

**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

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

ORAL ARGUMENT REQUESTED

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APPELLANTS

AMFED NATIONAL INSURANCE COMPANY

V.

FLORENCE TOWNSEND

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that following listed persons may have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualifications or recusal.

1. Britton & Koontz Bank, N.A., Appellant
2. AmFed National Insurance Company, Appellant
3. James M. Anderson, Esq., Counsel for Appellants
4. Daniel P. Culpepper, Esq., Counsel for Appellants
4. Florence Townsend, Appellee
5. John T. Ball, Esq., Counsel for Appellee

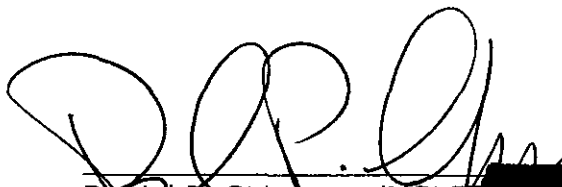

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STATEMENT REQUESTING ORAL ARGUMENT

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.

STATEMENT OF THE ISSUES

- A. WHETHER THE WORKERS COMPENSATION COMMISSION HAS AUTHORITY TO ASSESS THE EMPLOYER/CARRIER WITH INTEREST
- B. WHETHER THE WORKERS COMPENSATION COMMISSION ERRED IN ASSESSING INTEREST TO THE EMPLOYER/CARRIER IN THIS MATTER WITHOUT AN EVIDENTIARY HEARING OR PETITION TO CONTROVERT

STATEMENT OF THE CASE

This appeal involves a review of the decision of the Mississippi Workers' Compensation Commission (Commission) ordering Britton & Koontz First National Bank (Employer) and its workers' compensation carrier, AmFed National Insurance Company (Carrier), to pay the claimant interest in the total amount \$3,882.15. The Commission erroneously found that the Claimant was entitled to interest at the legal rate on compensation payments from December 04, 2004 to June 17, 2007.

Nature of the Case and Course of Proceedings

This particular appeal arises out of injuries allegedly sustained while the Florence Townsend (Claimant) was employed as a teller for the Employer. As a consequence of her injuries, the Claimant claimed to have sustained a permanent disability.

The course of proceedings before the Commission are very limited since the Claimant never filed a Petition to Controvert to commence litigation to allow the Commission to determine the compensation benefits to which the Claimant is entitled. The Claimant made an application for lump sum payment of indemnity benefits to the Commission. (R. 164) Upon review of the application, the Commission granted the request for lump sum payment of indemnity benefits pursuant to Miss. Code Ann § 71-3-37 (Rev. 1995)¹ (R. 171).

The Employer and Carrier promptly paid the lump sum as provided by Mississippi Code Annotated section 71-3-37 (Rev. 1995). Pursuant to the order, the Commission's Statistician provided a calculation of the benefits to be paid. The calculation performed by the Statistician erroneously contained an 8% interest in the amount of \$3,882.15. (R. 178) The

¹ Since the discussion of the applicable case law spans from 1950 to present, all citations to the Mississippi Code will use the Mississippi Code of 1972 for its references. The relevant sections were largely unchanged upon reorganization of the Mississippi Code.

Employer/Carrier paid the amount calculated, but refused to pay the erroneously added 8% interest. (R. 179).

On May 27, 2008, the Claimant filed a Motion to Compel Payments Pursuant to Order Authorizing Lump Sum Payment specifically requesting that the Employer/Carrier pay the interest from the previous calculation. (R. 181) The Employer/Carrier filed a response and on October 23, 2008, the Commission entered an Order directing the Employer/Carrier to immediately pay the Claimant \$3,882.15 in interest. (R. 185).

Upon entry of the Commission's Order, the Employer/Carrier appealed to the Circuit Court of Adams County. (R. 196). The Circuit Court of Adams County entered its judgment affirming the order of the Commission. (R. 2). It is from this order that the Employer/Carrier appeal.

Statement of Relevant Facts

As stated previously, a Petition to Controvert was never filed in this matter to commence litigation. Therefore, formal discovery was never commenced and more importantly an evidentiary hearing never took place in this matter. While there was never an evidentiary hearing, some background facts are needed to better understand the underlying action.

On or about April 29, 2002, the Claimant sustained injuries to her knee and shoulder when she tripped over a bag of nickels during the course and scope of her employment with the Employer.

After the fall, the Claimant received treatment at the emergency room for an injury to her right shoulder and an abrasion to her right knee. She subsequently had complaints of pain in her left knee. On November 1, 2002, Dr. Hamison performed surgery on the Claimant's right shoulder and left knee.

On July 7, 2003, Dr. Hamison opined that the Claimant may need knee replacements, but that they were more due to the pre-existing degenerative arthritis and not due to an exacerbation from the April 29, 2002 injury. On November 12, 2003, Dr. Hamison stated that the Claimant was at MMI, but would still need future care. Therefore, he referred the Claimant for a functional capacity evaluation. On December 16 and 17, 2003 a functional capacity evaluation was performed. This exam resulted in permanent impairment ratings of 0% to the left leg and 12% to the right arm.

Due to the Claimant's placement at MMI with impairment ratings to the scheduled members, the Claimant was entitled to twenty-one weeks of compensation for permanent disability. As of December 2004, the Claimant had been paid 66 weeks of compensation. Since the Claimant's placement at MMI by Dr. Hamison, 42 weeks over what she was entitled pursuant to her impairment rating.

Subsequent to Dr. Hamison's treatment and placement at maximum medical improvement, the Claimant's condition began to deteriorate and eventually Dr. Hamison felt that due to the Claimant's complaints she was going to be severely limited in her ability to return to work. This clarification was not received until August 16, 2006.

Following this clarification, the parties agreed to attempt to resolve the indemnity on a discounted permanent total disability lump sum. It was at this point that opposing counsel filed his application for lump sum payment leading to the issues that are now before this Court.

SUMMARY OF THE ARGUMENT

In this matter, the Commission assessed the Employer/Carrier with interest. The Act does not provide the Commission with the authority to assess interest. Since the Commission is a creature of statute, it is bound by those powers given to it by the Legislature. Without the grant of authority to assess interest by the statute, the Commission has looked to case law for its authority. While it provides that years of case law support the assessment of interest in like cases, it misinterprets those cases as providing it with authority to assess interest. The Legislature provided the appellate courts with the authority to assess interest on workers compensation matters that had been appealed to them, but the authority does not even reach to the circuit court. Therefore, the Commission erred when it required the Employer/Carrier to pay interest as it was without authority to do so.

In the event that this Court finds that the Commission does have authority to assess interest, it was improper to do so in this matter. Interest should only be awarded when there has been a fact-finding making an award and dictating from when the interest accrues. In this matter interest was assessed without an evidentiary hearing and upon an application for lump sum payment by the Claimant. Further, the calculation including interest in the matter was a mere authorization of a lump sum payment and not a true award following a finding of fact. Further, recent case law provides that interest runs from the date of the filing of the petition to controvert. A petition to controvert was never filed in this matter; therefore, there is no starting point from which interest is to run.

Due to the fact that the Commission was without authority to assess interest in this matter or in the alternative improperly assessed it in this matter, the Employer/Carrier request that the decision of the Commission requiring it to pay interest be reversed and rendered.

ARGUMENT

A. Standard of Review

An appellate court will reverse the Commission's ruling "where issues of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious." *Westmoreland v. Landmark Furniture, Inc.*, 752 So. 2d 444, 448 (¶8) (Miss. 1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and affords "a substantial basis of fact from which the facts and issues can be reasonably inferred." *Central Electric Power Ass'n v. Hicks*, 236 Miss. 378, 389, 110 So. 2d 351, 357 (1959). However, the review of questions of law is to be conducted under a *de novo* standard. *Bynum v. Anderson Tully Lumber Co.*, 996 So. 2d 814, 817 (¶11) (Miss. Ct. App. 2008).

The question on appeal is a legal one, whether the Commission erred in requiring the Employer and Carrier to pay interest in the amount of \$3,882.15. Further, an evidentiary hearing was never conducted allowing the parties to present evidence upon which the Commission could base its findings. Therefore, the proper standard of review on this issue is *de novo*. *Id.*

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

The Commission is a creature of statute and as a creature of statute, it only has the power to do those things specifically set forth within the statutes that created it. Nowhere in the Mississippi Workers Compensation Act does the Commission receive authority to assess interest against a party responsible for benefits. The Commission in its order cites case law and the general interest statutes for the premise that it has been granted the authority to assess interest; however, its reliance upon case law is based upon an improper interpretation of the case law. Demonstrative of the Commission's misunderstanding of the applicable case law is the confusion it states that has arisen from the more recent developments of case law. With a proper

interpretation of the relevant case law, recent case law coincides with the statutory dictates and no confusion is created. The interpretation that gives clarity is that the Commission, itself, does not have the authority to assess interest in a Workers' Compensation matter. However, the Supreme Court and Court of Appeals do have the authority to assess interest upon an appeal that has made its way from the Commission to the relevant appellate court. Without the proper authority the Commission erred in assessing the Employer/Carrier with interest.

1. The Commission is a creature of statute

The Commission was created by the Legislature in 1948 through the Mississippi Workers Compensation Act. Through this Act and its various amendments, the Commission was established to cooperate “with other state and federal authorities for the prevention of injuries and occupational diseases to workers and, in event of injury or occupational disease, their rehabilitation or restoration to health and vocational opportunity.” Miss. Code Ann. § 71-3-1 (Rev. 2008). When faced with issues that extend beyond those listed by the Act, the Commission has admitted that “it was well settled that the Mississippi Workers' Compensation Commission was a creature of statute and only had the power to do those things specifically set forth within the statutes.” *Hardin's Bakery v. Taylor*, 631 So. 2d 201, 207 (Miss. 1994). While the Commission has faced several issues in which it needed to extend beyond the dictates of the Act, the Legislature amended the Act appropriately to provide the power necessary. Examples of such power are limited subpoena power and the grant of authority for the Commission to establish appropriate rules to administer evidentiary hearings. See Miss. Code Ann. § 71-3-61 (Rev. 2009).

While it is possible for a creature of statute to appropriately extend beyond its statutory dictates, its limits must be closely maintained and limited to those necessarily implied. The Supreme Court specifically stated in reference to the Commission on Wildlife Conservation, a

separate creature of statute that “administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any such power exercised must be found within the four corners of the statute under which the agency operates.” *Strong v. Bostick*, 420 So. 2d 1356, 1361 (Miss. 1982).

2. No provision of the Act provides the Commission with authority to assess interest

Given that the Commission is a creature of statute limited by the power granted within the “four corners” of the Act, there is no authority in the Act that provides the Commission with the power to assess interest against a party that may or may not be liable for compensation benefits. The Commission provides in its order that “It has always been our understanding that interest accrues on all installments of compensation from the due date of each such installment until paid.” (R. 187) The Commission then goes on to discuss numerous court decisions which the Commission asserts recognizes and sanctions the Commission's authority to assess interest. (R. 187-191) In fact, the Commission has to rely upon the statutory provisions of the general interest statute and interest on judgments for any statutory authority. However, even these authorities are located outside of the Act and should not be deemed to give the Commission said authority. Further, these provisions are intended to provide the circuit courts with the power to assess interest and the Commission recognizes in its order that it is not equated with a circuit court. (R. 193)

The only section of the Act that provides any authority for the assessment of interest is found in Mississippi Code Annotated § 71-3-51 (Rev. 2009). This particular section governs the parties’ right to appeal the decision of the Commission to the appropriate circuit court and on to the Supreme Court and Court of Appeals. § 71-3-51. It provides in pertinent part 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.” *Id.* Through thorough research, it seems that the confusion of the Commission as it relates to its authority to assess interest can actually be traced to this particular statute. To be clear, it provides that interest on an award from the circuit court can be assessed with interest when appealed to the Supreme Court. *Id.* It **does not** state that the Commission can assess interest in this matter. This proposition will be discussed much more thoroughly below.

The only statutory authority that the Commission points to for the basis of interest is the general interest statute of Mississippi Code Annotated § 75-17-1 (Rev. 1999) and the interests on judgments of Mississippi Code Annotated § 75-17-7 (Rev. 1999). It is clear that these general statutes are not included in the “four corners” of the statute under which the Commission operates as provided in *Strong*, 420 So. 2d at 1361. The general interest statute does not convey any authority to any entity to assess interest. It merely provides the current legal rate of interest. § 75-17-1. The Commission correctly points out in its order that the rate of interest was formerly 6% and has now been raised to 8%. (R. 187). As for § 75-17-7, it provides the rate of interest on judgments and decrees. Clearly, an order from the Commission does not rise to the level of a court's judgment or decree as they are only enforceable by separate proceedings in circuit court. Miss. Code Ann. § 71-3-49 (Rev. 2009). As provided before, the Commission in its own order acknowledges that it as an administrative agency is not equal to a circuit court. (R. 193) Therefore, in addition to the fact that § 75-17-7 is outside of the Act and lends no authority to the Commission, it also applies to judgments and decrees, the like of which are beyond the scope of the awards made by the Commission.

In summary, the Act that established the Commission did not and does not provide any authority for the Commission to assess interest on a party liable to provide compensation benefits.

3. Commission's reliance upon case law is in error due to misinterpretation

The Commission provides in its order that “it has always been our understanding that interest accrues on all installments of compensation from the due date of each installment until paid.” (R. 187). As discussed before, the Commission is hard pressed to provide the statutory authority for its assertion and proceeds to cite fifteen different Supreme Court decisions for the premise that the Supreme Court has authorized the Commission to assess interest. (R. 187-192) Upon an initial glance at the various citations, they would appear to provide the very support the Commission claims. However, a thorough reading of the very authority provided by the Commission in context with the controlling statutory law paints a very different picture.

a) Case Law prior to *Goodnite v. Farm Equipment Co.*, 234 Miss. 342, 106 So. 2d 383 (1958)

To begin this thorough review, it is best to start at the earliest case that the Commission provides, *J.&B. Manufacturing Co. v. Cochran*, 216 Miss. 336, 62 So. 2d 378 (1953). The Commission is correct in that the case provides that interest on the weekly payments “should bear interest at the rate of 6% per annum from its due date.” *Id.* at 380. However, there is no mention in the opinion that the Commission assessed the interest and that the Supreme Court affirmed that award. *Id.* Instead, it was the Supreme Court that determined upon the insistence of the Appellee that it should be entitled to interest. This entitlement is easily explained via the statutory law mentioned above. § 71-3-51 provides that upon appeal of an award from the circuit court the Supreme Court may grant penalties and interest as it would with any other circuit court award. In this particular case, the Commission awarded benefits, the circuit court affirmed the award of benefits, and the Supreme Court also affirmed the award of benefits. Upon its award, the Supreme Court applied its authority from § 71-3-51 and using § 75-17-1 and § 75-17-7 for the assessment of interest. Since the circuit court made an award, the Supreme Court acting within

its statutory authority assessed interest due to the appeal. This did not mean that the Commission was given authority to assess interest. Further evidence of the Supreme Court's reasoning can be found in the discussion regarding the penalties that were requested. Statutory authority which was repealed in 2003 provided that damages of 5% could be awarded by the Supreme Court for unsuccessful or non-prosecuting appellants. The sheer fact that both of these two topics, penalties and interest, are discussed in the same context further lends support at the method by which the Supreme Court assessed interest, namely through the authority of § 71-3-51.

The second case that the Commission cites to is *M.T. Reed Const. Co. v. Martin*, 215 Miss. 472, 63 So. 2d 528 (1953). In this case, a nearly identical result occurred, except the issue of interest was addressed via a motion to correct the judgment. The Commission awarded benefits and the circuit court upheld the award. *Id.* Further, the Supreme Court affirmed both lower holdings. On the motion to correct the judgment, Martin, the Appellee, requested that penalties and interest be assessed. The Supreme Court in this case actually referenced § 71-3-51 for the assessment of interest upon appeal. The Court went on to say:

the effect of the amendment was to place awards of compensation made by judgment of the circuit court in the same category as other judgments of the circuit court, and to provide that in the event of an affirmance of an appeal therefrom to the Supreme Court, the same shall bear the *same* interest and penalties as do *other* judgments of the circuit court.

Id. at 531. Clearly, the Supreme Court interpreting the statute as it applies to circuit courts should not be a grant of authority to the Commission to assess interest.

The Commission goes on to cite several additional cases that it claims support the Commission's ability to assess interest. However, each of the cases cited merely reaffirm the principles discussed in *Martin* and *Cochran*. To be clear, each case cited by the Commission in

support of its opinion does provide an assessment of interest, but the interest is assessed by the Supreme Court and not the Commission. Please see the following: *Russell v. Southeastern Utilities Service Co.*, 230 Miss. 272, 284, 92 So. 2d 877, 878 (1957) (The Commission awarded benefits, was reversed by the circuit court, and the award was reinstated by the Supreme Court. The Supreme Court cited to *Martin* and *Cochran* for support of penalties and interest); *U.S.F.G Co. v. Collins*, 231 Miss. 319, 96 So. 2d 456 (1957) (Supreme Court assessing penalties and interest following modification of circuit court award); *Dependants of Harris v. Suggs*, 233 Miss. 533, 540, 102 So. 2d 696, 698 (1958) (Commission award, affirmance by circuit court, and modification by Supreme Court assessing interest pursuant to *Cochran* and *Martin*); *Grubbs v. Revell Furniture Co.*, 234 Miss. 319, 325, 106 So. 2d 390, 393 (1958) (Commission award, reversal by circuit court, and reinstatement by Supreme Court citing *Martin* and *Cochran* for assessing interest); *Central Electric Power Association v. Hicks*, 236 Miss. 378, 394, 112 So. 2d 230, 231 (1959) (Commission award, affirmance by circuit court, and affirmance by Supreme Court with assessment of interest and penalties); *Fair Stores v. Bryant*, 238 Miss. 434, 443 118 So. 2d 295, 299-300 (1960) (Commission award, affirmance by circuit court, and affirmance by Supreme Court with assessment of interest).

Not once in the plethora of case law cited by the Commission was it able to show an affirmance of an assessment of interest **by the Commission**. The majority of the time, the assessment of interest was requested via a motion to assess interest in the matter after the appeal was completed. Having addressed the history of the assessment of interest by the Supreme Court and laying the foundation for the case law to this point, we can address the seminal case of *Goodnite v. Farm Equipment Co.*, 234 Miss. 342, 106 So. 2d 383 (1958).

b) Decision of *Goodnite*

The Commission speaks at length as to the impact that *Goodnite* has in providing the

Commission with the authority to assess interest. The distinction between *Goodnite* and the cases discussed above is the procedural history in that the Commission denied the Claimant any benefits and the Circuit Court affirmed that denial. Previously, the cases involving an assessment of interest involved the Supreme Court affirming the circuit court's award or reinstating the Commission's award of benefits. This was the first time that the Supreme Court addressed the issue of how § 71-3-51 applies when there had not been an award of benefits before the matter reached the Supreme Court. The Commission views the discussion by the Supreme Court as the basis for its own authority to assess interest; however, the Supreme Court was merely addressing its own authority to assess interest when both the Commission and circuit court have denied benefits to a Claimant.

In *Goodnite*, the Supreme Court faced an issue where the employee was denied compensation benefits by the Commission and circuit court; however, the Supreme Court reversed the lower decisions and awarded compensation benefits to the employee. *Id.* at 384. Upon a motion to assess interest, the Employer alleged that no statutory authority existed to allow the Supreme Court to assess interest when there is no previous judgment awarding benefits. *Id.* The Supreme Court recognized that it had previously held in numerous cases “that when a claim is controverted and an award of death benefits is made by the commission and affirmed by the court of appeal, interest should be allowed on each weekly installment of the award ...” *Id.* (emphasis added). The Supreme Court provided that there should be no difference between a situation where the Commission or circuit court makes an award and is affirmed by the Supreme Court and where an award is denied by the Commission and circuit court only to be reversed by the Supreme Court. *Id.* The argument to the contrary that failed before the Supreme Court was that the employee was not entitled to an award until the Supreme Court’s judgment; therefore, interest should not be due as it was not being withheld pursuant to a

prior order. It was this argument that caused the Supreme Court to examine the nature of the workers compensation payment and determine that the employee was due compensation even though the Commission erred in its denial of an award. This is the reason the Supreme Court went into secondary authority, namely Texan and Alaskan law.

Most telling about the issue addressed in *Goodnite*, is the continual citation to the precursor to § 71-3-51 that allows the appellate court to assess interest and the numerous cases where that actually took place. The Supreme Court does not cite to a case where the Commission had assessed interest. This is due in all likelihood since the Commission was never vested with the statutory authority to assess interest; therefore, the Supreme Court would be remiss in granting or sanctioning that authority.

There is little argument that it was within the Supreme Court's power to assess interest as it did in *Goodnite*. It had the authority to assess interest on the payments pursuant to § 71-3-51. Further, the corresponding statute that addressed interests on judgments did not have limits on the assessment of pre-judgment interest at the time. Taking these two statutes together, it was clearly in the Supreme Court's authority vested by statute to assess interest on the workers' compensation payments. However, this case addressed the Supreme Court's authority to assess interest, **not the Commission's authority**. As provided before, the statutory construction of the Act provides that an appellate court can assess interest, but does not grant the authority to assess interest to the Commission.

c) Case law following *Goodnite*

The cases that follow *Goodnite* fall within the same line as those that preceded it. The Commission does an admirable job continuing the history of the decisions from the Supreme Court awarding interest on appealed workers compensation matters. However, in each of the matters to which the Commission cites, it is an award of interest made by the Supreme Court.

Once again, it is not an affirmance of an interest assessment made by the Commission. Any reliance by the Commission upon those cases as authority for the Commission as an administrative agency to assess interest is likewise misplaced as it was with *Goodnite*.

The case law continues to follow the clearly established precedent until the case of *Smith v. Jackson Const.* 607 So. 2d 1119 (1992). In this matter, the Commission awarded benefits, but was reversed by the circuit court on appeal. On appeal to the Supreme Court, the award of benefits was reinstated. Of importance to this matter, the Supreme Court noted a departure from the previous assessment of interest on judgments. The Supreme Court took note of the 1989 amendment to the statute of interests on judgments, Mississippi Code Annotated § 75-17-7. Prior to the amendment, the statute merely provided that interest on judgments could be assessed by the judge at the legal rate. The 1989 amendment which is still in effect today provides the following:

All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. *All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.*

§ 75-17-17 (emphasis added). The Supreme Court once again applying the appropriate statutes, namely § 71-3-51 and then § 75-17-1 and § 75-17-7, was faced with the proposition of how exactly the amendment to the interests on judgments would affect an assessment of interest on workers compensation benefits by the Supreme Court. One of the difficulties in this matter was addressing the limitation of no interest prior to a complaint in a workers compensation setting. The Act does not provide for the filing of a “complaint.” Therefore, the Supreme Court looked to the instrument that most closely resembled a complaint, namely the Petition to Controvert.

The Petition to Controvert is the instrument that a Claimant files to commence the litigated portion of a worker's compensation claim. While the Petition to Controvert is not an exact match to a complaint, one is hard pressed to find a better match in the workers compensation system.

To be clear, the subsequent cases from the appellate courts that address the assessment of interest **by the appellate courts** followed the decision of *Smith*. See *Lanterman v. Roadway Express, Inc.*, 608 So. 2d 1340, 1348 (Miss. 1992) (interest due from Petition to Controvert) and *Walden Lumber Yard v. Miller*, 742 So. 2d 785, 789 (¶9) (Miss. Ct. App. 1999) (interest due from Petition to Controvert). This line of cases once again underscores the fact that the Supreme Court has assessed interest on cases under three different statutes, § 71-3-51 allowing interest to be assessed on decisions appealed from the circuit court to Supreme Court, § 75-17-7 allowing interest on judgments, and § 75-17-1 setting the legal rate of interest. This assessment of interest does not provide the Commission with the authority to assess interest.

4) Resolution of issue identified in Commission's order from correct interpretation

The Commission voices a great deal of uncertainty about which statute it is to apply interest and how the statutes work together, eventually stating that in light of the more recent case law involving interest applications, it does not understand the Court's direction. Specifically when addressing the Supreme Court's decision in *Smith*, the Commission states, "One, does it mean that all installments which are past due accrue interest, but only from the date of the petition to controvert; or, does it mean that only those installments coming due since the date of the petition to controvert bear interest? **We don't know.**" (R. 192) (emphasis added). The Commission goes on to address a possible resolution to the confusion it says was created by *Smith* when it states:

Therefore, it could be reasoned that the general interest statute applied to

installments payable at anytime [sic] prior to entry of a court judgment, in which case interest runs from the due date of each and every installment until paid. If a decision of the Commission is appealed to and decided by the circuit court, or higher, however, interest on such an award would be figured under the terms of § 75-17-7, the interest on judgments and decrees statutes.

...

If the point of appeal to circuit court marks the transition from the general interest statute to the interest on judgments statute, then surely the Court would have clearly pointed this out long ago. We simply don't see anything in the statutes or cases to justify this kind of split treatment of workers' compensation awards.

(R. 193)

The above quotation demonstrates the problems that can arise when an administrative agency seeks to enforce powers that are not authorized in its statutory construction. The Commission fails to understand that it was never granted the authority either statutorily or through case law to assess interest on workers compensation benefits. When one views the case law with the understanding that the Commission does not have authority to assess interest, the entire line of case law makes sense. Namely, the Supreme Court was granted the authority by the legislature to assess interest and damages to judgments appealed from circuit court as it would normally through § 71-3-51. This grant of authority allows the appellate courts to assess interest on awards of benefits based upon two subsequent statutes, § 75-17-7 allowing interests on judgments and § 75-17-1 setting the rate at which interest is assessed.

Following the case law, the Supreme Court modified its assessment of interest as the applicable statutes were modified by the Legislature. First, the Supreme Court assessed interest at 6% when the legal rate of interest was 6% pursuant to § 75-17-1. However, when the legal

rate of interest was increased to 8% by amendment to § 75-17-1, the Supreme Court assessed interest at the appropriate amount. See *M&J Oil Co. v. Dependants of Wilson*, 507 So. 2d 1292, 1293 (Miss. 1987) (assessing interest at the rate of eight percent). Likewise, when the statute controlling interest on judgments was amended, the Supreme Court changed how the interest was computed. See *Smith*, 607 So. 2d at 1129.

One final illustration of the issue that arises from the Commission attempting to derive its authority to assess interest from case law and not statutorily created authority comes from its interpretation of the dissent by Judge Southwick in the *Walden Lumber Yard v. Miller*, 742 So. 2d at 790 (¶15) (Judge Southwick dissenting). There, the Commission points to the “better rule” in line with interest being due from the date the payment was due. From a complete reading of the opinion, the majority assessed *Walden Lumber Yard* with interest from the date the action was instituted regardless of when the installments became due. *Id.* at 789 (¶9). However, Judge Southwick argues that such a statement imposes interests on payments that could not have been due when Miller filed his Petition to Controvert. Judge Southwick’s decision does not support the notion that interest should be able to be assessed prior to the action being instituted. *Id.* at 790 (¶15). It merely provides that interest should accrue from payments that have become due after the filing of the Petition to Controvert.

As provided above, the Commission does not have authority from statute to assess interest on workers compensation benefits. Any authority that it alleges it should have comes from its misinterpretation of case law. Further, this misinterpretation is magnified when the Commission alleges that more recent case law flies in the face of established precedent. Once it is understood that the Commission does not have authority to assess interest and that the appellate court assessment of interest is based off of the authority granted by statute, the long line of case law is understood to be proper and does not conflict with itself.

Therefore, the Commission erred when it granted the Claimant's Motion to Compel Interest Payment as it was without authority, either statutory or case law to assess interest. The Commission's Order granting the motion should be reversed and rendered.

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

In the alternative, if this Court finds that the Commission did have authority to assess interest, it was not appropriate in this matter. The Commission clearly made fact findings in its Order without allowing an evidentiary hearing and actually assessed interest in a proceeding in which the Appellant was not a party. Further, if authority to assess interest can be said to have derived from case law, the recent authorities from 1992 to present provide that interest can only be assessed from the date of the filing of the Petition to Controvert. In this matter, a Petition to Controvert was never filed.

Given the fact that the Commission did not have an evidentiary hearing before assessing interest and a Petition to Controvert was never filed in this matter, the Commission erred when it granted the Claimant's Motion to Compel Interest Payment. Therefore, the Commission's Order granting the motion should be reversed and remanded.

1) No evidentiary fact finding occurred

The Commission in this matter assessed the Employer/Carrier with interest on this matter without having had an evidentiary hearing. Without an evidentiary hearing, the Commission has not had the facts presented as to why benefits were ceased, resumed, or even paid in the first place. Without an evidentiary finding by the Commission that the amounts were due the Claimant at the time alleged, there is no factual basis for the assessment of interest.

The Commission points out in its Order 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; then, in May 2007, agree to pay the Claimant for permanent and total disability.” (R. 185) Without any kind of fact finding from the Commission, there is no basis for the statement that the Employer/Carrier wrangled with the Claimant about the extent of disability for three years. There is no discussion of the fact that the Claimant at any point following her injury could have filed a Petition to Controvert and pushed for a hearing before an Administrative Judge to determine her extent of disability. Further, there is no discussion of why the disability benefits were suspended, much less a discussion that the Claimant alleged she had suffered injuries to various scheduled members, some of which were accepted as compensable and some of which were questioned.

The Commission does provide that the Employer/Carrier admits that the compensation in question was not timely made. (R. 186) This specific fact is completely contrary to any allegation made by the Employer/Carrier. It must be assumed that the Commission takes its position from the argument made by the Employer/Carrier that the Commission did not have the authority to assess interest, but did have statutory authority pursuant to Miss. Code Ann. § 71-3-37(5) (Rev. 2000) to assess a 10% late penalty. (R. 182) The Employer/Carrier did not imply that the penalty was proper in this matter; it was only illustrating the fact that even though the Commission had statutory authority to assess a penalty in certain cases, it did not do so in this matter, but attempted to assess interest when it did not have authority to do so.

While the Commission assessed the Employer/Carrier with interest in this matter, it did not assess a penalty as discussed above. There are a number of reasons why such a penalty was not assessed. One of the reasons that penalties were not assessed in this matter is that there are three ways that the Employer can show that it should not be liable for penalties. These three ways are:

1) the employer has paid compensation installments within fourteen days of when they became due, (2) the employer has filed a notice to controvert within fourteen days of the day he received notice of the injury, (3) that nonpayment, if it occurred, was as a result of conditions over which the employer had no control.

Kemper Nat. Ins. Co. v. Coleman, 812 So. 2d 1119, 1126 (¶23) (Miss. Ct. App. 2002). Without an evidentiary hearing there was never an opportunity for the Commission to determine if any of those excuses for the penalty were met. This once again underscores the necessity for an evidentiary hearing before assessing penalties or interest.

The assessment in interest in this matter came about from the Commission's grant of an Application for Lump Sum Payment. This particular proceeding occurs when the Claimant applies for a lump sum acceleration of benefits. The Claimant files the application before the Commission and the Employer/Carrier are not a party to the determination of the Lump Sum Payment. The Commission is to determine whether the Lump Sum Authorization is in the Claimant's best interest. If the Commission finds that the lump sum payment is in the best interest, it enters an order granting the lump sum application. The remaining benefits are paid in a lump sum discounted pursuant to statute.

In this case, the Employer/Carrier was assessed with interest without being a party to the application in which the interest was assessed and without a finding that the payments became due when the Commission alleged. Even if this Court finds that the Commission has the authority to assess interest in this matter, such an assessment would be improper without an evidentiary finding that the Claimant was due the compensation as provided. To hold otherwise would be a violation of principles established by statute and case law addressing the assessment of interest.

2. No award was made to constitute a judgment or decree within the meaning of § 75-17-7

Throughout the Commission's order, it provides that it has the authority to assess interest on any and all payments due pursuant to the general interest statute, § 75-17-1. However, § 75-17-1 only provides the amount interest that would govern any matter where the interest was not already set by contract. This statute alone does not provide any authority in the context alleged by the Commission. Any actual statutory authority would be derived from § 75-17-7. As mentioned previously, it provides the authority for interest to run on judgments and decrees. *Id.*

The Employer/Carrier does not concede that this statute provides the Commission with authority to assess interest; however, even it would not allow the Commission to assess interest in this matter. As provided above, § 75-17-7 provides that a judge can assess interest on a judgment or decree. One can easily infer that the judgment or decree provides an award in the matter before the appropriate court. In this matter, the Commission granted one party's application for lump sum payment without the other party being a part of the matter. It was only after an issue arose from the calculation of the lump sum due that the issue surrounding the interest arose. The Order granting the application for lump sum payment is a mere authorization that the Claimant be allowed to receive the lump sum payment. It is not an award of benefits to the Claimant. Therefore, it should not be considered a judgment or decree discussed in § 75-17-7.

Without an evidentiary ruling or true award, the Commission erred by ordering the Employer/Carrier to pay the interest assessed. Therefore, the decision of the Commission requiring the Employer/Carrier to pay the interest assessed should be reversed and rendered.

3) Under recent case law, no Petition to Controvert was filed in this matter

Finally, should this Court find that the Commission had authority to assess interest and

was allowed to assess interest in a single party proceeding without an evidentiary hearing; the Commission still erred when it assessed interest in this matter. Specifically, in the most recent cases involving the assessment of interest, this Court and the Supreme Court have provided that interest is due from no earlier than the date of the filing of the Petition to Controvert. See *Smith*, 607 So. 2d at 1129; *Lanterman*, 608 So. 2d at 1348; and *Walden Lumber Yard*, 742 So. 2d at 789 (¶9).

In each of those opinions, the Court applied the amendment of § 75-17-7 interest on judgments statute. As discussed above, this statute was amended in 1989 to provide that interest could be assessed as early as the filing of the complaint. The Supreme Court in *Smith* applied the language from the statute and equated the complaint to the filing of a Petition to Controvert in a workers' compensation proceeding. Both the complaint and the petition to controvert begin the litigation portion of an action. While not exactly similar, they are the best equivalent in the two different instruments.

In this matter, the Claimant never filed a petition to controvert or formal demand for benefits. Therefore, based on current case law, interest cannot be assessed until the action is commenced with the filing of the Petition to Controvert. If the Commission is found to have the authority to assess interest, requiring that the Petition to Controvert be filed in an action before interest can be assessed will help insure that the Commission makes fact findings that a Claimant is actually entitled to interest and the dates from which it is due.

Due to the unique nature of this issue, the Commission is unable to provide and we are unable to cite to any authority dealing with interest where a matter has come before this Court without the filing of a Petition to Controvert. This is primarily due to the cost of appeal versus the limited value of the interest assessment. Regardless, of the amount of the assessment, if it is incorrectly applied it should be reversed upon the instance of either party.

Therefore, the Commission erred when it assessed the Employer/Carrier with interest in this matter. Without the filing of a petition to controvert, the Commission could not assess interest and remain in compliance with the recent case law. Therefore, the Employer/Carrier request that this Court reverse and render the decision of the Commission granting the Claimant's Motion to Compel Payment of Interest.

CONCLUSION

The Commission erred when it ordered the Employer/Carrier to pay interest. This error is due to the fact that the Commission was without authority to assess interest against the Employer/Carrier either from statute or case law. Further, the Commission cites a plethora of case law in support of its possession for the imposition of interest, but misinterprets the Supreme Court's opinions. Through a proper understanding of the long line of cases involving imposition of interest, it is clear that the Supreme Court was merely following the dictates of § 71-3-51 and not providing the Commission with authority to assess interest.

Alternatively, if this Court finds that the Commission has authority to assess interest, the imposition of interest was improper in this particular matter. The Commission did not conduct an evidentiary hearing and its approval of a lump sum payment involved a petition by one party without the joinder of the Employer/Carrier. Even if the Commission is found to have the authority to assess interest, it should not be allowed to assess interest in matters where there has not been an evidentiary finding that compensation payments are due. Finally, the assessment of interest in this matter is improper due to recent case law that provides that interest accrues from the date of the filing of the Petition to Controvert. Since a Petition to Controvert was never filed in this matter interest could have begun to accrue in accordance with the most recent case law.

Given the above errors of the Commission, the Employer/Carrier respectfully request that the order of the Commission requiring the Employer/Carrier to pay interest in this matter be



reversed and rendered.

Respectfully submitted,

BRITTON & KOONTZ BANK, N.A. and
AMFED NATIONAL INSURANCE COMPANY

BY: 

OF COUNSEL

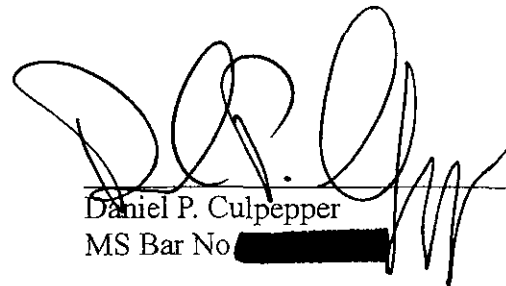
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CERTIFICATE OF SERVICE

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:

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This the 1st day of June, 2010.



Daniel P. Culpepper
MS Bar No [REDACTED]