IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

SUPERIOR MANUFACTURING GROUP	**EMPLOYER/ APPELLANT**
&	
ROYAL INDEMNITY COMPANY	**CARRIER / APPELLANT**
VS.	**CAUSE NO.: 2010-WC-00534-COA**
BILL CRABTREE	**CLAIMANT/APPELLEE**

On Appeal from the Circuit Court of Jones County, Mississippi

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REPLY BRIEF OF EMPLOYER AND CARRIER / APPELLANTS

ORAL ARGUMENT REQUESTED

PREPARED AND SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Employer and Carrier certifies that the following listed persons and/or business entities have an interest in the outcome of this case. These representations are made in order that the members of the Mississippi Workers' Compensation Commission, any Circuit Court Judge assigned to review this Appeal, and/or the justices of the Supreme Court or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Bill Crabtree, Claimant
2. Jolly Matthews, Attorney for Claimant
3. Superior Manufacturing Group, Inc.
4. Royal Indemnity Company
5. Twin City Fire Insurance Company
6. Administrative Judge Tammy Harthcock
7. Judge Billy Joe Landrum, Circuit County Judge
8. Amy Topik, Attorney for Employer/Carrier, Empire Fire
9. C. Paige Herring, Attorney for Employer/Carrier, Royal

C. PAIGE HERRING
Attorney for Superior Manufacturing Group, Inc., and Royal Indemnity Company

TABLE OF AUTHORITIES

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JOINDER

To the extent that any argument is raised by co-Appellants Superior/Empire which is not raised herein, Appellant Superior/Royal joins in said argument and incorporates said argument herein as if copied in words and figures.

ARGUMENT

In response to the Brief of Appellants Superior/Royal and Superior/Twin City, Crabtree states that "if allowed to reopen his case, [he] will be able to prove that his medical condition is related to his on the job injury." See appellant's Brief, p. 4. He then summarily states that the ALJ was correct in allowing the Claimant to reopen his case. *Id.* He then moves on to make his argument which he inquires, "was the Administrative Law Judge correct in allowing the Claimant to reopen his case for additional medical evidence?" *Id.* at 5. However, he does so assuming that his case law is applicable and that he has met all initial threshholds to having his case reopened.

A. Claimant's Case Law is Inapplicable.

Admittedly, an ALJ has a large amount of discretion in the admission of evidence and testimony during a hearing. However, following the entry of a judgment or opinion, that discretion is not unbridled. Regardless of his simply, yet eloquent, argument, Crabtree is simply barred from doing what he is trying to do.

In his Brief, Crabtree has cited a number of cases., but the cases that he has cited are those which are not factually similar to the instant case. Moreover, all of the cases cited have a an underlying similarity that is distinct from this case. For example, Claimant discusses the case of *Wells-Lamont Corp. v. Watkins* which involves a case wherein both parties had consented to certain physician testimony being used at the hearing on the merits. *Wells-Lamont Corp. v. Watkins*, 247 Miss. 379, 382; 151 So.2d 600, 601 (Miss. 1963). When the party who was supposed

to call the physician did not call him, the opposing party filed a motion to introduce the testimony, prior to the entry of an order on the merits. *Id.* The Supreme Court held that the dismissal was inappropriate given the known relevance of the testimony, the agreement of the parties, and the desire to introduce testimony that was inadvertently or mistakenly not entered. *Id.* at 387-88; 604.

Plaintiff also cites *Day Detectives v. Savell*, 291 So.2d 716 (Miss. 1974). *Day Detectives* is also a case that deals with complications that arose when a motion for further discovery/testimony was filed following a hearing on the merits but before a final order was entered.

Dunn v. Dunn is not even applicable. *Dunn v. Dunn* 577 So.2d 378 (Miss. 1991). Initally, this case is not relevant because it involves a dispute over venue in a divorce action. Further, the rationale of reopening the case, prior to a decision on the merits, is nothing like this case because the venue issue was addressed before the Chancellor ruled on the merits of the case.[1]

Crabtree further cites the case of *Wood v. City of Bridgeport*, 216, Conn. 604, 583 A.2d 124, 125 (1990) for the proposition that the reopening of cases should be "liberally allowed." Obviously, this case has no binding authority here in Mississippi, as it is a Connecticut case. Moreover, its pursuasive authority is also suspect because it is a tort case and not a worker's compensation matter. Regardless of either ground for consideration of authority, *Wood* involved a dispute over the introduction of evidence prior to a final ruling on the merits, or, in that case, a decision of the jury. *Id.*

The Defendant could go on and on about the list of cases cited by the Plaintiff which

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[1]The *Anderson v. Anderson* case is also similar in that it involves a request to provide information prior to the entry of a final decree. 249 Miss. 1, 4; 162 So.2d 853, 855 (Miss. 1964) ["before the final decree was entered, the Wife made a motion to reopen the case for the admission of testimony"].

essentially state that it is within a trial or administrative court's discretion to allow parties to develop their cases and/or have leave to introduce evidence. However, that discretion is no longer present once a decision is rendered. Once a decision is rendered, there are criteria that allow for a revisiting of the issue(s). Indeed, Claimant's citation of the standard that it is "an abuse of discretion for and Administrative Law Judge (Attorney-Referee) not to reopen a case after the Claimant has rested to put on additional evidence" is only partly true and only applies before a ruling is entered. It is not the law in Mississippi jurisprudence once a decision has been rendered by the fact finder. Further, it denies the need for all parties to have certainty. Had Crabtree filed his motion prior to the rendering of the initial opinion of the ALJ, then, grudgingly, Superior/Royal would have to agree to the propriety of the action. However, no one is allowed to back-door the appellate process or usurp the function of the hearing itself.

B. Post-Decision/Opinion Procedure is Governed by Law and/or Appellate Rules.

Once a ruling has occurred, Claimant may do one of two things. Claimant may appeal the ruling and cite error as in any traditional case. Alternatively, a Claimant may move to reopen a case pursuant to MISS. CODE ANN. § 71-3-53. In this case, no appeal has been made; therefore, there is no need to discuss this issue. However, in this case, Plaintiff did file his Petition to Reopen on or about October 23, 2009.

Under § 71-3-53, "the commission may, at any time prior to (1) year after the date of the last payment of compensation, whether or not a compensation order has been issued...review a compensation case." MISS. CODE ANN. § 71-3-53. However, there are two limitations upon the Commission regarding said right. The Commission or the party who is seeking the reopening of the case must show a mistake in a determination of fact or a change in conditions. *Id.*

Therefore, we need only look to the Petition to Reopen to see whether the Claimant has come forward with any proof or other evidence to show that there has been a change in condition. In his Petition, the Claimant does not make any allegation that a mistake of fact or error was made by the ALJ. The only statement is that he should allowed to reopen the case to present additional depositions of the Claimants to present the "additional medical evidence which the Administrative Judge found was lacking in this matter." As no error was claimed on behalf of the Court, that issue is not extant.

The other basis for reopening a case is to show that there was a change in conditions. A review of the pleading indicates no such changes are referenced. Thus, that issue must also be resolved in favor of Superior/Royal. In short, the issue is clear. Crabtree has not alleged any change in condition. Therefore, no justification for reopening the case upon the basis of a change in conditions exists.

C. No Evidence or Claim of Inadvertent Omission Has Been Made.

While not explicitly stated, Claimant apparently is or may claim that the non-existant testimony or evidence should be admitted because it was inadvertently omitted.[2] However, that cannot be true. Crabtree never claims that anything was inadvertently left-out. On the date of the hearingon the merits, he agreed to close the record and never requested to reopen the evidentiary portion of the hearing prior to the entry of the opinion of the ALJ. This case did not turn on whether some evidence was available and was accidentally not included into the record. It does not turn on the fact that the evidence was unknown or that there was anything hidden or not disclosed to the Plaintiff. In fact, no good reason has been provided to show why this information,

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[2]Claimant does not explicitly make this claim; however, he cites worker's compensation cases which are premised upon inadvertently omitted evidence in his brief.

testimony or evidence was not timely supplied to the Court other than wilful neglect or intentional act. Therefore, there is no justification as to why any additional evidence should be admitted or, even if it was, how it would change the outcome or decision of the Commission.

D. Claimant failed to comply with the MWCC Rules to introduce evidence.

In his brief, Crabtree does not respond to Superior/Royal's arguments or contend that he complied with the MWCC Rules with regard to the introduction or supplemental introduction of evidence as required under MWCC Rule 9. As such, Appellant Superior/Royal shall consider the matter uncontested. Suffice it to say, that Claimant has failed to comply with the procedural rules, and the introduction of such evidence is now procedurally barred.

E. The Commission's Decision is Arbitrary and Capricious.

As previously stated, the Commission's conclusions "remain undisturbed unless the agency's order: (1) is not supported by substantial evidence, (2) is arbitrary or capricious, (3) is beyond the scope or power granted to the agency, or (4) violates one's constitutional [or statutory] rights." *Pub. Employees' Ret. Sys. v. Dearman* 846 So.2d 1014, 1018 (Miss. 2003); *quoting Fulce v. Pub. Employees' Ret. Sys.*, 759 So.2d 401, 404 (Miss. 2000). Substantial evidence is more than a mere scintilla, but is not a preponderance of the evidence. It is something that provides a substantial basis for a reasonable inference. *Delta CMI v. Speck*, 586 So.2d 768, 773 (Miss. 1991).[3] "'If an administrative agency's decision is not based upon substantial evidence, it necessarily follows that the decision is arbitrary and capricious.'" *Dearman* 846 So. 2d at 1019; *quoting Miss. State Dep't of Health v. Natchez Community Hosp.*, 743 So.2d 973, 976 (Miss. 1999).

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Citing, quoting and/or referencing United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); *Johnson v. Ferguson*, 435 So.2d 1191 (Miss. 1983); *Babcock & Wilcox Co. v. McClain*, 149 So.2d 523 (Miss. 1963); *State Oil & Gas Board v. Miss. Mineral and Royalty Owners Association*, 258 So.2d 767 (Miss. 1971).

As of the writing of this Reply, Claimant has not come forward with any information to show how the introduction of evidence would result in any different opinion or decision of the Commission. Indeed, a major component of the Full Commission's logic is based in its summary upholding of the ALJ's ruling. The ALJ's ruling, in large part, was based upon the Court of Appeals decision in *Short v .Wilson Meat House, LLC, and Bridgefield Casualty Ins. Co.* That case was reversed by the Supreme Court. *Short v .Wilson Meat House, LLC, and Bridgefield Casualty Ins. Co.* (Miss. 2008-CT-01224-SCT, Decided 6/17/2010). Therefore, any reliance of the ALJ upon those conclusions is unfounded.

Further, and as cited above, Crabtree has never provided one scintilla of evidence that would justify a reopening of the case. This leaves no evidentiary basis for reopening the case coupled with no legal basis for reopening the case. Therefore, the Commission could not have based its decision upon the evidence. Given the fact that the primary legal basis for the opinion of the Commission, the *Short* decision, has been reversed, there can no longer be a sufficient legal basis for the order reopening the case. A decision that is not based in either the evidence or the law is a textbook definition of arbitrariness and/or capriciousness. Consequently, this Court should reverse the decision of the ALJ and Commission.

CONCLUSION

The law, courts and Commission have established a procedural framework in an attempt to promote fairness and certainty. That framework allows for discretion at certain times and mandates requirements at others. Once the opinion of the ALJ was provided; the discretion to admit new evidence was limited to a . Further, Claimant must comport with the statutory law and procedural rules when seeking to reopen a case. In this case, Claimant did not comply with either and the Commission did not have substantial evidence to justify reopening the case. There is no

evidence that would show a change in circumstances or a mistake of fact. Claimant's motion never questions the issue of causation or the fact that he was not at work. In short, Claimant's Petition does not say anything other than request to reopen the case.

Claimant seeks to disregard of Miss. Code. Ann. § 71-3-53, and the Claimant did not comply with the Rules, or really said what he intends to prove by reopening the case. The Commission granted the request for a second bite at the apple without providing a legal justification for its ruling which outlined the errors or factual changes required by the law. The failure to have substantial evidence to support the order of the Commission renders the decision arbitrary and capricious. Consequently, this Honorable Court should reverse the ruling of the Commission and the Circuit Court of Jones County with regard to Claimant's Petition to Reopen his case.

WHEREFORE, PREMISES CONSIDERED, Employer-Carrier respectfully requests that this Honorable Court Grant its appeal and reverse the order of the Commission regarding the reopening of the case. The Employer-Carrier would further seek any additional relief deemed appropriate and/or necessary.

Respectfully submitted, this the 20th day of August, 2010.

EMPLOYER, SUPERIOR MANUFACTURING GROUP, INC. AND CARRIER, ROYAL INDEMNITY COMPANY

BY: _____

C. Paige Herring, Of counsel for Employer and Carrier

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CERTIFICATE OF SERVICE

I, C. Paige Herring, one of the counsel of record for the **EMPLOYER, SUPERIOR MANUFACTURING GROUP, INC. AND CARRIER, ROYAL INDEMNITY COMPANY (ARROWOOD),** do hereby certify that I have this date caused to be served, **via United States Mail, postage prepaid,** a true and correct copy of the above and foregoing document to the following:

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Honorable Billy Joe Landrum
Jones County Circuit Court Judge
P. O. Box 685
Laurel, MS 39441

THIS the 20th day of August, 2010.

C. PAIGE HERRING