

**IN THE COURT OF APPEALS OF MISSISSIPPI
CASE NO. 2010-WC-00535-COA**

BRITTON & KOONTZ BANK, N.A.

AND

AMFED NATIONAL INSURANCE COMPANY

APPELLANTS

VERSUS

FLORENCE TOWNSEND

APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT
OF ADAMS COUNTY, MISSISSIPPI**

08-KV-0132-S

**REPLY BRIEF OF APPELLANTS
BRITTON & KOONTZ BANK, N.A. AND
AMFED NATIONAL INSURANCE COMPANY**

ORAL ARGUMENT REQUESTED

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STATEMENT REQUESTING ORAL ARGUMENT

The Employer/Carrier requests that oral argument be granted in this matter for several different reasons. First, this particular issue is one that has not been addressed by the appellate courts. Specifically, it challenges the alleged authority of the Commission to assess interest on workers compensation benefits. Second, the Commission itself has cited difficulty in reconciling the long line of case law with current develops. This has lead to confusion from the Commission which may need further clarification from oral argument before this Court. Finally, this particular topic deals with a nuanced aspect of administrative law. Due to the intricacies of the workers compensation law and its application through case law, certain aspects may be made clearer through oral argument. Questions could be created through the parties briefs that would need clarification that would be better suited to be heard at oral argument.

For the above mentioned reasons, the Employer/Carrier request that oral argument be granted in this matter.

I. Standard of Review

The Claimant provides that this Court will reverse an Order of the Mississippi Workers' Compensation Commission only if it finds the Order clearly erroneous and contrary to the overwhelming weight of the evidence. While that is the general standard of review in most matters this Court addresses from the Workers' Compensation Commission, it is not the proper standard in this matter with which to review the initial issue in this appeal. This appeal addresses the application of law, specifically an inquiry into the authority of the Commission to assess interest. Since this is an application of law, the standard of review is *de novo*. *Bynum v. Anderson Tully Lumber Co.*, 996 So. 2d 814, 817 (¶11) (Miss. Ct. App. 2008).

In the event that this Court finds that the Commission has the authority to assess interest in this matter, it would only then apply the more deferential standard. *Central Electric Power Ass'n v. Hicks*, 236 Miss. 378, 389, 110 So. 2d 351, 357 (1959). However, there were no underlying fact-findings that could have been made by the Commission. This is due to the fact that an evidentiary hearing was never held in this particular matter. Without having evidence presented before it, the Commission did not have any evidence, much less substantial evidence to support the allegations it made in its Order. The Commission provided that "the Employer/Carrier unilaterally terminated the compensation payments it had been making voluntarily as of December 3, 2004, only to later admit it's liability for permanent total disability benefits in May 2007." The Employer/Carrier did not have the opportunity to offer evidence to show why benefits were terminated, nor have the Commission adjudge the Claimant's disability. To be clear, no evidence was presented before the Commission other than the form filings that the Commission's rules require for reporting purposes.

II. The Commission does not have statutory authority to assess interest

The Claimant in her brief phrases the issue on appeal as to whether the Employer and

Carrier “are required to pay interest to a Claimant for all past due installments of compensation benefits from the date that they become due or from the date of the filing of a Petition to Controvert.” While the Claimant is correct that is an issue in this matter, it is only a secondary issue. The primary issue is whether the Commission actually has the authority to assess interest. Without first addressing whether the Commission has the authority to assess interest, the analysis should not move onto the impact of the filing of a Petition to Controvert in this matter.

The Claimant’s position is that the Commission’s authority to assess interest is based on 40 years of case law. Further, statutory support for the authority is found in Mississippi Code Annotated Section 75-17-1(1). To be clear, the Claimant, the Commission, and the treatise upon which the Claimant so heavily relies have failed to point to a single statutory provision in the workers compensation act that provides the Commission with the statutory authority to assess interest on compensation payments. Each entity alludes to general statutory case law and a forty year case law history to back up their assertion. While a cursory review of the cases to which the Claimant has cited would seem to support the assertion that the Commission is allowed to assess interest. However, a more thorough review sheds a completely different light on what the 40 years of case law means.

As provided before, the Commission is a creature of statute; therefore, it has only the power that is granted to it from the statutes that created it. Even the Commission has admitted this fact and it has been upheld by the Supreme Court. *Hardin’s Bakery v. Taylor*, 631 So. 2d 201, 207 (Miss. 1994). Therefore, one cannot merely gloss over the fact that nowhere in the Mississippi Workers Compensation Act is the Commission granted the authority to assess interests. The legislature did feel the need to allow the Commission the ability to assess penalties on past-due benefits and could have easily granted the Commission similar authority when it came to assessing interest. However, it is clear that the state legislature did not grant this

authority to the Commission. By this analysis alone, the Commission's assessment of interest in this matter should be deemed improper.

If one resorts to case law for the Commission's authority to assess interest, it should be done with great caution as it would be an expansion of the authority by which the Commission is bound. The Claimant cites to 13 cases for the premise that over the past 40 years the Commission has the authority to assess interest. It is clear that the cases cited by the Claimant assess interest for past-due compensation benefits. However, each of these cases involves the Supreme Court assessing interest for the first time and not an affirmance of the Commission's assessment of interest. Further, these cases do not contain any express acknowledgment that the Commission is allowed to assess interest and never once was the Commission's authority discussed.

For example, the Claimant cites to *M.T. Reed Const. Co. v. Martin*, 63 So. 2d 528 (1953) for the premise that it espouses the rule that the Commission is authorized to assess interest. The Claimant is correct in that interest was awarded on past-due benefits in this matter. However, it was the Supreme Court that assessed the interest and not the Commission. Further, the Supreme Court had the authority to assess interest on the matter pursuant to the language of Mississippi Code Annotated section 71-3-51. It provides that "Any award of compensation made by the circuit court and appealed to the Supreme Court shall bear the same interest and penalties as do other judgments awarded in circuit court." Miss. Code Ann. § 71-3-51. The Supreme Court clearly had the statutory authority to assess interest in a case like this, but that same authority was not extended to the Commission itself. Knowing the framework of the Workers Compensation Act and its handling of appealed Commission decisions, it would be completely inappropriate to treat *M.T. Reed Construction Company* case as bestowing the Commission the authority to assess interest.

The Claimant, Commission, and treatise addressed in the Claimant's brief, refer with great deference to the case of *Goodnite v. Farm Equipment Co.*, 106 So. 2d 383 (Miss. 1958). The authors of Mississippi Workers' Compensation went so far as to say that the liability of the employer for workers' compensation benefits was in the nature of a debt to the Claimant, in the nature of a note, account or contract. However, it appears that the authors of the treatise took a much broader view of the language used in *Goodnite* than was the intent of the Supreme Court. One has to take a look at what the Supreme Court was specifically addressing to determine what the language and explanation meant. The Supreme Court was grappling with the specific language of Section 71-3-51 which provides that interest and damages may be assessed on "any award of compensation made by the circuit court and appealed to the Supreme Court." (emphasis added). However in *Goodnite*, the circuit court had found that the Claimant was not entitled to benefits. Pursuant to the language of the statute, the Supreme Court had to address whether it had the authority to assess interest when there was not an award of compensation benefits at the circuit court. While the analysis goes into detail as to how other states address the particular situation faced by the Supreme Court as well as an analysis of the underlying statutes, it does not provide the Commission with authority to assess interest. It was merely addressing its interpretation of its statutory right to assess interest in a situation where there was not an award of benefits at the circuit court.

Given the fact that the Commission was not granted the statutory authority to assess interest, it would be remiss to take the reasoning of the Supreme Court in analyzing its own ability to assess interest (a statutorily given ability) and implying that the Commission then obtained its own authority through this opinion. The misinterpretation of this case and its progeny by the Claimant and the authors of Mississippi Workers' Compensation have led to the issue that arose when the Supreme Court addressed the change in how interest was applied. The

author's of Mississippi Workers' Compensation, go on to say that the topic of interest was clear for 40 years "until the waters were muddied" by two decisions from 1992 namely, *Smith v. Jackson Construction Company*, 607 So. 2d 1119 (Miss. 1992) and *Lanterman v. Roadway Exp., Inc.*, 608 So. 2d 1340 (Miss. 1992).

As discussed more thoroughly in the Employer and Carrier's main brief, these two cases addressed a change in the statutes regarding the assessment of interest on judgments. Given the Claimant's interpretation of the case law and failure to recognize the Commission's lack of authority to assess interest, there is a struggle to understand exactly how these cases "muddied the waters" of 40 years of case law. However, when one reviews the cases with the understanding that the Commission does not have the authority to assess interest, the water remains crystal clear as the opinions are in line with history of the Supreme Court and subsequently Court of Appeals assessing interest.

As stated before the Supreme Court had a long history of assessing interest on awards of benefits appealed to it pursuant to the statutory dictates of Section 71-3-51. To determine the amount of interest, the Supreme Court would in turn follow the dictates of the general interest statute of Mississippi Code Annotated Section 75-17-1. This explains the rise in rates from the earlier cases applying a 6% interest rate and currently an 8% interest rate as the statute has been amended. Further, the Supreme Court was allowed to address interest on judgments through Mississippi Code Annotated Section 75-17-7.

Before 1989, section 75-17-7 provided how prejudgment interest could be addressed and there was no limit as to how early interest could begin to accrue. In 1989, the legislature amended the code section to prohibit prejudgment interest from accruing prior to the filing of the complaint. The Supreme Court then merely followed the dictates of the statutory framework that addressed the proper assessment of interest as it had since 1953. The Court of Appeals has likewise

followed the Supreme Court's lead in the case of *Walden Lumber Yard v. Miller*, 742 So. 2d 785 (Miss. Ct. App. 1999).

If the legislature had in fact intended that the Commission have the authority to assess interest on past-due benefits, it could have easily added a section or even paragraph into the Mississippi Workers' Compensation Act. To date, they have not done such even in the apparent confusion that has arisen from the case law for the past eighteen years as alleged by the Claimant. Without the authority to assess interest, the Commission's Order requiring the Employer and Carrier to pay interest to the Claimant should be reversed and rendered.

III) If the Commission does possess authority to assess interest, such assessment was not proper in this matter

If this Court does find that the Commission has some type of authority to assess interest on past-due benefits, it would not be proper in this matter. As provided earlier, the Supreme Court and Court of Appeals have held in turn that interest begins to accrue from the filing of the Petition to Controvert. A Petition to Controvert was never filed in this matter. Further, there was never even a hearing to determine whether the benefits were owed to the Claimant or why they had not been paid.

1) Failure to file a Petition to Controvert

Even if the Commission is found to have the authority to assess interest on past-due benefits, the Claimant never filed a Petition to Controvert. Under current case law since the 1989 amendment to section 75-17-7, the beginning point for the accrual of interest never occurred in this matter. Therefore, any assessment of interest was improper. The Commission and the Claimant both provide that "interest should accrue ... until paid regardless of whether the obligation is assumed voluntarily, or arises from an award, judgment or decree." Unfortunately, there is no statutory or case law that can be referenced which confirms this sentiment. The

Supreme Court opinions of *Smith* and *Lantermann* as well as the Court of Appeals decision of *Walden Lumber Yard*, provides that interest will run at the earliest from the date of the filing of the Petition to Controvert.

Even the Claimant's case of *Goodnite*, provides that "the Employer has the right under the statute to contest the matter of those payments before the commission and in courts. If it can show that the injury or death does not come within the law, it escapes all payment and all liability for all payment; but when it contests such payments, and the courts decide that the injury or death comes within the provisions of the law" then interest is owed. *Goodnite* specifically references that an assessment of interest comes following a decision of the Courts that the payments are due. Without a Petition to Controvert being filed, no evidentiary hearing is to take place and such a finding cannot be made by the Commission and subsequently the Courts.

Clearly, no Petition to Controvert was filed in this matter. Under current case law, the starting point for the accrual of interest never began. Therefore, the assessment of interest in this case is improper and the Order requiring the Employer and Carrier to pay the assessed interest should be reversed and rendered.

2) Failure to have finding of fact

The Claimant's discussion of the standard of review focused on the substantial evidence test and when the appellate courts are addressing fact-findings by the Commission that is the appropriate standard. However, for substantial evidence to exist there must have been fact findings made by the Commission. In the workers' compensation matters, those fact-findings occur before an Administrative Judge and then are reviewed by the full Commission if appealed to them. In this matter, the case was never addressed by an Administrative Judge. Further, an evidentiary hearing never occurred to determine if the benefits were in fact past-due.

Even the Commission's statutory authority to assess penalties provides that an Employer

and Carrier can avoid penalties by three different scenarios. Those penalties require fact-findings to be made by the Commission which couldn't even be assessed in this matter because a hearing and determination of fact never occurred. The Commission's most telling statement is in the second paragraph of its Order when it provides that "it is the position of the Employer/Carrier, in essence, that it can stop payments being voluntarily made in December 2004; then, for the next thirty months wrangle with the Claimant about the extent of his permanent disability ... yet, not have to pay interest on the installments coming due ..."

The Commission never had or took the opportunity to review the actual facts of the matter to determine the reasons why benefits were withheld at that time. Without a fact-finding, it could have been found that the Claimant was working for a period of time and would not be owed benefits for that short period. Regardless, the Commission takes the position that the voluntary payments are acceptance of the liability without any fact-findings to support such a conclusion. It is clear that even the case law that it relies upon for its authority to assess interest is prompted only upon an adjudication that the benefits were past-due.

It appears that the Commission and in turn the Claimant fault the Employer and Carrier for the suspension of benefits and do not look at any alternatives other than that the Employer and Carrier were at fault. It should be pointed out that the period of time in question is 132 weeks or 2 and ½ years. If the Claimant felt she was being wrangled about, she had the right to file a Petition to Controvert and have her case determined by an Administrative Judge. However, as mentioned above, she did not do that. In the event that the benefits were then found to be past-due by the Administrative Judge, the Claimant could have been awarded a 10% penalty according to the statutory authority of the Commission. Yet, the Claimant alleges that failure to assess interest will reward the Employer and Carrier for unilaterally terminating benefits. Essentially, she is requesting that the interest be assessed without the Commission making a

finding that the benefits are actually past-due.

The mere fact that the Claimant may regret a particular course of action that was available to her should not sway this Court in its determination that the assessment of interest in this matter was improper. Further, such a ruling would not reward the Employer and Carrier. A finding that the assessment of interest was proper would unfairly punish the Employer and Carrier when there has been no finding that the benefits were in fact past-due.

CONCLUSION

The Commission lacks the statutory authority to assess interest in a workers' compensation matter. Further, there has not been a grant of authority through the case law. Based on that reason alone, the assessment of interest by the Commission was improper and the Order requiring the Employer and Carrier to pay such should be reversed and rendered. In the event that this Court finds that the Commission does have the authority to assess interest, such an assessment was improper since a Petition to Controvert was never filed, nor did the Commission make fact findings at an evidentiary hearing. Likewise this Court should reverse and render the Order of the Commission. To do otherwise, would require the Employer and Carrier to pay interest on benefits where there was never a determination that they were past due.

Respectfully submitted,

BRITTON & KOONTZ BANK, N.A. and
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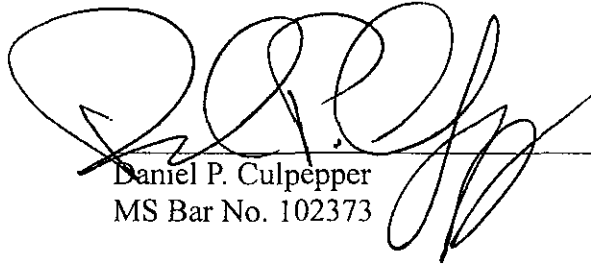
CERTIFICATE OF SERVICE

I, Daniel P. Culpepper, of counsel for Britton & Koontz Bank, N.A., and AmFed National Insurance Company, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to the attorney for the Appellee and Judge Lilli Blackmon Sanders:

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This the 4th day of August, 2010.


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