

**BEFORE THE MISSISSIPPI COURT OF APPEALS
CASE NO. 2019-WC-00236-COA**

KATHRYN DILDY

CLAIMANT/APPELLANT

V.

**MCPETERS, INC. FUNERAL
DIRECTORS AND OLD
REPUBLIC INSURANCE COMPANY**

EMPLOYER AND CARRIER/APPELLEES

BRIEF OF APPELLEES

MCPETERS, INC. FUNERAL DIRECTORS

AND

OLD REPUBLIC INSURANCE COMPANY

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CERTIFICATE OF INTERESTED PERSONS

THE UNDERSIGNED Counsel of record certifies that the following listed persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Judges at the Court of Appeals of the State of Mississippi and the Justices of the Mississippi Supreme Court may evaluate possible disqualifications or recusal.

1. Kathryn Dildy, Appellant-Claimant;
2. McPeters, Inc. Funeral Directors, Appellee-Employer;
3. SCI, Employer;
4. Old Republic Insurance Company, Appellee-Carrier;
5. Chairman Mark Formby, Commissioner Beth Harkins Aldridge, Commissioner Mark Henry, Mississippi Workers' Compensation Commission;
6. The Honorable Deneise Turner Lott, Administrative Judge, Mississippi Workers' Compensation Commission;
7. Loreleigh C. Phillips, Esq.; Upshaw Williams Biggers & Beckham, LLP; attorney of record for Appellees-Employer; and
8. Greg E. Beard, Esq.; attorney of record for Appellant-Claimant.

SO CERTIFIED, this the 14th day of August, 2019.

Respectfully submitted,

McPETERS, INC. FUNERAL
DIRECTORS, AND OLD REPUBLIC
INSURANCE COMPANY, APPELLEES
BY:

/s/ Loreleigh C. Phillips
LORALEIGH C. PHILLIPS

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STATEMENT OF THE ISSUE

Did the Commission properly dismiss the Claimant's appeal as untimely?

STATEMENT OF THE CASE

This appeal involves the application of the twenty (20) day time limit with which a party must appeal from the decision of an Administrative Judge within the Mississippi Workers' Compensation Commission.

The Final Order of the Administrative Judge was issued and filed with the Mississippi Workers' Compensation Commission on December 4, 2018. However, the Appellant filed her Petition for Review on December 28, 2018. Because the Appellant failed to timely appeal within the twenty (20) day time limit, the appeal was dismissed by the Commission.

From this Full Commission Order dismissing her appeal, the Appellant timely appealed, and this matter is currently before this Honorable Court of Appeals.

SUMMARY OF THE ARGUMENT

This case was tried before the Honorable Mississippi Workers' Compensation Commission Administrative Judge and thereafter, the Final Order of the Administrative Judge was issued and filed with the Mississippi Workers' Compensation Commission on December 4, 2018. However, the Appellant, (hereinafter "Claimant"), failed to timely appeal within the twenty (20) day time limit and the appeal was dismissed by the Commission.

The Claimant argues she should be provided an allowance to deviate from the Rules of the Mississippi Workers' Compensation Commission and her appeal be accepted, albeit late, due to a number of circumstances involving abnormalities with the mailing of the Final Order of the Administrative Judge by the Commission and the Christmas holidays.

Legal holidays are mandated by statute and additional discretion was given extend the Christmas holiday by the Governor's Proclamation issued in 2018. However, despite these holidays extending the otherwise twenty (20) day time limit to appeal, the Claimant still did not timely petition the Full Commission for review of the Final Order of the Administrative Judge.

The Appellee, (hereinafter "Employer/Carrier"), in this matter, urges this Court to uphold the Commission's dismissal because the Claimant admittedly had notice of issuance and entry of the *Final Order of the Administrative Judge* in time to perfect an appeal, but instead filed her appeal late. The Employer/Carrier respectfully requests this Court to uphold the Commission's dismissal of the Claimant's appeal as untimely.

ARGUMENT

Pursuant to Mississippi Administrative Code Rule 2.10, once the Administration Judge's order is written, it becomes final, unless, within twenty days of the date of the decision, either side files an appeal to the Full Commission for review. Any decision of the Administrative Judge is final "unless within twenty (20) days [from the date of the filing of the Judge's Order] a request or petition for review by the full commission is filed." Miss. Code Ann. §71-3-47 (Rev. 2011); MS. Admin. Code Rule 2.10 (Review Hearings).

In this workers' compensation claim, this case was tried at a Hearing on the Merits before the Administrative Judge. Thereafter, the *Final Order of the Administrative Judge* was signed by the Judge on November 29, 2018, (R. at 23), rendering a final decision. This *Final Order of the Administrative Judge* was filed into the docket of the Mississippi Workers' Compensation Commission on December 4, 2018. (R. at 5; R. at 29).

While the Final Order of the Administrative Judge was entered into the docket of the Mississippi Workers' Compensation Commission on December 4, 2018, neither the attorney for the Employer/Carrier, nor the attorney for the Claimant received the written *Final Order of the Administrative Judge* in the mail in the days that followed. In fact, this undersigned attorney for the Employer/Carrier only found the *Final Order of the Administrative Judge* by happenstance, while searching for other orders issued on the Mississippi Workers' Compensation Commission website, on December 11, 2018. That being the circumstance, yet, on that same date, on December 11, 2018, this undersigned attorney for the Employer/Carrier informed the Claimant's attorney of the

issuance and entry of the *Final Order of the Administrative Judge*. In fact, the Claimant's attorney confirmed such facts in his own writings within the *Claimant's Petition for Review Before the Full Commission et al.* (R. at 24-26). Therein, the Claimant's attorney states, "Counsel for the employer/carrier, the Honorable Loreleigh Phillips, inquired as to whether or not Claimant's attorney had a copy on December 11, 2018 at which point a search was conducted on the Commission's website and found that said Order was posted on December 4, 2018." (R. at 24-25). Such a statement by the Claimant's attorney served as an admission that he received notice of the filing of the *Final Order of the Administrative Judge* within the twenty (20) day time period with which he could have timely appealed. (R. at 24-25). In fact, the Full Commission noted that the Claimant's attorney had such notice of the entry of the *Final Order of the Administrative Judge* within the applicable twenty (20) day review period, in its decision, as well. (R. at 29).

Later in December of 2018, this counsel for the Employer/Carrier received a copy of the *Final Order of the Administrative Judge* through the mail on December 13, 2019. Counsel for the Claimant advised the Commission in the *Claimant's Petition for Review Before the Full Commission et al.*, (R. at 24), that he received a copy of the *Final Order of the Administrative Judge* on December 20, 2018. Again, counsel for the Claimant admitted he received the *Final Order of the Full Commission* within the twenty (20) day time period with which could have been timely appealed. (R. at 24).

Even with the abnormalities in the parties' receipt of the *Final Order of the Administrative Judge* from the Commission, each party had notice of its entry within the twenty (20) day time frame from which to appeal. This was so, even despite the

number of legal holidays that fell within that twenty (20) day time period, as well. However, the Claimant did not appeal in time.

Twenty (20) days from December 4, 2018, the operative time in which the Claimant was to have perfected an appeal, came and went on Wednesday, December 26, 2018. The Claimant did not perfect and file her appeal until Friday, December 28, 2018. (R. at 24-26).

In counting the time, the date on the order is excluded and the last day is included. *Marlboro Shirt Co. (Reliance Mfg. Co.) v. Whittington*, 195 So. 2d 920 (Miss. 1967). If the last day falls on Saturday or Sunday, the petition must be filed the Friday before. *Id.* Any other Saturday or Sunday shall be counted in the number of days. *Id.* This Court found that state, but not federal holidays, are counted in those twenty (20) days calculation, when it ruled that a pro-se employer's Review Petition filed Tuesday, October 10, 2017, was not timely for failure to file by Monday, October 9, despite the federal holiday (but not state holiday) of Columbus Day. *Emmanuel Ridge Community Services Inc. v. Loggins*, 270 So. 3d 1073 (Miss. App. 2018)).

Pursuant to Mississippi Code Annotated Section 3-3-7 (Amended 2013), Christmas Eve of 2018 was not a state recognized holiday; however, by the Governor's Proclamation and the discretion of the Chairman of the Mississippi Workers' Compensation Commission, Christmas Eve was dedicated and declared a State Holiday. This is important because the Claimant's twenty (20) day running of the time limitations to file an appeal was extended due to the State Holiday of Christmas Eve 2018.

State Holidays declared as legal holidays per Mississippi Code Annotated Section 3-3-7(1) are "the first day of January (New Year's Day); the third Monday of January

(Robert E. Lee's birthday and Dr. Martin Luther King, Jr.'s birthday); the third Monday of February (Washington's birthday); the last Monday of April (Confederate Memorial Day); the last Monday of May (National Memorial Day and Jefferson Davis' birthday); the fourth day of July (Independence Day); the first Monday of September (Labor Day); the eleventh day of November (Armistice or Veterans' Day); the day fixed by proclamation by the Governor of Mississippi as a day of Thanksgiving, which shall be fixed to correspond to the date proclaimed by the President of the United States (Thanksgiving Day); and the twenty-fifth day of December (Christmas Day). In the event any holiday hereinbefore declared legal shall fall on Sunday, then the next following day shall be a legal holiday." And, further, by the power vested in the Governor for the State of Mississippi, Governor Phil Bryant issued a Proclamation also authorizing the executive officers of all state agencies, in their discretion after considering the interests of the people of the State of Mississippi and the staffing needs of their respective agencies, to close all offices of the State of Mississippi on Friday, November 23, 2018, in further observance of the Thanksgiving holiday; on Monday, December 24, 2018, in further observance of Christmas; and on Monday, December 31, 2018, in further observance of the New Year; and to staff their respective agencies as needed during the Thanksgiving holiday and Christmas and New Year's season." Proclamation of the Office of the Governor of the State of Mississippi, issued October 16, 2018 (emphasis added).

By operation of Statute and Governor's Bryant's Proclamation, the Christmas Holidays were extended, closing the Mississippi Workers' Compensation Commission

through its reopening on Wednesday, December 26, 2018. Thus, the Claimant's appeal time was extended from December 4, 2018, through December 26, 2018.

But, instead of the Claimant filing her timely appeal on or before the twenty (20) day time period following the filing of the *Final Order of the Administrative Judge*, instead, on Friday, December 28, 2018, the *Claimant's Petition for Review Before the Full Commission and to Allow Claimant to File For Commission Review Out of Time* was filed. (R. at 24-26). Now, here before this Court of Appeal for the State of Mississippi, the Claimant's attorney cites the Claimant's attorney's own office hours during the Christmas holidays as the basis for the request for the deviation from the ordinary twenty (20) day time limitation to file the Claimant's appeal. (See Appellant's Brief at Page 1).

In *Ford v. KLLM, Inc.*, 909 So. 2d 1194 (Miss. Ct. App. 2005), a petition for review that was filed on the twenty-first (21st) day from the date of the Administrative Order was considered untimely, absent showing of unique facts demonstrating constructive timely filing. In that case, The fact that petition was placed in the mail on the 20th day did not constitute such evidence. Therefore, the appeal was dismissed. *Id.*

Pursuant to Mississippi Administrative Code Rule 2.14, the Commission is allowed to deviate from its own Rules, for good cause shown, insofar as compliance is found to be impossible or impracticable. Mississippi Administrative Code Rule 2.14 goes on to read as follows: "However the time limits for requesting review of an Administrative Judge's decision or judicial review or appeal of a decision of the Commission may not be waived unless otherwise provided by statute or case law."

Here, the Full Commission did not find that such circumstances of the Claimant's attorney's own law office closing during the Christmas holidays to be so "unique" so as to justify a deviation from the Rules of the Mississippi Workers' Compensation Commission pursuant to Mississippi Administrative Code Rule 2.14 (effective January 18, 2018.) Nor, did the Full Commission find that compliance was impossible or impracticable. And, then, what is more, the Mississippi Administrative Code notes specifically that such Rule 2.14 cannot be used to extend the time limits for appeal purposes.

On January 2, 2019, the Mississippi Workers' Compensation Commission acknowledged receipt of the Claimant's Petition for Review. (R. at 27). The Mississippi Workers' Compensation Commission issued its Full Commission Order quickly thereafter, and dismissed the Claimant's Petition for Review. R. at 28-29). In that Full Commission Order, the Commission noted that "the parties had notice by their own admission on December 11, 2018, of the Order of the Administrative Judge, which was within the applicable twenty (20) day review period."

The Commission's findings of fact are entitled to substantial deference. *Raytheon Aerospace Support Servs. v. Miller*, 861 So. 2d 330, 335 (¶11) (Miss. 2003). "The findings of the Commission should be reversed 'only in rather extraordinary cases.'" *Id.* This Court reviews whether the Commission's finding was supported by substantial evidence, was arbitrary or capricious, or was based on erroneous application of facts. *Logan v. Klaussner Furniture Corp.*, 238 So. 3d 1134, 1138 (¶11) (Miss. 2018).

Here, the facts are clear and the dates are documented. The *Final Order of the Administrative Judge* was entered with the Commission on December 4, 2018. Any

appeal was to be taken within twenty (20) days, and due to the Christmas holidays, that would mean an appeal deadline of December 26, 2018. However, the Claimant filed her appeal on December 28, 2018. The appeal by the Claimant was out of time and the Full Commission lost jurisdiction of this claim to hear the appeal. The Commission correctly dismissed the appeal, lacking jurisdiction to hear such appeal.

CONCLUSION

For these reasons, the Appellee herein, the Employer/Carrier, respectfully requests that this Court uphold the dismissal of the Claimant's appeal to the Full Commission of the Mississippi Workers' Compensation Commission.

Respectfully submitted this, the 14th day of August, 2019.

McPETERS, INC. FUNERAL DIRECTORS
AND OLD REPUBLIC INSURANCE
COMPANY, Employer/Carrier

BY: /s/ Loreleigh C. Phillips
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CERTIFICATE OF SERVICE

I, Loreleigh C. Phillips, hereby certify that I have on this date filed on the ECF electronic filing system, a true and correct copy of the above and foregoing McPeters, Inc. Funeral Directors and Old Republic Insurance Company's Brief to the Court of Appeals of the State of Mississippi to the following attorneys:

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So certified, this 14th day of August, 2019.

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