IN THE SUPREME COURT OF MISSISSIPPI

CAL-MAINE FOODS, INC.	**PETITIONER-APPELLEE**
V.	**NO. 2008-CT-00529-SCT**
ROBIN HARPER, Individually and on behalf of REIJAH HARPER, a Minor	**RESPONDENT-APPELLANT**

APPEAL FROM THE DECISION OF THE HINDS CIRCUIT COURT, SECOND JUDICIAL DISTRICT

PETITIONER'S SUPPLEMENTAL BRIEF UPON GRANT OF WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

Petitioner-Appellee, Cal-Maine Foods, Inc. ("Cal-Maine"), pursuant to M.R.A.P. 17(h), files this its Supplemental Brief upon Grant of Writ of Certiorari. Part I of this brief will summarize the argument for reversal of the court of appeals' decision below, as presented in the Petition.[1] Part II will rebut arguments Plaintiff made in her response opposing rehearing below.

I. The Court of Appeals Incorrectly Reversed the Trial Court.

Largely on the basis of *T.C. Fuller Plywood Co. v. Moffett*, 95 So. 2d 475 (Miss. 1957), the court of appeals agreed with the plaintiff, Harper, that pursuant to Miss. Code Ann. § 71-3-51, an order of the Workers' Compensation Commission ("the Commission") "did not become final until after the thirty-day appeal period had expired," so that the statute of limitations on Harper's bad faith claim began to run only at the end of that 30-day period. Opinion at ¶¶ 10-11.

Contrary to Harper's position that "the decision of the Commission did not become final until after the time for appeal had lapsed," Op. at ¶ 7, the express language of § 71-3-51 refers to the order's being final upon its being entered:

> The **final award** of the commission **shall be** conclusive and binding unless either party to the controversy shall, within thirty (30) days from

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[1]This summary is owing to the literal language of M.R.A.P. 17(h), which states that this Court's review "shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed" — which seems to exclude the petition for writ of certiorari. In an abundance of caution, therefore, Petitioner recapitulates its Petition herein; if the rule should not be construed so literally, its amendment by this Court might be of aid to future litigants.

> the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the circuit court of the county in which the injury occurred.

(emphasis added). Regardless of whether or not the order is appealed, it is "final" upon "its filing." What happens after 30 days is not that it becomes "final," but that it becomes "conclusive and binding."

The Opinion confuses "final" in the sense of "appealable" with "final" in the sense of "conclusive and binding" such that no further appeal is allowed. The statute clearly says that the order which may be appealed is a *final* order, dovetailing with the established rule that only a final order, not an interlocutory order, may be appealed: "By statute, only final orders of the Workers' Compensation Commission are appealable." *Blankenship v. Delta Pride Catfish, Inc.*, 676 So. 2d 914, 916 (Miss. 1996) (citing Miss. Code Ann. § 71-3-51). If, as Harper argued, the order became *final* only after it was no longer *appealable*, that would set *Blankenship* on its head.

Contrast § 71-3-51 with the language of § 71-3-47 concerning ALJ decisions, where the Legislature did in fact say, with regard to an ALJ's decision, "[t]his decision *shall* be final *unless* within twenty (20) days a request or petition for review by the full commission is filed" (emphasis added). Here, the Legislature does expressly state that the decision "shall be final," i.e., *is not final yet, but will be in the future*, if no appeal is made to the full Commission. The contrast with § 71-3-51, where the Legislature spoke of a "final award of the commission" upon the date of entry — *not* an "award that shall be final" at some later date — shows that the

Legislature did not intend the appealability of the final award to make it anything other than a *final* decision upon entry. What "*shall*" happen, in the express language of § 71-3-51, is not that the order "shall be" final — it already is — but that it "shall be conclusive and binding."

As this Court recently held in *Bullock v. AIU Insurance Co.*, 995 So. 2d 717 (Miss. 2008), § 71-3-47 expressly applies only to the *interlocutory* decision of whether some award should be made, which is thus not a final order for purposes of exhausting one's remedies. *Bullock*, 995 So. 2d at 721. *Bullock* distinguishes such a decision from precisely the kind of order at issue in the present case: a monetary "award" is what "constitute[s] a final order *from which the statute of limitations begins to run*" in a bad faith case. *Id.* at 723 (emphasis added). This holding of the Court is consistent with the plain language of § 71-3-51: "the *final* award of the commission." The statute "begins to run" from the final order, not from 30 days after the final order, just as a trial court's final judgment is "final" in the sense that it binds the parties and may be executed upon (after the 10-day M.R.C.P. 62(a) automatic stay). The ability of parties to execute upon the judgment has nothing to do with whether the judgment is appealable.

Thus, administrative agencies and trial courts hand down "final judgments" and "final orders" every day, without anyone's being confused about what "final" means: "final" in the sense that one has *gone as far as one can go at that level*, but not "final" in the sense that there is no appeal to a higher level. We emphasize "gone

as far as one can go" because that is the plain and simple meaning of "exhausting one's remedies," which is the issue in this case: at what time Harper had exhausted her remedies at the administrative level. That exhaustion occurred when the Commission's final order was *filed* and *no further recourse could be had from the agency itself.* That is when the statute of limitations began to run on Harper's bad faith claim.

The Opinion's heavy reliance on the *T.C. Fuller* decision was erroneous, because the issue in *T.C. Fuller* was very different: this Court had to reconcile the 30 days allotted for appeal of a final order of the Commission (under the precursor of § 71-3-51) with the 14 days allotted for paying an award "after it becomes due," so that an employer who might wish to appeal did not become liable for fines during the 30 days. *T.C. Fuller*, 95 So. 2d at 477-78.

Misapplying that case to the context of bad faith suits, the Opinion failed to distinguish between "final" (in the sense of "appealable") and "conclusive and binding" (in the sense of "pay the money") in § 71-3-51's precursor statute (which was materially identical to the present statute). Although this Court did speak generally of "a legislative intent to postpone the *conclusiveness and finality* of the order until the expiration of the thirty days allowed for appeal," *T.C. Fuller*, 95 So. 2d at 478 (emphasis added), the context of the specific issue in *T.C. Fuller* made it clear that the real issue concerned when the final order became "conclusive and binding" (i.e., when liability for a 20% penalty attached), as opposed to there being

any issue of when the final word had been heard from the Commission and no further remedies remained to be exhausted. This Court did not need to spell out that distinction, because the issue of finality for purposes of exhaustion of remedies *was not before it*. Where that issue is properly before this Court, as in the present case, there is no difficulty in distinguishing *T.C. Fuller* and adhering to the Legislature's statement that the Commission's *final* order is what may be appealed, and what therefore demonstrates that administrative remedies have been exhausted.

Reading *T.C. Fuller* in this manner, and distinguishing "final" in the sense of exhaustion of remedies from "final" in the sense of "conclusive and binding," easily removes any seeming conflict between that case and those cases holding that a Commission order becomes appealable when issued, such as *Blankenship*. Moreover, it is the only reading that is consistent with the express statutory language as demonstrated above, and with *Bullock*, as shown below.

It is crystal-clear from the *Bullock* decision that this Court equates "final" in the sense of "appealable" with "final" in the sense of "exhaustion of administrative remedies" for purposes of the accrual of a bad faith cause of action:

> **Because no "award" was made or denied by the October 1999 order, it did not constitute a final order from which the statute of limitations began to run** on Bullock's bad-faith claim.
>
> Our decision is further supported by general principles of administrative law. As a general rule, administrative orders that determine liability **but do not decide damages** are not considered final for the purpose of judicial review.

Bullock, 995 So. 2d at 722 (emphasis added). This Court equated "final" for appeal purposes with "final" for purposes of filing a bad faith claim. Had the Commission in *Bullock* issued a "final order" with award — as did the Commission in the present case on July 9, 2003 — the statute of limitations would have begun to run *on that date*. This Court went on to hold:

> We recognize that our precedent requires only a determination that a plaintiff is "entitled" to compensation before a bad-faith action may be brought. [Citations omitted.] We affirm these decisions, but emphasize that **a determination of entitlement must be final**. Because the October 1999 order **did not make or deny an award** and was interlocutory, **it did not constitute a final order from which the statute of limitations commenced to run.**

Id. at 723 (emphasis added). There is no way to read the final sentence quoted as saying anything other than that a "final award" by the Commission *is* a "final order" which starts the clock both on the 30 days for appeal to circuit court, *and* on the three years' statute of limitations for bad faith actions. No other interpretation is consistent with *Bullock*, with *Blankenship*, and with § 71-3-51. The statute of limitations began to run on Harper's bad faith claim on July 9, 2003, when the final order of the Commission was entered, and expired on July 9, 2006, a month before she filed suit.

II. Harper's Arguments Below Are Unavailing.

Harper filed no response to Cal-Maine's Petition for Writ of Certiorari, but perhaps may file a supplemental brief repeating her arguments in her Response to Motion for Rehearing filed in the court of appeals. Cal-Maine thus takes the opportunity to rebut those arguments.

Although Harper cited *Triplett v. Farm Fresh Catfish Co.*, 737 So. 2d 438 (Miss. Ct. App. 1999), that case merely held that the 30 days to appeal the Commission's final order runs from its date of entry, not from notice of the order. *Triplett*, 737 So. 2d at 441. *Triplett* thus supports Cal-Maine's position, not Harper's.

Harper attempted to distinguish *Blankenship* by claiming that this decision "sets no precedent as to the ultimate issue of when a Commission order becomes final." Resp. at 2. However, as above, Cal-Maine cited *Blankenship* merely for the rule that a final order by the Commission is appealable. The logical inference from this, of course, is that an order is *final* when it is *appealable*, and thus does not become final only *after* the time to appeal has run — contrary to Harper's position.[2]

The federal cases cited by Harper are of limited support for her; at best, they demonstrate that the federal courts themselves are confused about the law, thus making this Court's review of the Opinion especially appropriate. (As this Court will recall, the federal courts were sufficiently unclear on the subject that the Fifth Circuit certified a similar question in *Bullock*, which is how that case came before this Court. *Bullock v. AIU Ins. Co.*, 503 F.3d 384 (5th Cir. 2007).)

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[2]Although Harper cited *McCain v. Northwestern National Insurance Co.*, 484 So. 2d 1001 (Miss. 1986), for the proposition that a bad faith suit may not commence "prior to the conclusion of the administrative proceeding determining whether claimant is entitled to benefits," Resp. at 4, we do not find that proposition in *McCain*, and Harper provides no pinpoint citation. Regardless, the rule she states is correct but unavailing: the bad faith suit may be brought *at the conclusion of the administrative proceeding*, i.e., when the Commission's final order in her favor issues.

In *Billingsley v. United Technologies Motor Systems*, 895 F. Supp. 119 (S.D. Miss. 1995), the plaintiff sued for bad faith while the defendants' appeal from an ALJ order was pending before the Commission. When the Commission affirmed, the defendants appealed to circuit court. *Billingsley*, 895 F. Supp. at 120. The district court, confessedly making an *Erie* guess, held that the administrative process was still open and thus that the plaintiff's suit must be dismissed without prejudice. *Id.* at 122. Nothing in *Billingsley*, however, affects whether the bad faith statute of limitations (which was not an issue in that case) begins to run from the date of the Commission's final order or from the expiration of the 30 days' appeal time; to the extent that *Billingsley* implies otherwise, it is not consistent with the precedents cited in part I above, and the district court's *Erie* guess simply went astray, like the district court's *Erie* guess in *Bullock*.

The odd facts in *Shepard v. Boston Old Colony Insurance Co.*, 811 F. Supp. 225 (S.D. Miss. 1992), provide even less support for Harper. Shepard obtained Louisiana workers' compensation benefits, sued in Louisiana federal court when they were interrupted, and obtained resumption of the benefits plus all other relief available under Louisiana's workers' compensation law. *Shepard*, 811 F. Supp. at 227. Shepard then filed a bad faith suit in Mississippi circuit court, which was removed to Mississippi federal court; that court then held that no bad faith remedy was available under Mississippi law without a prior decision by Mississippi's own Commission. *Id.* at 227, 232. *Shepard* in fact held that "it is clear that a bad faith

action for termination or denial of workers' compensation benefits is completely derivative of an underlying action to recover benefits under the Mississippi Workers' Compensation Act," *id.* at 232, which supports the position that such an action arises from the Commission's final order determining what benefits are owed — if there is no award, there is no bad faith denial of benefits. Legal entitlement to an award is what triggers the cause of action, and that entitlement begins to exist when the Commission's final order is entered, not years later after the award is affirmed upon appeal to the courts.

Finally, in her Response below Harper criticized Cal-Maine's reading of the *Bullock* decision, but her criticism rests merely on the fact that an interlocutory order, not a final order, was before this Court. But we do not dispute that. *Bullock* is relevant because this Court *distinguished* the fact pattern before it, where an interlocutory order did not commence the statute of limitations for a bad faith suit, from the fact pattern where a *final* order was issued. To repeat: "Because the October 1999 order *did not make or deny an award* and was interlocutory, *it did not constitute a final order from which the statute of limitations commenced to run.*" *Bullock*, 995 So. 2d at 723 (emphasis added). Harper does not explain away this language, and thus fails to show why *Bullock* should not control the result in this case. In *Bullock*, this Court expressly affirmed the Fifth Circuit's holding that a plaintiff "must exhaust the *administrative* remedy provided and establish his entitlement to workers' compensation benefits *in that process* prior to commencing a court action

for tort damages for the same failure to pay his claim." *Id.* (quoting *Dial v. The Hartford Acc. & Indem. Co.*, 863 F.2d 15, 17 (5th Cir. 1989)) (emphasis ours). The "administrative process" is all that must be exhausted before a plaintiff may file a bad faith suit, *not* the additional "process" of judicial appeals, if any. And that process is exhausted, and the statute of limitations begins to run, when the Commission issues its final order.

Bad faith suits may be brought within three years from the date the Commission enters its final order. Harper failed to do so, and her suit was properly dismissed by the circuit court. This Court should reinstate that dismissal.

WHEREFORE, PREMISES CONSIDERED, Cal-Maine asks that this Court REVERSE the June 30, 2009 opinion of the court of appeals (and the November 10, 2009 denial of rehearing) in this matter, and issue its judgment AFFIRMING the judgment of the Hinds Circuit Court, Second Judicial District.

Respectfully submitted, this the ***8th*** day of February, 2010.

CAL-MAINE FOODS, INC.

By: Andy Lowry

Andy Lowry
Counsel for Petitioner-Appellee

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner-Appellee hereby attests that he has today caused a true and complete copy of the foregoing document to be served upon the following via United States mail (postage prepaid):

The Honorable Malcolm Harrison
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So certified, this the ***8th*** day of February, 2010.

Andy Lowry