

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2018-WC-00792-COA**

WINDIE KOPITSKIE

APPELLANT

V.

H&K DRYWALL

AND

AMFED CASUALTY INSURANCE COMPANY

APPELLEES

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Windie Koptiskie, Claimant and Appellant
2. H&K Drywall, Employer and Appellee
3. Rodney Koelker, Manager/Owner of H&K Drywall
4. Gena B. Koelker, Manager/Registered Agent of H&K Drywall
5. Amfed Casualty Insurance Company, Carrier and Appellee
6. Joseph R. Franks, Esq., Counsel for Appellant
7. Jared H. Hawkins, Esq., Counsel for Appellees
8. Honorable Robert J. Arnold, III, Administrative Law Judge
9. Honorable Virginia Wilson Mounger, Administrative Law Judge
10. Mark Formby, Chairman, Mississippi Workers' Compensation Commission
11. Thomas A. Webb, Esq., Commissioner, Mississippi Workers' Compensation
Commission

12. Beth Harkins Aldridge, Commissioner, Mississippi Workers' Compensation Commission

SO CERTIFIED, this the 19th day of September, 2018.

Respectfully submitted,



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STATEMENT OF ISSUES

The Appellant asserts the following issues on appeal:

- I. The administrative judge erred by denying the Claimant's Motion to Deem Request for Admissions Admitted.
- II. The administrative judge erred by denying Claimant's Supplemental Motion to Deem Request for Admissions Admitted.
- III. The administrative judge erred by denying the Claimant's Motion to Strike Employer and Carrier's Responses to Claimant's First Set of Request for Admissions and Second Set of Requests for Admissions.

STATEMENT OF THE CASE

This workers' compensation claim arose from a work-related injury occurring on June 4, 2015. Appellant filed a Petition to Controvert with the Mississippi Workers' Compensation Commission on May 12, 2017. (R. 1). Appellant propounded Request for Admissions to the Employer on or about June 8, 2017 and moved to have those deemed admitted on August 4, 2017. (R. 2-5).

Appellant propounded a Second Set of Request for Admissions on October 6, 2017 mailed with a copy the First Set of Request for Admissions via certified mail. (R. 10, 13-14). All documents were returned to sender. (R. 15-19).

The Employer and Carrier responded to all Request for Admissions on November 20, 2017. R. 10. Appellant moved to strike those responses and filed a Supplemental Motion to Deem Request for Admissions Admitted on November 27, 2017. (R. 9-31).

At a telephonic hearing held on April 4, 2018, the Administrative Law Judge, Robert J. Arnold, III, denied Appellant's motions, specifically, Motion to Deem Request for Admissions Admitted, Supplemental Motion to Deem Request for Admissions Admitted, and Motion to Strike Employer and Carrier's Responses to Claimant's First Set of Requests for Admissions and Second Set of Requests for Admissions. (R. 62).

Appellant sought review before the Full Commission. The Commission dismissed said petition and review was sought before this Honorable Court.

STATEMENT OF FACTS

Wendie Koptiskie, the Appellant, sustained a work-related injury on June 4, 2015. Appellant filed a Petition to Controvert with the Mississippi Workers' Compensation Commission on May 12, 2017. (R. 1). Appellant propounded Request for Admissions to the Employer on or about June 8, 2017 and moved to have those deemed admitted on August 4, 2017. (R. 2-5).

On October 2, 2017, a hearing was held before the Honorable Virginia Wilson Mounger at the Mississippi Workers' Compensation Commission.¹ At that time, the administrative law judge suggested the Appellant take steps to ascertain and contact the entity named in the Petition to Controvert. No record of that hearing is enclosed in the file.

On October 6, 2017, after obtaining further information, Appellant propounded a Second Set of Request for Admissions. (R. 10). Appellant enclosed a copy of the First Set of Request for Admissions with the Second Set of Request for Admissions and sent them via certified mail. (R. 20).

Appellees did not respond to either set of Request for Admissions until November 20, 2017. *Id.* At that time, responses to the First Set of Request for Admissions were 135 days overdue and responses to the Second Set of Request for Admissions were 15 days overdue.

Appellant filed a motion to strike those responses and filed a Supplemental Motion to Deem Request for Admissions Admitted on November 27, 2017. R. 9-31. Appellees filed their combined response on February 2, 2018. (R. 32-58). Appellees alleged the address, 1066 Windmill Drive in Meridian, Mississippi is an old address and was not the correct address for about the last ten (10) years. (R. 32). Appellant however, also sent copies on the address

¹ The administrative judges rotate cases at two year intervals at the Mississippi Workers' Compensation Commission.

located at 11430 Highway 49 North located in Collinsville, Mississippi identified as the proper address in the same response, which were also returned to sender. (R. 25-28).

Subsequently, Appellees filed an Amended Response on February 28, 2018. (R. 59-61). In that response, the Appellees admit the address on file with the Commission was 1066 Windmill Drive in Meridian, Mississippi 39305. (R. 59). Attached as an exhibit to that response, was the affidavit of Mr. Rodney Koelker admitting he did stay at his home in Mississippi from May 2017 through November 2017, but omitted exactly what address he resided at in Mississippi. (R. 61).

At a telephonic hearing held on April 4, 2018, the Administrative Law Judge, Robert J. Arnold, III, denied Appellant's motions, specifically, Motion to Deem Request for Admissions Admitted, Supplemental Motion to Deem Request for Admissions Admitted, and Motion to Strike Employer and Carrier's Responses to Claimant's First Set of Requests for Admissions and Second Set of Requests for Admissions. (R. 62).

SUMMARY OF THE ARGUMENT

The Administrative judge erred by denying Appellant's Motions to Deem Request for Admissions Admitted, Supplemental Motion to Deem Request for Admissions Admitted, and Motion to Strike the responses of the Appellees to request for admissions despite Appellees' failure to submit timely responses. Such error is arbitrary, capricious, and contrary to the laws of the State of Mississippi since the administrative judge failed to identify any rationale, evidence, or law in his Order regarding the original ruling. Lastly, Appellees failed to request amendment or withdrawal of the request for admissions pursuant to the Mississippi Rules of Civil Procedure.

Argument

Standard of Review

This Court utilizes the substantial error test in workers' compensation cases. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (Miss. 2003). A workers' compensation case will only be overturned "for an error of law or unsupported finding of fact." *Weatherspoon*, 853 So. 2d at 778 (citing *Georgia Pac. Corp. v. Taplin*, 586 So. 2d 823, 826 (Miss. 1991)). "Reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of law." *Weatherspoon*, 853 So. 2d at 778 (citing *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992)).

I. The administrative judge erred as a matter of law by failing to deem Appellant's request for admissions admitted based on the original motion or the supplemental motion.

The Mississippi Workers' Compensation Commission adopted Rules 26-37 of the Mississippi Rules of Civil Procedure. MWCC Procedural Rule 9. A "matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney." M.R.C.P. 36(a). "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." M.R.C.P. 36(b).

Mississippi courts have held request for admissions are not be taken lightly. In *Tyler v. Automotive Finance Co., Inc.*, Tyler argued improper service of the request for admissions

since they were provided to an attorney, representing Tyler on another matter, who had not entered an appearance in the circuit court and merely mailing them to Tyler's address did not suffice. 113 So. 3d 1236, 1240-1241 (Miss. 2013). While the Mississippi Supreme Court did not analyze those issues, it did uphold the trial court's ruling deeming those request for admissions admitted going so far as to state that "Rule 36 is self-executing, and no motion to have a request deemed admitted is required.." *Id.* at 1240.

Like Tyler, the request for admissions in this case were deemed admitted by operation of law. Both sets of request for admissions were sent to the address on file with the Workers' Compensation Commission for the Employer Appellee. (R. 59). Additionally, they were sent to every address² via certified mail, return receipt requested, without any response. It is the duty of the Employer Appellee to maintain current information with the Commission and not that of the Appellant in this matter.

In another case before the Mississippi Supreme Court, that Court upheld a trial court's ruling deeming request for admissions admitted. *Scoggins v. Baptist Memorial Hosp.-Desoto*, 967 So. 2d 646, 648-649 (Miss. 2007). In that case, the Court reviewed an appeal based on request for admissions answered 148 days after Baptist propounded those request for admissions. *Id.* at 648. The Court in *Scoggins* stated "rules are promulgated for a purpose." *Scoggins*, 967 So. 2d at 649 (quoting *Earwood v. Reeves*, 798 So. 2d 508, 516 (Miss. 2001)).

Appellees in this case, failed to respond for 165 days for the first set of request for admissions and forty-five (45) days for the second set of request for admissions. And like

² The Employer had two addresses to which all documents were sent. One on file with the Mississippi Workers' Compensation Commission and one on file with the Mississippi Secretary of State. The registered agent's address was the same as the one on file with the Mississippi Secretary of State.

Scoggins, the Appellees failed to seek withdrawal or amendment. *Scoggins*, 967 So. 2d at 649.

In *DeBlanc v. Stancil*, this Court upheld another set of request for admissions deemed admitted. 814 So. 2d 796, 797-798 (Miss. 2002). In *DeBlanc*, request for admissions were served with the complaint, but were not answered for four months. *Id.* at 797. This Court held “there is no gratuity about” Rule 36 and “[c]ourts cannot give or withhold at pleasure. Rule 36 is to be enforced according to its terms.” *DeBlanc*, 814 So. 2d at 799 (quoting *Educational Placement Servs. V. Wilson*, 487 So. 2d 1316 (Miss. 1986)); *see also Sawyer v. Hannan*, 556 So. 2d 696 (Miss. 1990) (responses were three weeks late and the court did not exercise leniency despite a request to withdraw); *Martin v. Simmons*, 571 So. 2d 254 (Miss. 1990) (responses were eleven days late and chancellor found no justifiable excuse for the tardiness).

Like the *Deblanc* decision, this Court should not show any leniency toward Appellees. Appellees were sent copies at all known addresses, including the address on file with the Mississippi Secretary of State. (R. 23). Failure of Appellees to update their address should not place additional burdens on the Appellant. This Court is well within its power to overturn the ruling of the administrative judge and deem the request for admissions admitted.

Additionally, the administrative judge failed to identify any reason or provide any record as to why said motions were denied. (R. 62). Therefore, the judge’s ruling is not based on any substantial evidence in this matter. *Weatherspoon*, 853 So. 2d at 778 (citing *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992)). “Substantial evidence is more than a scintilla.” *Central Elec. Power Ass’n v. Hicks*, 236 Miss. 378, 389 (Miss. 1959).

Lastly, said ruling is arbitrary and capricious for the same reasons as it fails to cite any reasons whatsoever as support. Therefore, the administrative judge's order is not based in law or evidence and this Court should overturn such a ruling.

II. The administrative judge erred by denying the Claimant's Motion to Strike Employer and Carrier's Responses to Claimant's First Set of Request for Admissions and Second Set of Requests for Admissions.

The administrative judge provided no reasons supporting his ruling. (R. 62). For the same reasons cited above, the ruling is arbitrary and capricious without any substantial evidence supporting its position.

Additionally, Appellees failed to seek withdrawal or amendment of the admissions as required by Rule 36(b). M.R.C.P. 36(b). Do to that failure, no basis exists for the administrative judge's denial of the Appellant's/Claimant's Motion to Strike Employer and Carrier's Responses to Claimant's First Set of Request for Admissions and Second Set of Request for Admissions.

Conclusion

Ms. Windie Koptiskie respectfully requests this Court to review the administrative judge's Order, and enter an order deeming the first set of request for admissions admitted. Appellant also requests this Court to enter an order striking the Employer and Carrier's (Appellees') responses to the request for admissions propounded by the Appellant.

Respectfully submitted this, the 19th day of September, 2018.

WINDIE KOPITSKIE



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CERTIFICATE OF SERVICE

I, Joseph R. Franks, do hereby certify that I have this date hand delivered, mailed by United States Mail, postage prepaid, or electronically delivered a true and correct copy of the above and foregoing document to counsel for the Employer and Carrier:

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THIS, September 19, 2018.



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