

2011-WC-01086 T

**CERTIFICATE OF INTERESTED PERSONS**

**Joseph Dewayne Johnson v. Sysco Food Services and New Hampshire Ins. Co.,**

**2011-WC-01086-SCT**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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## **STATEMENT OF THE ISSUES**

### **I. Issue 1**

Whether 2011 Mississippi Laws Chapter 389, which amended Miss. Code Ann. § 71-3-51, now providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, is constitutional under Mississippi Constitution Article 6, § 146.

### **II. Issue 2**

Whether the Supreme Court of Mississippi has appellate jurisdiction over a direct appeal from the Mississippi Workers' Compensation Commission.

## STATEMENT OF THE CASE

This is a workers' compensation case on appeal from the Order of the Full Commission, which erroneously affirmed the Order of Administrative Law Judge, Virginia Wilson Mounger, who found, in error, that Claimant/Appellant Joseph Johnson (Claimant) failed to prove the existence of a work related injury, and the medical evidence presented, failed to demonstrate a causal nexus between Claimant's alleged work injury and his current condition/complaints.

On or about March 14, 2008, Claimant was working as a delivery truck operator for Employer Sysco Food Services (Employer). While in the scope of his employment, Claimant was delivering groceries to a restaurant. During said delivery, while Claimant was rolling groceries from the back of the truck, he suffered injuries to his knees. As a result of the foregoing, Claimant filed a Petition to Controvert on or about August 12, 2008. Employer/Carrier filed their Answer to said Petition, denying Claimant's claim, on or about August 19, 2008.

A Hearing on Compensability was held September 10, 2010 at the Mississippi Workers' Compensation Commission, located in Jackson, Mississippi. Subsequent to said hearing, Administrative Law Judge Virginia Wilson Mounger, dismissed Claimant's claim, holding that the "medical proof was insufficient to cement a causal connection between Claimant's current status and/or condition" relative to Claimant's knees.

Claimant subsequently appealed Judge Mounger's decision to the Full Commission, which affirmed Judge Wilson's holding, via an Order dated July 1, 2011. In response, Claimant filed a Notice of Appeal of the Full Commission's decision with the Hinds County Circuit Court on or about July 6, 2011. However, 2011 Mississippi Laws

Chapter 389, providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, became effective July 1, 2011. Therefore, Claimant filed a Notice of Appeal to this Honorable Court on or about July 14, 2011. As a result, an Order was issued from this Honorable Court for the parties in the instant matter to submit briefs addressing the following issues:

1. Whether 2011 Mississippi Laws Chapter 389, which amended Miss. Code Ann. § 71-3-51, now providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, is constitutional under Mississippi Constitution Article 6, § 146; and
2. Whether the Supreme Court of Mississippi has appellate jurisdiction over a direct appeal from the Mississippi Workers' Compensation Commission.

Pursuant to the Order of this Honorable Court, said issues will be addressed herein.

## SUMMARY OF THE ARGUMENT

2011 Mississippi Laws Chapter 389, which amended Miss. Code Ann. § 71-3-51, now providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, is constitutional under Mississippi Constitution Article 6, § 146. Said law does not improperly encroach upon the judicial powers of the Supreme Court of Mississippi, as the constitutionality of laws passed by the legislature is *prima facie* presumed. *Natchez & S. R. Co. v. Crawford*, 99 Miss. 697 (Miss. 1911). Additionally, this Honorable Court has appellate jurisdiction over direct appeals from the final decisions of the Mississippi Workers' Compensation Commission, as this Honorable Court has long since expanded its appellate jurisdiction, and the statute at issue is merely a result of that expansion. All other previous holdings in contradiction to this expansion should be overturned, specifically the holding in *Illinois Cent. R. Co. v. Dodd*, 61 So. 743 (Miss. 1913).

The holding in *Illinois Cent. R. Co. v. Dodd*, 61 So. 743 (Miss. 1913) should be overturned, in order to find that the Mississippi Supreme Court has appellate jurisdiction of the rulings of the Mississippi Workers' Compensation Commission, pursuant to 2011 Mississippi Laws Chapter 389. In *Dodd*, the Mississippi Supreme Court held that its revisory jurisdiction includes only judicial decisions rendered by a tribunal clothed with judicial power. *Id.* at 743. However, in 1979, the Mississippi Commission on Judicial Performance was established, providing the Mississippi Supreme Court the authority to discipline and remove judges (§ 177-A of the Mississippi Constitution), which is not an ordinary exercise of appellate jurisdiction. In 1984, § 146 of the Mississippi Constitution, was amended to add public-utility-rate appeals. It is only logical that the

amendment of § 146 in 1984 be construed consistently with the expansion of the Mississippi Supreme Court's Jurisdiction in 1979, with the enactment of § 177-A. *Dodd*, and cases with similar holdings, should be overturned in order to remain consistent with the expansion of this Honorable Court's appellate jurisdiction, which was arguably the intent of the § 177-A of the Mississippi Constitution, providing this Honorable Court with the authority to discipline and remove judges, pre-dating the 1984 amendment to §146 of the Mississippi Constitution.

## ARGUMENT

The standard of review for the constitutionality of Mississippi statutes is *de novo*. *Thoms v. Thoms*, 928 So.2d 852 (Miss. 2006). The question of whether a statute is violative of the Constitution is one of much delicacy, and which the court should approach with great caution and deliberation. *Natchez & S. R. Co. v. Crawford*, 99 Miss. 697 (Miss. 1911).

- I. **The 2011 Mississippi Laws Chapter 389, which amended Miss. Code Ann. § 71-3-51, now providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, is constitutional under Mississippi Constitution Article 6, § 146.**

A statute's constitutionality is *prima facie* presumed, because the legislature, in adopting it, is first required to determine its constitutionality. *Id* at 714. The legislature must be deemed to have acted with integrity, and with a just desire to keep within constitutional limitations. *Id*. The legislature is a coordinate branch of the government with the judiciary, invested with high and responsible duties, and legislates under the solemnity of an oath, which they are not supposed to disregard. *Id*. All doubts are resolved in favor of the constitutionality of the statute. *Id*. If there is reasonable doubt of its constitutionality, it must be upheld by the courts. *Id*. In the instant matter, the issue of constitutionality of the amendment to Miss. Code Ann. § 71-3-51 is solely whether it conflicts with Mississippi Constitution Article 6, § 146, providing Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility. The amended code section at issue, and Article 6, § 146 of the Mississippi Constitution are provided herein:

**Miss. Code Ann. § 71-3-51. Court review of compensation award**

The final award of the commission shall be conclusive and binding unless either party to the controversy shall, within thirty (30) days from the date of its filing in the office of the commission and notification to the parties, appeal therefrom to the Supreme Court.

Such appeal may be taken by filing notice of appeal with the commission, whereupon the commission shall under its certificate transmit to the Supreme Court all documents and papers on file in the matter, together with a transcript of the evidence, the findings, and award, which shall thereupon become the record of the cause. Appeals shall be considered only upon the record as made before the commission. The Supreme Court shall always be deemed open for hearing of such appeals. The Supreme Court shall review all questions of law and of fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the commission for enforcement. If prejudicial error be found, the same shall be reversed and the Supreme Court shall enter such judgment or award as the commission should have entered. An appeal from the commission to the Supreme Court shall not act as a supersedeas unless the court shall so direct, and then upon such terms as such court shall direct.

No controversy shall be heard by the commission or an award of compensation made therein while the same matter is pending either before a federal court or in any court in this state.

Any award of compensation made by the Supreme Court shall bear the same interest and penalties as do other judgments awarded in circuit court.

**Miss. Const. Ann. Art. 6, § 146 (2011). Jurisdiction of Supreme Court**

The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law. The Legislature may by general law provide for the Supreme Court to have original and appellate jurisdiction as to any appeal directly from an administrative agency charged by law with the responsibility for approval or disapproval of rates sought to be charged the public by any public utility. The Supreme Court shall consider cases and proceedings for modification of public utility rates in an expeditious manner regardless of their position on the court docket.

The amendment to Miss. Code Ann. § 71-3-51, is constitutional under Mississippi Constitution Article 6, § 146, as said law does not improperly encroach upon the judicial powers of the Supreme Court of Mississippi. It is presumed constitutional under *Crawford*, and nothing on the face of the amended statute implies that it is unconstitutional; therefore the law must be upheld.

**II. The Supreme Court of Mississippi has appellate jurisdiction over a direct appeal from the Mississippi Workers' Compensation Commission.**

Appellate jurisdiction is granted by both the Constitution and the Legislature "by general law." *Miss. Const. art. 6, § 146*. Further, the supreme court has consistently held that a litigant's right to an appeal is statutory and "not based on any inherent common law or constitutional right." *Gill v. Miss. Dep't of Wildlife Conservation*, 574 So. 2d 586, 590 (Miss. 1990); *Fleming v. State*, 553 So. 2d 505, 506 (Miss. 1989) (citing *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312-13, 77 L. Ed. 2d 987 (1983)). This Honorable Court has appellate jurisdiction over direct appeals from the final decisions of the Mississippi Workers' Compensation Commission, as this Honorable Court has long since expanded its appellate jurisdiction, and the statute at issue is merely a result of that expansion. All other previous holdings in contradiction to this expansion should be overturned, specifically the holding in *Illinois Cent. R. Co. v. Dodd*, 61 So. 743 (Miss. 1913).

The holding in *Illinois Cent. R. Co. v. Dodd*, 61 So. 743 (Miss. 1913) should be overturned, in order to find that the Mississippi Supreme Court has appellate jurisdiction of the final rulings of the Mississippi Workers' Compensation Commission, pursuant to 2011 Mississippi Laws Chapter 389. In *Dodd*, the Mississippi Supreme Court held that

its revisory jurisdiction includes only judicial decisions rendered by a tribunal clothed with judicial power. *Id.* at 743. However, in 1979, the Mississippi Commission on Judicial Performance was established, providing the Mississippi Supreme Court the authority to discipline and remove judges (§ 177-A of the Mississippi Constitution), which is not an ordinary exercise of appellate jurisdiction. In 1984, § 146 of the Mississippi Constitution, was amended to add public-utility-rate appeals. It is only logical that the amendment of § 146 in 1984 be construed consistently with the expansion of the Mississippi Supreme Court's Jurisdiction in 1979, with the enactment of § 177-A. As the instant issues are of first impression in the state of Mississippi, it is imperative to look to other jurisdictions for guidance, who have addressed this issue (or similar issues). In fact, a number of other states have addressed the issue of directly appealing to the state's highest court, if aggrieved by a final ruling in the workers' compensation case.

In the state of Montana, Mont. Code Anno. § 2-4-701 (2010) provides:

Immediate review of agency action.

A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Specifically regarding workers' compensation cases, Mont. Code Ann. § 39-71-2904 (2010) provides:

Direct Appeal to the Supreme Court. Notwithstanding 2-4-701 through 2-4-704, an appeal from a final decision of the workers' compensation judge shall be filed **directly** with the Supreme Court of Montana in the manner provided by law for appeals from the district court in civil cases. (emphasis added).

Mont. Code Ann. § 39-71-2904 grants a right of appeal from a "final" decision of a workers' compensation judge to the Montana Supreme Court. An order refusing to

dismiss a cause is not ordinarily appealable. *Bowen v. Super Valu Stores*, 229 Mont. 84, (Mont. 1987). Furthermore, in *McMahon v. Anaconda Co.*, 828 P.2d 374 (Mon. 1981), the Montanan Supreme Court held that it was not the fault of the claimant that Mont. Code Ann. § 39-71-2904 provided unclear guidelines for the filing and service of a notice of appeal, and in the absence of express direction from the legislature, justice required the court to hold that the filing of the notice of appeal by the claimant was timely, and that the court was vested with jurisdiction of his appeal. *Id.* remanded by 208 Mont. 482, 678 (Mont. 1984). In other words, Montana law holds that their supreme court is vested with appellate jurisdiction under their laws, and even if the code addressing appeals to the Montana Supreme Court from workers' compensation cases is vague or unclear, justice requires the Montana Supreme Court be vested with appellate jurisdiction. While Montana law, specifically Mont. Code Ann. § 39-71-2904, addresses direct appeals from workers' compensation *judges* and necessarily the commission, the legal principle regarding appellate jurisdiction for direct appeals to a state's highest court remains applicable and comparable. The state of Kentucky's rules and procedures regarding direct appeals to the state's highest court is even more analogous to the new law enacted in Mississippi.

In 2003, Workers' Compensation Board decisions were subject to direct review by the Kentucky Court of Appeals without the need for trial court adjudication. *Ky. CR 76.25(1)*. Those decisions are subject to review by the Supreme Court of Kentucky, which has held that such review is guaranteed by the Kentucky Constitution and is not discretionary. *Vessels v. Brown-Forman Distillers Corp.*, 793 S.W.2d 795, 798 (Ky. 1990)(held it was unconstitutional to prohibit appeals from the workers' compensation

boards to the Kentucky Court of Appeals, or to the Supreme Court of Kentucky). Section 115 of the Kentucky Constitution gives to parties in workers' compensation actions a matter of right to appeal to the Supreme Court via KRS 342.290. The *Vessels* Court held that KRS 342.290 constitutionally eliminated the circuit court as the court authorized to review opinions, orders and awards of the Workers' Compensation Board. *Id.* at 798. The court held that the statute "gave the Court of Appeals the same power to review as had been originally given by statute to the circuit court- no more, and no less." *Id.* Rule 76.25(12) of the Kentucky Rules of Civil Procedure provides, as a matter of right, an appeal by any party aggrieved by a decision of the Workers' Compensation Board to the Court of Appeals. In CR76.25(12), the rule provides that further review may be sought in the Supreme Court of a final decision or final order of the Court of Appeals in a workers' compensation matter in accordance with the rules applicable to motions for discretionary review under CR 76.20. As in Kentucky, the amendment to Miss. Code Ann. § 71-3-51, allowing direct appeals to the Mississippi Supreme Court merely gives the Mississippi Supreme Court "the same power to review as had been originally given to the circuit court- no more, and no less." Furthermore, while the Legislature has the constitutional power to determine our appellate jurisdiction, the Constitution also grants the judiciary the power to establish its own rules of practice and procedure.

Article 6, Section 144, states that the judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." *Miss. Const. art. 6, § 144.* "The phrase 'judicial power' in Section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business." *S. Pac. Lumber Co v.*

*Reynolds*, 206 So. 2d 334, 335 (Miss. 1968) (citations omitted). The "fundamental constitutional concept of separation of powers" gives this Court the "inherent power . . . to promulgate procedural rules." *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975) (citing *Matthews v. State*, 288 So. 2d 714, 715 (Miss. 1974); *Gulf Coast Drilling & Exploration Co. v. Permenter*, 214 So. 2d 601, 603 (Miss. 1968); and *S. Pac. Lumber. Co.*, 206 So. 2d at 335 (Miss. 1968)). The amendment to Miss. Code Ann. § 71-3-51 should be upheld.

### CONCLUSION

2011 Mississippi Laws Chapter 389, which amended Miss. Code Ann. § 71-3-51, now providing that appeals of final awards of the Mississippi Workers' Compensation Commission shall be made directly to the Supreme Court of Mississippi, is constitutional under Mississippi Constitution Article 6, § 146. Under *Crawford*, the constitutionality of Miss. Code Ann. § 71-3-51, as amended, is *prima facie* presumed, and does not improperly encroach upon the powers of the judiciary.

Further, the holding in *Illinois Cent. R. Co. v. Dodd*, 61 So. 743 (Miss. 1913) should be overturned, in order to find that the Mississippi Supreme Court has appellate jurisdiction of the rulings of the Mississippi Workers' Compensation Commission, pursuant to the amendment to Miss. Code Ann. § 71-3-51. This Honorable Court should find that it has appellate jurisdiction over matters appealed from the Mississippi Workers' Compensation Commission, as previous actions by this Honorable Court, specifically, the establishment of the Mississippi Commission on Judicial Performance in 1979, display a trend in expanding the appellate jurisdiction of this Honorable Court. Finding that this Honorable Court has appellate jurisdiction over direct appeals from the Mississippi

Workers' Compensation Commission will only maintain the consistency of said expansion.

**CERTIFICATE OF SERVICE**

I, Carlos E. Moore, Appellant's attorney, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

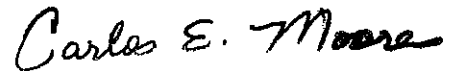
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The Commissioners of the Mississippi Workers' Compensation Commission  
c/o Liles Williams, Chairman  
The Mississippi Workers' Compensation Commission  
P.O. Box 5300  
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I have also on this date mailed via United States mail, postage prepaid, the original and three copies of Appellant's Brief on Constitutionality and Jurisdiction addressed as follows to:

Clerk, MS Supreme Court  
P.O. Box 249  
Jackson, MS 39205-0249

THIS, the 7<sup>th</sup> day of September, 2011.



\_\_\_\_\_  
Carlos E. Moore, Esq.  
Tangala L. Hollis, Esq.