

CAUSE NO. 2008-WC-391-COA

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WAL-MART SUPERCENTER. and AMERICAN
HOME ASSURANCE COMPANY ,

APPELLANTS

v.

MELISSA WINTER

APPELLEE

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

BRIEF FOR WAL-MART SUPERCENTER and AMERICAN HOME ASSURANCE
COMPANY

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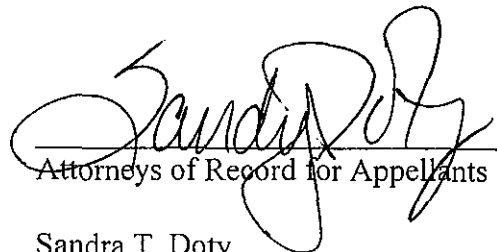
APPELLEE

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 and/or the judges of the Court of Appeals may evaluate their possible disqualification or recusal.

1. Wal-Mart Supercenter, Appellant
2. American Home Assurance Company, Appellant
3. Melissa Winter, Claimant
4. Tina M. Scott, Esquire and Rick Fox, Fox Law Firm, attorneys representing the Claimant.
5. Sandra T. Doty and Roxanne P. Case, Wilkins, Stephens & Tipton, P.A., attorneys for the Appellants
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 12th day of August, 2008.


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

STATEMENT REGARDING ORAL ARGUMENT

Appellants, Wal-Mart Supercenter and American Home Assurance Company, request oral argument. This appeal is not frivolous and the dispositive issue has not been authoritatively decided. Additionally, while the significant facts of this case and the legal arguments are clearly presented in this brief, the decision process would be significantly aided by oral argument because it will add clarity to the issue in dispute and the merits of this appeal.

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RULES

Mississippi Rules of Appellate Procedure Rule 4(h)	5, 7, 9, 10
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STATEMENT OF THE ISSUE

Whether the lower court erred in granting Appellee's Motion to Re-Open Time for Appeal, based on Appellee's assertion that she did not receive notice of the entry of the Circuit Court's Order from the clerk of the lower court, or counsel of record, in light of evidence presented by the Appellant that Appellee was provided the executed Order and filing letter to the court clerk, requesting that said Order be filed.

Appellants further request that this Court delineate which Circuit Court matter has been appealed by Appellee, which is the basis of a separate appeal before this Court, under No. 2007-WC-01717-COA. Although Appellee had two files before the Circuit Court, assigned Nos. U-2006-017-5216 and U-2006-018-5218, respectively, she only filed one notice of appeal. The underlying Circuit Court actions were never consolidated. As such, only one of these two Circuit Court cases has been appealed. If Appellee desired to appeal both of the Circuit Court actions, two separate appeals and filing fees were required. As such, Appellant is seeking this Court's guidance and determination as to which of these lower court matters has been appealed.

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the court below.

The underlying substantive issue in this case, which is the subject of Melissa Winters' separate appeal before this Court, No. 2007-WC-01717-COA, stems from a Mississippi Workers' Compensation Commission Order, entered by the Administrative Judge on November 10, 2003. This Order was later affirmed by the Full Commission on December 16, 2005. Claimant appealed the ruling to the Circuit Court of Union County, Mississippi, which was assigned two Circuit Court cause numbers, No. U-2006-017-5216 and U-2006-018-5218. These matters were never consolidated. After oral arguments, the Circuit Court of Union County affirmed the rulings of the Mississippi Workers' Compensation Full Commission. This Order was entered by Judge Howorth on August 21, 2007, and filed with the Circuit Court Clerk on August 27, 2007.

Claimant filed her Notice of Appeal from the Order of the Circuit Court of Union County on October 2, 2007, thirty six (36) days following the date of entry of the Order she is appealing from. Based on this untimely filing, on October 8, 2007, the Employer-Carrier filed an objection to, and requested dismissal of, Claimant's Notice of Appeal in the Circuit Court of Union County. In her response, Claimant conceded that she did not timely file this appeal, and thereafter filed a Motion to Re-Open Time for Appeal. Employer-Carrier filed their Response in Opposition to Claimant's Motion to Re-Open Time for Appeal on October 26, 2007. Claimant then filed her Designation of Record on November 8, 2007. On November 26, 2007, employer and carrier filed an Objection to Appellant's Designation of Record and again motioned the court for dismissal. The lower court denied Employer-Carrier's objection to Appellant's Designation of Record and Motion to Dismiss, and granted Claimant's Motion to Re-Open Time for Appeal.

B. Statement of facts.

The underlying substantive issue in this case, which is the subject of Melissa Winters' separate appeal before this Court in case number 2007-WC-01717-COA, stems from a Mississippi worker's compensation matter. The Claimant filed two Petitions to Controvert with the Mississippi Workers Compensation Commission on July 3, 2002. These cases were assigned file numbers 0112064-H-5216 and 0204000-H-5218, respectively. (W. Comp. R. at 1-4 for 0112064-H-5216 and W. Comp. R. at 1-4 for 0204000-H-5218, See Record Excerpt No. 5-8 and 9-12.) An Amended Petition to Controvert for case number 0112064-H-5216 was filed on September 23, 2002, alleging a work related injury occurred on February 25, 2002. (W. Comp. R. at 6-9, See Record Excerpt No. 13-16.) An Amended Petition to Controvert for case number 0112064-H-5218 was filed on September 24, 2002, alleging a work related injury occurred on June 30, 2000. (W. Comp. R. at 6-8, See Record Excerpt No. 17-19.) The Employer-Carrier filed their Answer in case number 0112064-H-5216 wherein the February 25, 2002, injury was admitted. (W. Comp. R. at 10-13, See Record Excerpt No. 20-23.) A separate Answer was filed by Employer-Carrier in case number 0112064-H-5218 wherein the June 30, 2002, injury was denied. (W. Comp. R. at 9-12, See Record Excerpt No. 24-27.) On November 10, 2003, Orders in both cases were issued, Dismissing Claimant's Case for Failure to File a completed Prehearing Statement. (W. Comp. R. at 31 for Case Number 0112064-H-5216 and W. Comp. R. at 28 for Case Number 0204000-H-5218, See Record Excerpt No. 28 and 29.) No appeal of these Orders was sought within twenty (20) days, thereby rendering each a final Order as of November 30, 2003.

On October 26, 2004, the Claimant filed a Motion to Reopen and Reinstate Claim on each case. (W. Comp. R. at 33 for Case Number 0112064-H-5216 and W. Comp. R. at 31 for Case Number 0204000-H-5218, See Record Excerpt No. 30-31 and 32-33.) Employer-Carrier filed their

Responses to each respective Motion to Reopen, asserting that Claimant had failed to demonstrate a change in circumstances or mistake in material fact in support of her motion as required pursuant to Miss. Code Ann. § 71-3-53 (Supp. 2003). (W. Comp. R. at 39-41 for Case Number 0112064-H-5216 and W. Comp. R. at 37-39 for Case Number 0204000-H-5218, See Record Excerpt No. 34-36 and 37-39.) These causes came on for hearing on March 9, 2004, before Administrative Judge Cindy Wilson. Judge Wilson entered an Order on March 9, 2005, in each case, denying Claimant's Motion to Reopen and Reinstate claim. (W. Comp. R. at 63-64 for Case Number 0112064-H-5216 and W. Comp. R. at 56-58 for Case Number 0204000-H-5218, See Record Excerpt No. 40-41 and 42-44.)

From these Orders, the Claimant appealed to the Full Commission. (W. Comp. R. at 65 for Case Number 0112064-H-5216 and W. Comp. R. at 59 for Case Number 0204000-H-5218, See Record Excerpt No. 45-46 and 47-48.) These appeals were heard by the Full Commission on June 27, 2005. (W. Comp. R. at 69 for Case Number 0112064-H-5216 and W. Comp. R. At 66 for Case Number 0204000-H-5218, See Record Excerpt No. 49 and 50.) The Full Commission affirmed Administrative Judge Wilson's dismissal in each case, in its Orders of December 16, 2005. (W. Comp. R. at 82 for Case Number 0112064-H-5216 and W. Comp. R. at 75 for Case Number 0204000-H-5218, See Record Excerpt No. 51-56 and 57-60.)¹

Claimant appealed the ruling of the Full Commission to the Circuit Court of Union County, Mississippi. (See Record Excerpts No. 61-63 and 64-66.) These appeals were assigned Circuit Court numbers 2006-017-5216 and 2006-018-5218. The Circuit Court of Union County affirmed

¹ Due to the extreme confusion caused by the different file numbers assigned, which were erroneously indicated at times in the Circuit Court file, in an effort to simplify and create clarity, from this point on in Appellant's brief, all document references will be made only to Appellant's record excerpts.

the rulings of the Mississippi Worker's Compensation Full Commission; the Order was entered by the Honorable Judge Andrew K. Howorth on August 21, 2007. (See Record Excerpt No. 67.)

The Claimant/Appellee then attempted to appeal the Circuit Court's affirmation of the Full Commission findings. (See Record Excerpt No. 68.) Pursuant to Mississippi Rule of Appellate Procedure 4(h), Claimant/Appellee was required to file any appeal or notice of appeal from the Circuit Court's Order within thirty (30) days from the entry of the Order. This established that Claimant/Appellee was required to file her appeal or notice of appeal no later than September 26, 2007. Claimant/Appellee did not file her Notice of Appeal until October 2, 2007, thirty-six (36) days following the entry of the Order. (See Record Excerpt No. 68.) Accordingly, pursuant to the Mississippi Rules of Appellate Procedure, Claimant/Appellee failed to timely file her Notice of Appeal from the Order of the Circuit Court of Union County, Mississippi.

The Employer-Carrier/Appellant filed an Objection to and Motion to Dismiss regarding Claimant/Appellee's Notice of Appeal. (See Record Excerpt No. 69-71.) In response to Employer-Carrier/Appellant filing an objection to, and requesting dismissal of Claimant/Appellee's Notice of Appeal, Claimant/Appellee conceded that she did not timely file her appeal. (See Record Excerpt No. 72-74.) She stated that the reason for her untimely filing was due to the fact she did not receive notice of the filing of the Circuit Court Order. Thereafter, Claimant/Appellee filed a Motion to Re-Open Time for Appeal. (See Record Excerpt No. 75-76.) Claimant/Appellee then filed a Designation of Record on November 8, 2007. (See Record Excerpt No. 77-78.) Employer and Carrier filed a Response in Opposition to Appellant's Motion to Re-Open Appeal. (See Record Excerpt No. 79-83.) Employer and Carrier also filed an Objection to Appellant's Designation of Record and Motion to Dismiss Appeal. (See Record Excerpt No. 84-85.) On February 12, 2008, the Circuit Court denied Employer-Carrier's Objection to Designation of Record and Motion to

Dismiss, and granted Claimant's Motion to Re-Open Time for Appeal, extending the time to appeal to October 2, 2007. (See Record Excerpt No. 86.)

SUMMARY OF THE ARGUMENT

According to Mississippi Rule of Appellate Procedure 4(h), a Motion to re-open time for appeal is to be granted only upon a party establishing they did not receive notice of entry of an Order from the clerk or any other party within 21 days of the date of said entry, and that any such Motion to Re-Open Time for Appeal must be filed within seven (7) days from the date the party becomes aware of the entry of the underlying Order, or within 180 days of the entry of the Order, whichever is shorter. M.R.A.P. 4(h).

Additionally, Rule 31(a) of the Mississippi Rules of Appellate Procedure specifically addresses the issue of untimely filing of briefs. Rule 31(a) of the Mississippi Rules of Appellate Procedure states, "...the failure of the Clerk to give, or other party to receive notice of the filing of the record, shall not excuse any delay in filing briefs."

In the present case, the Appellee did not meet her burden as required by M.R.A.P. 4(h). In her Motion to Re-Open Time for Appeal, Appellee did not dispute that she received a copy of August 24, 2007, correspondence to the Union County Circuit Court Clerk, requesting that the executed Order Affirming Full Commission be filed. Further, Appellee did not address nor confirm what day she received notice, or how she received notice of the Order Affirming Full Commission, as is required under Mississippi Rule of Appellate Procedure 4(h). Accordingly, a determination on her Motion to Re-Open Time for Appeal could not be established or considered, due to the fact that she did not address with the Court whether she filed her Motion within seven (7) days of receiving notice, as required under the Rule. Absent a specific finding by the Circuit Court, the grant of time to reopen under the Rule was inappropriate and should be reversed.

Appellee also had two separate cases before the Circuit Court of Union County, assigned Civil Action Numbers 2006-017-5216 and 2006-018-5218. She is presumably attempting to appeal both cases; however, Appellee failed to consolidate the two cases at the lower court level and thus, has only perfected appeal on one of those cases. Claimant/Appellee filed only one Notice and paid only one filing fee. Accordingly, only one appeal can stand perfected and the other should die as Claimant/Appellee has already petitioned the lower court to re-open her time for appeal and the fourteen (14) days from said Order granting same has run. Appellant leaves it to the discretion of the Court to make a determination of which Circuit Court matter the Appellee has appealed in her action before this Court, assigned Number 2007-WC-01717-COA.

The Appellant herein respectfully asks this Court to reverse the Opinion and Order of the lower court granting Appellee's Motion to Re-Open Time for Appeal and denying Appellants' Objection to Claimant's Designation of the Record and Motion to Dismiss Appeal. Additionally, Appellants request that this Court confirm that only one of the two lower court cases has been appealed by Appellee, in her separate appeal before this Court, assigned No. 2007-WC-01717-COA, and delineate which of the two Circuit Court matters has been appealed.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing issues of law, the appellate court's proper standard of review is de novo. *Shelton v. State*, 984 So. 2d 320 (Miss. Ct. App., 2007). Accordingly, this Court should use a de novo standard in evaluating the issues presented in the present brief.

II. THE LOWER COURT ERRED IN GRANTING THE APPELLEE'S MOTION TO REOPEN TIME FOR APPEAL AS APPELLEE FAILED TO MEET THE REQUISITE BURDEN OF PROOF TO DEMONSTRATE SHE DID NOT RECEIVE NOTICE OF ENTRY OF AN ORDER BY THE CIRCUIT COURT.

According to Mississippi Rule of Appellate Procedure 4(h), a Motion to re-open time for appeal is to be granted only upon a party establishing they did not receive notice of entry of an Order from the clerk, or any other party, within 21 days of the date of said entry, and that any such Motion to Re-Open Time for Appeal must be filed within seven (7) days from the date the party becomes aware of the entry of the underlying Order, or within 180 days of the entry of the Order, whichever is shorter. M.R.A.P. 4(h).

In this case, the Claimant did not meet her burden as required by M.R.A.P. 4(h). As stated in Employer-Carrier's Response in Opposition to Claimant's Motion to Re-Open Time for Appeal, the Appellant provided counsel for Appellee a copy of correspondence dated August 24, 2007, addressed to the Union County Circuit Court Clerk, requesting that the Order Affirming Full Commission, which had been executed by Judge Howorth, be filed in the Circuit Court file. Accordingly, Appellee did receive notice that the said Order had been executed, and that same had been sent to the Circuit Court Clerk for filing. Thus, Appellee was clearly on notice that the appeal

time was imminent and she should timely follow up on same. Appellee's actions do not constitute excusable neglect.

In Re A.M.A., 2007 WL 4303807 (Miss. Ct. App., 2007), is a case in which this Court addressed that petitioner's assertion that he was entitled to the grant of an Order to Reopen the Time for Appeal. This Court held that because the record did not reflect the date upon which the petitioner received notice that the judgment was entered, it could not be determined whether petitioner's motion to Reopen Time for Appeal was made within "7 days of receipt of such notice..." as required by M.R.A.P. 4(h).

In her Motion to Re-Open Time for Appeal, Appellee did not dispute that she received the August 24, 2007, correspondence. In fact, Appellee did not address nor confirm what day she received notice, nor how she received notice of the Order Affirming Full Commission, as is required under Mississippi Rule of Appellate Procedure 4(h). Accordingly, the lower court could not determine whether Appellee's Motion to Re-Open Time for Appeal was made within the requisite time frame as required under M.R.A.P. 4(h), and therefore, should have been denied.

Rule 31(a) of the Mississippi Rules of Appellate Procedure specifically addresses the issue of untimely filing of briefs. Rule 31(a) of the Mississippi Rules of Appellate Procedure states, "...the failure of the Clerk to give, or other party to receive notice of the filing of the record, shall not excuse any delay in filing briefs."

It is based on the uncontroverted fact of Appellee's failure to timely file her Notice of Appeal, and subsequent failure in establishing the requisite burden of proof to re-open time for appeal, that Appellants file this appeal and ask this Court to reverse the Circuit Court of Union County's Opinion and Order dated February 12, 2008, granting Appellee's Motion to Re-Open Time

for Appeal as well as the denial of the Appellants' Motion to Dismiss Appeal and Objection to Appellee's Designation of Record.

III. APPELLEE FAILED TO PROPERLY APPEAL HER CASES; HER FILING OF ONLY ONE NOTICE OF APPEAL AND ONE FILING FEE DETERMINES THAT ONLY ONE MATTER HAS BEEN APPEALED.

Claimant had two separate cases before the Circuit Court of Union County, Mississippi, assigned Circuit Court Numbers U2006-017-5216 and U2006-018-5218, and is presumably attempting to appeal them both; however, Appellee did not consolidate the two cases at the lower court level. Further, she only filed one Notice of Appeal and paid only one filing fee for appeal to the Mississippi Supreme Court, and thus has only perfected her appeal for only one of these matters.

Claimant's single Notice of Appeal erroneously lists both Circuit Court file numbers. Since these two matters were never consolidated at the lower court level, Appellee was required to file two separate appeals if she wished to appeal both lower court matters. Only one of these matters has been appealed, and Appellants request that this Court indicate which of these cases has been appealed. Until such determination is made, Appellants have appealed both of the lower court matters to ensure preservation of same.

CONCLUSION

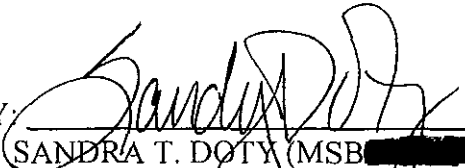
The Appellant herein respectfully asks this Court to reverse the Opinion and Order of the lower court granting Claimant's Motion to Re-Open Time for Appeal and denying Employer-Carriers' Objection to Claimant's Designation of the Record and Motion to Dismiss Appeal on February 12, 2008.

Appellants also request that this Court delineate which of the two lower court matters has been properly appealed to this Court.

Respectfully submitted,

WAL-MART SUPERCENTER and AMERICAN HOME
ASSURANCE COMPANY, Appellants

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

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

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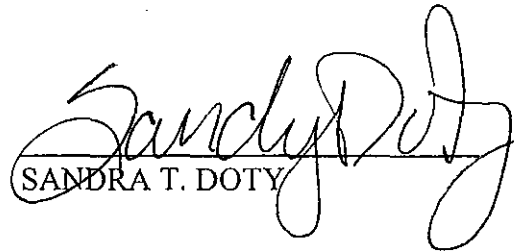
CERTIFICATE OF SERVICE

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

Tina M. Scott, 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 12th day of August, 2008.


SANDRA T. DOTY