that Cal-Maine is mistaken about the issues presented in *Bullock* and their application to this case. *Bullock* is the best guidance on the issues presented in the case *sub judice*.

The Mississippi Supreme Court, when deciding when the ALJ's order became final, determined that the order became final only after the twenty day appeal period ended and no appeal was taken by the parties. Applying the rationale of *Bullock* to the case sub judice, it is clear that Harper's claims were timely filed since the order of the Commission was not final until the thirty day appeal period lapsed and the administrative remedies would only be exhausted after the appeal period lapsed.

The MWCC order was entered on July 9, 2003, and it became final on or about August 9, 2003, when the time for appeal lapsed and no appeal was filed. As such, the statute of limitations for any related bad faith claims began to run on August 9, 2003, and lapsed on August 9, 2006. Harper's claims were timely filed on August 4, 2006. Therefore, the trial court's grant of summary judgment should be reversed and the case remanded back to the Circuit Court of the Second Judicial District of Hinds County, Mississippi for further proceedings.

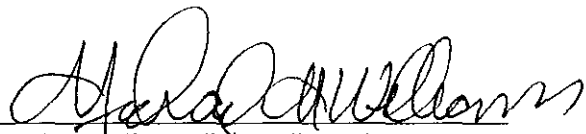
CONCLUSION

The trial court erred when it granted summary judgment in favor of Cal-Maine, since Harper's claims were timely filed. Therefore, the order granting summary judgment in favor of Cal-Maine should be reversed and the case should be remanded for further proceedings.

SO REPLIED, the 22nd day of October, 2008.

Respectfully Submitted,

ROBIN HARPER, Individually and on
Behalf of REIJAH HARPER, a Minor

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CERTIFICATE OF SERVICE

I, MICHAEL M. WILLIAMS, attorney for appellant ROBIN HARPER, Individually and on behalf of Reijah Harper, certify that I have this day mailed, postage prepaid, a true and correct copy of APPELLANTS' REPLY BRIEF to:

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Honorable Bobby Burt DeLaughter
CIRCUIT COURT JUDGE
Post Office Box 27
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THIS, the 22nd day of October, 2008.


MICHAEL M. WILLIAMS