

# MISSISSIPPI WORKERS' COMPENSATION

## “A GUIDELINE FOR EMPLOYERS AND CARRIERS”

2021



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## **I. INTRODUCTION**

Mississippi enacted its Workers' Compensation Act (the "Act")<sup>1</sup> in 1948. Since its original adoption, the Act has been amended many times. The most recent amendments were during the 2012 session of the Mississippi Legislature and took effect for all claims occurring on or after July 1, 2012.<sup>2</sup> The Mississippi Workers' Compensation Commission, which administers the Act, has promulgated its own Procedural and General Rules. Those Rules were last amended effective January 18, 2018. This paper will acquaint the reader with the law and their company's rights under the present workers' compensation scheme. These few pages cannot address all of the issues pertinent to workers' compensation; however, it does serve as a manual covering germane principles and problems in resolving and/or defending workers' compensation claims. While this guide will provide a general explanation, legal counsel should be consulted so a careful analysis can be prepared of each particular situation.

## **II. THE COMMISSION**

The governmental entity responsible for the administration of the Mississippi Workers' Compensation law is the Mississippi Workers' Compensation Commission. Most of the claims under the Mississippi Workers' Compensation Act are paid voluntarily and do not become the subject of controversy. If a claim is the subject of a dispute, a hearing on the merits will be held before an Administrative Law Judge, who will subsequently render a decision. Appeals are made initially to the Full Commission which is composed of three Commissioners. Appeals from decisions of the Full Commission are taken to the Mississippi Supreme Court. The Supreme Court may and often does assign the case to the Mississippi Court of Appeals, subject to ultimate review by the Supreme Court.<sup>3</sup>

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<sup>1</sup> Miss. Code Ann. §§ 71-3-1 through 71-3-127.

<sup>2</sup> Where pertinent, amendments to the Act have been noted in this paper.

<sup>3</sup> Miss. Code Ann. § 71-3-51.

### III. ELEMENTS OF A CLAIM

#### (A) Burden of Proof:

Section 71-3-7 of the Mississippi Code sets forth the burden each claimant must satisfy in order to receive compensation. "Compensation shall be payable for disability or death of an employee<sup>4</sup> from injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease." Thus, each claim brought under the Act must satisfy three elements: (1) an injury (or occupational disease); (2) disability; and (3) a causal connection between the injury and the disability.<sup>5</sup> In 2012, section 71-3-7 was amended to provide that "[i]n all claims in which no benefits, including disability, death and medical benefits, have been paid, the claimant shall file medical records in support of his claim for benefits when filing a petition to controvert."<sup>6</sup>

For all claims on or after July 1, 2012, the Commission is required to neither show favor towards one party over another, nor to liberally construe the Act in favor of one party over another.<sup>7</sup> For claims arising prior to July 1, 2012, however, disputed issues are resolved and the Act is liberally construed in favor of the claimant.<sup>8</sup> While the law for these older claims favors a liberal interpretation, a claimant is still required to prove the claim by a fair preponderance of the evidence and to a legal certainty.<sup>9</sup> However, a claimant's uncontradicted testimony must

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<sup>4</sup> Averitt Express, Inc. v. Collins, 172 So.3d 1252 (Miss. Ct. App. 2015) (applicant participating in pre-employment testing has been held to be an employee).

<sup>5</sup> Miss. Code Ann. § 71-3-7; *see also* Dunn, Miss. Workers' Compensation, §265 at 322-23 (3d. Ed. 1982); Hedge v. Leggett & Platt, Inc., 641 So.2d 9 (Miss. 1994); Seals v. Pearl River Resort and Casino, 301 So.3d 585 (Miss. 2020) (Court affirmed Commission acceptance of 3 physicians opinions over opinion of 1 physician on issue of disability).

<sup>6</sup> Miss. Code Ann. § 71-3-7 also added that if a claimant was confined by the limitations of time established by Miss. Code Ann. §§ 71-3-35 & 71-3-53 at the time the Petition was filed, an additional 60 days were allowed to file medical proof.

<sup>7</sup> Miss. Code Ann. § 71-3-1 (2012).

<sup>8</sup> Miss. Code Ann. § 71-3-1 (1990); *see also*, Miller Transporters, Inc. v. Guthrie, 554 So.2d 917, 918 (Miss. 1989); Binswanger Mirror v. Wright, 947 So.2d 346 (Miss. Ct. App. 2006).

<sup>9</sup> Bracey v. Packard Elec. Div. General Motors Co., 476 So.2d 28 (Miss. 1985); Cedeno v. Moran Hauling, 769 So.2d 203 (Miss. Ct. App. 2000) (claimant's inability to speak English must be considered by Commission but does not change burden of proof).

generally be accepted as correct,<sup>10</sup> making it very difficult to successfully defend a claim.<sup>11</sup> The 2012 changes to the Act should place the claimant and employer/carrier on equal ground when litigating a claim.<sup>12</sup>

(B) Job-Related Injury:

The Act defines "injury" as "an accidental injury or death, arising out of and in the course of employment, resulting from an untoward event or events, which, without regard to fault, was contributed to, aggravated or accelerated by the employment in a significant manner."<sup>13</sup> This definition includes harm caused by a third person's willful act "directed against an employee because of his employment while so employed and working on the job."<sup>14</sup>

There are several terms and concepts within that definition which require elaboration. "Accidental" is interpreted from the viewpoint of the employee and denotes an occurrence which is neither expected, designed, nor intentionally caused by the worker.<sup>15</sup> An injury may be accidental even if it occurs in the usual course of employment, involving only the usual exertion.<sup>16</sup> A gradually developing injury qualifies as an accidental injury where normal occupational exertion combined with an employee's physical condition brings about the disability.<sup>17</sup> In practice, the Commission tends to restrict the meaning of "accidental injury" by requiring claimants to prove the occurrence of some event or set of circumstances which could give rise to the injury.

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<sup>10</sup> Performance Tire & Wheel, Inc. v. Rhoads, 113 So.3d 1262 (Miss. Ct. App. 2013).

<sup>11</sup> But see, Brown v. Robinson Property Group, Ltd., 24 So.3d 320 (Miss. Ct. App. 2009); Smiley v. Hercules Concrete Pumping Service Inc., 132 So.3d 655 (Miss. Ct. App. Feb. 11, 2014).

<sup>12</sup> Jones v. Miss. Baptist Health Sys., 294 So.3d 76 (Miss. 2020) (Court of Appeals was reversed and Commission opinion was reinstated based upon credibility decision in light of 2012 amendment).

<sup>13</sup> Miss. Code Ann. § 71-3-3(b).

<sup>14</sup> Miss. Code Ann. § 71-3-3(b).

<sup>15</sup> Jenkins v. Ogletree Farm Supply, 291 So.2d 560 (Miss. 1974).

<sup>16</sup> Dunn, § 148 at 173-74.

<sup>17</sup> Jenkins v. Ogletree Farm Supply, 291 So.2d 560 (Miss.1974); KLLM, Inc. v. Fowler, 589 So.2d 670 (Miss. 1991) (when an injury with physical results develops gradually from the work and cannot be traced to a single event or to a precise time, the injury meets the requirement of accidental injury if it is causally connected to the work activities or environment and the events are within a reasonably definite and not too remote period of time).

Similarly, an "untoward event" is an unexpected event or a normal work activity having unexpected results.<sup>18</sup> There need not be any unusual or external force, nor is it necessary that there be a sudden happening.<sup>19</sup> The onset of the disability may be gradual and progressive and not immediately perceivable.<sup>20</sup>

The phrases "arising out of and in the course of employment" and "contributed to or aggravated or accelerated by the employment" have been interpreted to mean the conditions of employment need only be a substantial or significant factor in bringing about the injury.<sup>21</sup> When an employee's pre-existing condition or ailment is aggravated, accelerated or contributed to by her employment, a new compensable injury exists.<sup>22</sup> Although, when the effects of an injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.<sup>23</sup> An employer who has accepted a claim as compensable remains liable for all manifestations of any injury, regardless of how long they continue, even if a prior compensable injury makes a claimant more prone to a subsequent injury.<sup>24</sup>

The mere fact an injury occurs at work does not mean it is compensable.<sup>25</sup> Hence, harm produced by acts of God (e.g., tornados, lightning, earthquakes, etc.) are not compensable injuries unless the employee is exposed to a peculiar, increased risk or danger from the elements by reason of his employment.<sup>26</sup> Similarly, normal wear and tear or general stress upon the human body is not compensable.<sup>27</sup> Personal comfort activities reasonably incident to employment, such

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<sup>18</sup> Miss. Code Ann. § 71-3-3(b); see also, KLLM, Inc. v. Fowler, 589 So.2d 670 (Miss. 1991).

<sup>19</sup> Miller Transporters, Inc. v. Guthrie, 554 So.2d 917 (Miss. 1989); Dunn, §149 at 174.

<sup>20</sup> Jenkins v. Ogletree Farm Supply, 291 So.2d 560 (Miss. 1974); Dunn, §149 at 174-75).

<sup>21</sup> KLLM, Inc. v. Fowler, 589 So.2d 670 (Miss. 1991).

<sup>22</sup> Miller Transporters, Inc. v. Guthrie, 554 So.2d 917 (Miss. 1989); Flowers v. Crown Cork & Seal USA, Inc., 167 So.3d 188 (Miss. 2014).

<sup>23</sup> Rathborne, Hair & Ridgeway Box Co. v. Green, 115 So.2d 674 (Miss. 1959); Dept. of Agriculture and Commerce v. Austin, 150 So.3d 994 (Miss. Ct. App. 2014).

<sup>24</sup> Howard Industries, Inc. v. Robinson, 846 So.2d 245 (Miss. Ct. App. 2002).

<sup>25</sup> Dunn, § 156 at 184.

<sup>26</sup> Dunn, § 158 at 186.

<sup>27</sup> Fought v. Stuart C. Irby Co., 523 So.2d 314 (Miss. 1988).

as going to the bathroom or drinking water, are generally considered to "arise out of the employment."<sup>28</sup>

(C) Disability:

Under the Act, "disability" refers to an occupational incapacity, rather than medical or functional incapacity, and is defined as a claimant's incapacity to earn the same wages being received at the time of injury in similar or other employment.<sup>29</sup> Thus, a claimant may have a "medical" disability, but still be capable of working at her original job. Since the test for "disability" is occupational, a claimant may have a "medical disability," but can return to employment earning the same or a higher wage. In those instances, a presumption of no disability is established.<sup>30</sup>

An occupational disability must be supported by adequate medical findings;<sup>31</sup> however, absolute medical certainty is not required to prove that work related injuries caused the disability.<sup>32</sup> In addition to treatment and opinions by physicians, the Supreme Court has recognized the opinions of non-traditional medical providers such as chiropractors<sup>33</sup> and psychologists<sup>34</sup> to constitute "medical findings."

There are four classifications of disability commonly used in discussing workers' compensation claims:

**Total** disability prevents an employee from performing the substantial acts normally required in his/her usual occupation.<sup>35</sup> Sporadic earnings or doing some of the acts connected

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<sup>28</sup> White v. Miss. Dept. of Corrections, 28 So.3d 619 (Miss. Ct. App. 2009).

<sup>29</sup> Miss. Code Ann. § 71-3-3(i); International Paper Co. v. Kelley, 562 So.2d 1298 (Miss. 1990).

<sup>30</sup> Dunn, § 67 at 75-76; International Paper Co. v. Kelley, 562 So.2d 1298 (citing Agee v. Bay Springs Forest Products, Inc., 419 So.2d 188 (Miss. 1982)); but see, University of Miss. Med. Ctr. v. Smith, 909 So.2d 1209 (Miss. Ct. App. 2005) (claimant's return to former job at same rate of pay after initial surgery did not give rise to presumption since claimant's physical disability had not fully manifested).

<sup>31</sup> Miss. Code Ann. § 71-3-3(i); see also, Dunn, § 82.1 at 42-43 (Supp. 1990).

<sup>32</sup> Frito-Lay, Inc. v. Leatherwood, 908 So.2d 175 (Miss. Ct. App. 2005).

<sup>33</sup> White v. Hattiesburg Cable Co., 590 So.2d 867 (Miss. 1991).

<sup>34</sup> KLLM, Inc. v. Fowler, 589 So.2d 673 (Miss. 1991).

<sup>35</sup> Dunn, § 74 at 87-88.

with the business is insufficient to disqualify an employee from total disability benefits.<sup>36</sup> Total disability is usually temporary, but becomes permanent if the condition is such as to preclude any regular employment in the labor market.<sup>37</sup>

**Partial** disability is where the employee retains a functional use of her body or injured body part, but whose earning capacity is nonetheless reduced. The employee's retained use of her body or body part must be sufficient to allow her to perform the substantial acts required of some other employment, if not the original work.<sup>38</sup>

**Temporary** disability, either partial or total, refers to the healing period immediately after an injury. It starts with the time after the disabling injury and continues until the employee is cured or reaches maximum medical recovery.<sup>39</sup>

**Permanent** disability, whether total or partial, represents the amount of permanent lost wage-earning capacity or industrial loss of use a claimant suffered.<sup>40</sup> Benefits for permanent disabilities begin after a claimant reaches maximum medical recovery.

(D) **Causation**:

A claimant bears the burden of proof to establish a connection between the job-related injury and disability.<sup>41</sup> While circumstantial evidence may be used to establish the elements, medical evidence is generally necessary in order to show a disability exists and it was caused by the injury.<sup>42</sup> The medical evidence may be based upon medical records only and may not necessarily require a specific opinion addressing causation.<sup>43</sup> A claimant does not have to prove

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<sup>36</sup> University of Miss. Med. Ctr. v. Smith, 909 So.2d 1209 (Miss. Ct. App. 2005).

<sup>37</sup> Dunn, § 75 at 88.

<sup>38</sup> Dunn, §§ 72-74 at 84-88.

<sup>39</sup> Dunn, § 75 at 89.

<sup>40</sup> Dunn, § 72 at 84 and § 76 at 90.

<sup>41</sup> Shipp v. Thomas & Betts & Ace Am. Ins. Co., 13 So.3d 332 (Miss. Ct. App. 2009); Barnes v. LFI Fort Pierce, Inc., 238 So. 3d 7 (Miss. Ct. App. 2018) (claim denied based upon Claimant's misrepresentations).

<sup>42</sup> Short v. Wilson Meat House, LLC, 36 So.3d 1247 (Miss. 2010); Tate v. International Paper Co., 194 So.3d 136 (Miss. Ct. App. 2015).

<sup>43</sup> Calhoun Apparel, Inc. v. Hobson, 770 So.2d 539 (Miss. Ct. App. 2000).



with absolute medical certainty that the work related injuries were the cause of the disability.<sup>44</sup> He must prove with "credible medical evidence rather than by mere speculation" that the injury was caused by a work related accident.<sup>45</sup> Once the initial causal connection between a claimant's employment and her injury is established, all disabilities arising then or thereafter from the injury are compensable.<sup>46</sup> As to all injuries after July 1, 2012, a claimant must attach medical documentation in support of the claim with the initial petition to controvert, or his claim will be subject to dismissal.<sup>47</sup> The decision by an employer/carrier to initially accept a claim is a factor to consider in addressing causation.<sup>48</sup> Where the sole cause of a claimant's disability is a pre-existing condition, the claim should be denied.<sup>49</sup> A claim will be denied where a claimant provides late notice, contradictory history of the injury, and insufficient medical evidence.<sup>50</sup>

#### **IV. SPECIAL CASES**

##### **(A) Death - Found Dead Presumption:**

The burden of proof is upon the claimant to prove each element of the claim in a death case. There is a presumption that when an employee is found dead at a place where her duties required her to be, or where she might properly have been in the performance of her duties

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<sup>44</sup> Wayne Farms LLC v. Weems, 105 So.3d 1178 (Miss. Ct. App. 2012); *but see*, Kittrell v. W.S. Red Hancock, 162 So.3d 857 (Miss. Ct. App. 2014) (claim denied based upon employees lack of credibility).

<sup>45</sup> Hensarling v. Casablanca Construction Co., 906 So.2d 874 (Miss. Ct. App. 2005); Thadison v. Universal Lighting Technologies, Inc., 77 So.3d 551 (Miss. Ct. App. 2012) (claimant's doctor testified that the injury was "possibly" connected to his work and the court held "recovery under the workers' compensation scheme must rest upon reasonable probabilities, not upon mere possibilities").

<sup>46</sup> Dunn, § 157 at 185; Bellsouth Telecommunications, Inc. v. Harris, 174 So.3d 909 (Miss. Ct. App. 2015).

<sup>47</sup> Miss. Code Ann. § 71-3-17 (an exception is where the statute of limitations is near expiration; in that case the claimant has 30 days to file an amended petition to controvert).

<sup>48</sup> Forrest General Hospital v. Humphrey, 136 So.3d 468 (Miss. Ct. App. 2014) (employer/carrier accepted case and suspended benefits after EME; court found in case of first impression Commission could rely on payment as evidence of compensability).

<sup>49</sup> Price v. MTD Products & Safety National Cas. Corp., 242 So. 3d 900 (Miss. Ct. App. 2017); Wright v. Turan-Foley Motors, Inc., 269 So.3d 160 (Miss. Ct. App. 2018).

<sup>50</sup> Price v. MTD Products & Safety National Cas. Corp., 242 So.3d 900 (Miss. Ct. App. 2017); Burton v. Nissan N. Am., 305 So.3d 1163 (Miss. Ct. App. 2020).

during work hours, her death was the result of an accident arising out of and in the course of the employment.<sup>51</sup>

The burden of proof then shifts to the employer/carrier to show by substantial credible evidence that the employee's work activities did not cause or contribute to the death.<sup>52</sup> The employer/carrier cannot challenge the presumption by merely pointing out the lack of evidence supporting the causal connection.<sup>53</sup> This "onset on the job" presumption has been utilized as the basis for an award even when all of the medical testimony was negative on the issue of causation.<sup>54</sup>

(B) Heart Attacks:

Cardiac cases are a difficult area of compensation law, possessing widely differing facts and often conflicting medical testimony. Thus, only a few broad legal concepts can be derived from this body of case law. Ultimately, each case must "be resolved upon its own facts."<sup>55</sup>

Disabilities resulting from a heart attack must be tested under the same burden of proof as any other injury. For instance, an attack is "accidental" if it results from "any substantial exertion or stress over and above the ordinary wear and tear of life."<sup>56</sup> The requisite causal connection is satisfied if a claimant's work activities "aggravated, accelerated or contributed to the attack."<sup>57</sup> Compensation is usually awarded in all but the most clear-cut, non-work related cases, even if an underlying disease or congenital condition is present.<sup>58</sup> The trend has been to

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<sup>51</sup> Dependents of Harbin v. Outokumpu Heatcraft USA, 958 So.2d 1260 (Miss. Ct. App. 2007); Dunn, § 269 at 328.

<sup>52</sup> Dependents of Sherman v. Ergon Refining, Inc., 726 So.2d 597 (Miss. Ct. App. 1998) (autopsy performed at the direction of a coroner without the consent of the spouse was held admissible to rebut the presumption).

<sup>53</sup> Road Maintenance Supply v. Dependents of Maxwell, 493 So.2d 318 (Miss. 1986); Baptist Memorial Hospital-North Miss. Inc. v. Slate, 282 So.3d 1211 (Miss. Ct. App. 2019).

<sup>54</sup> Johnston v. Hattiesburg Clinic, P.A., 423 So.2d 114, 117 (Miss. 1982); see also, Miss. Code Ann. § 71-3-3(b) (definition of injury expressly recognizes presumption).

<sup>55</sup> Dunn, § 92 at 112.

<sup>56</sup> Dunn, § 93 at 113.

<sup>57</sup> Dunn, § 94 at 115 (citing numerous cases).

<sup>58</sup> But see, Curl v. Quality Aluminum Products, 996 So.2d 181 (Miss. Ct. App. 2008).

award compensation and require apportionment of the pre-existing condition which contributed to the attack.<sup>59</sup> A claim for a ruptured aneurysm is analyzed the same as a claim for heart attack.<sup>60</sup>

(C) Occupational Diseases:

Occupational diseases are treated in the same manner as other job-related injuries.<sup>61</sup> These cases often present problems of who should pay if the injured employee had successive employers/carriers. The most important criteria is when the disability, medically or symptomatically, manifests itself.<sup>62</sup> If the date the disease was contracted can be established or firmly approximated, then the employer/carrier who would have been responsible at that time must bear the liability for the claimant.<sup>63</sup> Although, if the disability manifests itself gradually or is the result of a series of accidents, then courts employ the "last injurious exposure rule." This rule provides that, absent a medically established date of disability, "the carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation."<sup>64</sup> Mississippi only applies this rule when there is difficulty locating a definite and certain time.<sup>65</sup>

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<sup>59</sup> Road Maintenance Supply v. Dependents of Maxwell, 493 So.2d 318 (Miss. 1986); Stuart's Inc. v. Brown, 543 So.2d 649 (Miss. 1989) (exception recognized for heart attack cases to general rule which provides that, to prevail, pre-existing condition must have been occupationally disabling); but see, Langley v. Waddle Trucking, LLC, 206 So.3d 1262 (Miss. Ct. App. 2016) (claim denied for lack of causation).

<sup>60</sup> Fresenius Medical Care v. Woolfolk, 920 So.2d 1024 (Miss. Ct. App. 2005).

<sup>61</sup> Miss. Code Ann. § 71-3-3(b).

<sup>62</sup> Singer Co. v. Smith, 362 So.2d 590 (Miss. 1978)(court specifically rejected notion that liability should attach only when diagnosis of disease is made).

<sup>63</sup> Singer Co. v. Smith, 362 So.2d 590 (Miss. 1978).

<sup>64</sup> Singer Co. v. Smith, 362 So.2d 590 (Miss. 1978).

<sup>65</sup> Singer Co. v. Smith, 362 So.2d 590 (Miss. 1978).

(D) Emotional Injuries:

Some awards have been granted for mental/emotional disabilities arising from, or being considered as, compensable injuries. Mental injuries must be "disabling" to be compensable<sup>66</sup> and claims are separated into the following categories:

(i) "Mental/physical" claims seek compensation where emotional stress or strain arising from the employment is causally related to a subsequent physical injury. This category includes heart attack, stroke, and hypertension cases. Where a claimant establishes by a fair preponderance of the evidence that a causal relationship between the stress and strain on the job and the subsequent disability exists, the claim may be compensable.<sup>67</sup>

(ii) "Physical/mental" claims seek compensation for emotional distresses or disabilities proximately caused by compensable physical injuries. The general rule is the full effects of a disability, including all nervous injuries, arising from a physical injury, are compensable.<sup>68</sup> The causal relationship between the mental or nervous ailment and the physical industrial injury must be shown by "clear evidence."<sup>69</sup>

(iii) "Mental/mental" disabilities involve no physical trauma. A claimant must prove by clear and convincing evidence the connection between the employment and injury. To be compensable, a mental disability without a physical injury must be caused by "something more than the ordinary incidents of employment" and result from an "untoward event or unusual

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<sup>66</sup> Havard v. Titan Tire Corporation of Natchez, 919 So.2d 995 (Miss. Ct. App. 2005).

<sup>67</sup> Dean Truck Line, Inc. v. Wilkes, 248 So.2d 462 (Miss. 1971); Harper v. Bank, Finley, White & Co., 167 So.3d 1155 (Miss. 2015).

<sup>68</sup> Hemphill Drug Co. v. Mann, 274 So.2d 117 (Miss. 1973); Hodges v. Heritage Properties, Inc., 150 So.3d 735 (Miss. Ct. App. 2014) (death claim for mental injury denied based upon pre-existing conditions).

<sup>69</sup> Miller Transporters, Ltd. v. Reeves, 195 So.2d 95 (Miss. 1967); Barfield v. Miss. State Hospital, 120 So. 3d 461 (Miss. Ct. App. 2013).

occurrence."<sup>70</sup> If a claimant "experiences a series of identifiable and extraordinary stressful work connected incidents, benefits may be available."<sup>71</sup> A claim will be denied unless the claimant presents sufficient proof that the workplace stress was unusual and more than the ordinary incidents of employment.<sup>72</sup> A significant factor in the denial of a mental-mental claim is a history of pre-existing mental illness.<sup>73</sup>

(E) Hernia Cases:

The Act contains a special statute which addresses hernias.<sup>74</sup> Generally, for a hernia claim to be compensable, a claimant must prove (a) the descent or protrusion immediately followed a sudden effort, severe strain, or application of force to the abdominal wall, (b) severe pain in the region, (c) no descent or protrusion prior to alleged accident, (d) notice was provided within a reasonable time, and (e) medical attention was sought within five days after alleged injury. The statute should be reviewed in every hernia claim.

**V. BENEFITS**

Awards to claimants can include compensation for disability, medical benefits, maintenance during vocational rehabilitation, death benefits, and funeral expenses.

(A) Compensation for Disability:

The amount of compensation for a claimant's disability will depend primarily upon its classification as temporary or permanent, total or partial, or scheduled or non-scheduled. Once

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<sup>70</sup> Smith & Sanders v. Peery, 473 So.2d 423 (Miss. 1983); Fought v. Stuart C. Irby Co., 523 So.2d 314 (Miss. 1988); Miss. Dept. of Public Safety v. Adcox, 135 So.3d 194 (Miss. Ct. App. 2014).

<sup>71</sup> Smith & Sanders v. Peery, 473 So.2d 423 (Miss. 1983); Fought v. Stuart C. Irby Co., 523 So.2d 314 (Miss. 1988); Kemper National Ins. Co. v. Coleman, 812 So.2d 1119 (Miss. Ct. App. 2002).

<sup>72</sup> Smith v. City of Jackson, 792 So.2d 335 (Miss. Ct. App. 2001); see also, Scott Colson's Shop, Inc. v. Harris, 67 So.3d 841 (Miss. Ct. App. 2011)(claimant failed to prove pre-existing schizophrenia causally related to work injury).

<sup>73</sup> Kirk v. K-Mart Corp., 838 So.2d 1007 (Miss. 2003); Meoller v. Miss. Dept. of Human Services, 125 So.3d 695 (Miss. Ct. App. 2013).

<sup>74</sup> Miss. Code Ann. § 71-3-23.

this is established, a claimant may receive no less than \$25.00 per week for as long as the disability continues, except in partial dependency and disability cases, subject to the maximum benefits of the Act.<sup>75</sup> The maximum weekly compensation for disability and death is 66 2/3% of the State's average weekly wage.<sup>76</sup> While there is no minimum number of weeks that benefits must be paid, recovery may not exceed the maximum weekly compensation rate for 450 weeks.<sup>77</sup> Payments are made every 14 days.

(i) Temporary Disability Benefits are awarded from the time of injury to the date of maximum medical improvement if claimant is taken off work by a medical provider.<sup>78</sup> However, temporary total disability benefits are suspended prior to MMI where employee returns to work at the same or greater rate of pay than his average weekly wage.<sup>79</sup> Temporary total benefits are calculated based upon 66 2/3% of the claimant's average weekly wage, but not exceeding the maximum weekly rate.<sup>80</sup> Temporary partial benefits represent 66 2/3% of the difference between claimant's average weekly wage and her wage-earning capacity after the injury, subject to the previously mentioned limitations.<sup>81</sup> Temporary total or partial benefits may be paid for the greater of the maximum of 450 weeks or the Act's maximum monetary limitation. Temporary disability benefits are not allowed for the first five days of disability; however, if the disability continues for 14 days, then benefits are due from the first day of disability.<sup>82</sup> Neither the five

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<sup>75</sup> Miss. Code Ann. § 71-3-13.

<sup>76</sup> Miss. Code Ann. § 71-3-13(1).

<sup>77</sup> Miss. Code Ann. § 71-3-13(2). The 2020 maximum weekly compensation for disability and death benefits is set at \$505.43, with a lifetime disability maximum cap on compensation payments set at \$227,443.50.

<sup>78</sup> Smith v. Tronox, LLC, 76 So.3d 774 (Miss Ct. App. 2011) (claimant did not provide any medical records to support her claim of temporary total disability for period she was off work due to her carpal tunnel surgery and her claim was denied).

<sup>79</sup> Flowers v. Crown Cork & Seal USA, Inc., 167 So.3d 188 (Miss. 2014).

<sup>80</sup> Miss. Code Ann. § 71-3-17(b).

<sup>81</sup> Miss. Code Ann. §§ 71-3-21 & 71-3-17(b).

<sup>82</sup> Miss. Code Ann. § 71-3-11.

day nor the 14 day period must consist of consecutive days.<sup>83</sup> Temporary benefits may be suspended for the period of time a claimant refuses to comply with reasonable, relatively safe and simple medical treatments.<sup>84</sup> The Commission has suggested temporary benefits may not be suspended solely because a claimant is incarcerated.<sup>85</sup> An employee who returns to work at full pay is not entitled to temporary disability benefits from the date of termination for non-work related reasons.<sup>86</sup>

(ii) Permanent Disability Benefits are awarded once a claimant reaches maximum medical improvement.<sup>87</sup> This is generally true even though a claimant may have a period of employment after the maximum medical improvement date.<sup>88</sup> Permanent total disability benefits are 66 2/3% of a claimant's average weekly wage, subject to the maximum limitations of the Act.<sup>89</sup> Normally, permanent benefits are paid in addition to any temporary benefits previously given to a claimant.<sup>90</sup> However, the benefit limit for permanent and temporary payments combined may not exceed the statutory maximum.<sup>91</sup> Thus, a claimant may receive temporary disability benefits, partial or total, and subsequently receive 450 weeks of permanent partial benefits so long as the statutory monetary maximum is not exceeded.<sup>92</sup>

Where a claimant receives temporary total disability benefits and is later adjudicated to be permanently and totally disabled, the entire disability "relates back" to the beginning date

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<sup>83</sup> See, Mississippi Workers' Compensation Commission General Rule 11.

<sup>84</sup> Bridgeman v. North America Plastics, Inc., 769 So.2d 236 (Miss. Ct. App. 2000).

<sup>85</sup> Hollinshead v. Croft Metals, Inc.-Magnolia, MWCC No. 02-197041-9470 (Full Comm'n Order, Jan. 24, 2005).

<sup>86</sup> Lankford v. Rent-a-Center, Inc., 961 So.2d 774 (Miss. Ct. App. 2007).

<sup>87</sup> Miss. Code Ann. §71-3-17(a) and (c); Flowers v. Crown Cork & Seal USA, Inc., 167 So. 3d 188 (Miss. 2014) (award of permanent disability reversed since claimant had not attained maximum medical improvement).

<sup>88</sup> See, Ainsworth v. Hackney, Inc., MWCC No. 93-08949-E-9119 (Full Comm'n Order, July 24, 1996).

<sup>89</sup> Miss. Code Ann. § 71-3-17(a).

<sup>90</sup> Dunn, § 41 at 40-41 (citing numerous cases).

<sup>91</sup> Dunn, § 41 at 41 (citing numerous cases).

<sup>92</sup> Midland Shirt Co. v. Ray, 163 So.2d 251 (Miss. 1964).

when claimant was first temporarily totally disabled, and the employer/carrier are entitled to a credit for the temporary total disability so that the total permanent total disability award is limited to 450 weeks.<sup>93</sup> An award for permanent and total disability can be made when the injuries are for total loss of use of two scheduled members even where a claimant only requested an award for those two members.<sup>94</sup> An award for permanent and total disability can be made even when the medical and anatomical rating is 10% and the treating physician testified that claimant was capable of performing some type of work.<sup>95</sup> The ability to earn post-injury wages, even if significantly diminished, defeats a permanent disability claim.<sup>96</sup>

Permanent partial disability benefits are divided into: scheduled and non-scheduled injuries. Scheduled claims involve actual loss, or loss of use of, body parts, members, appendages, senses, or organs as addressed by the Act.<sup>97</sup> Scheduled injuries can involve arms, legs, hands, feet, eyes, thumbs, fingers, toes, testicles, female breasts, and combinations thereof.<sup>98</sup> They can also include loss or impairment of hearing and binocular vision.<sup>99</sup> For each member or sense, a fixed number of weeks of compensation is specified for the total loss or loss of use of the member.<sup>100</sup>

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<sup>93</sup> Brogdon v. Link-Belt Co., 298 So.2d 697 (Miss. 1974); Eaton Corp. v. Brown, 130 So.3d 1131 (Miss. Ct. App. 2013).

<sup>94</sup> Miss. Code Ann. § 71-3-17(a); McDonald v. I.C. Isaacs Newton Co., 879 So.2d 486 (Miss. Ct. App. 2004) (employer failed to present evidence to rebut presumption of total disability); Harris v. Stone County Bd. of Supervisors, 270 So.3d 989 (Miss. Ct. App. 2018) (claimant overcame employer's rebuttal to presumption of total disability; award of permanent and total affirmed).

<sup>95</sup> Lott v. Hudspeth Ctr., 26 So.3d 1044 (Miss. 2010) (award for permanent and total benefits set aside on appeal despite extensive job search because employee's inability to secure other employment though job search was due to economy not injury).

<sup>96</sup> Hill v. Mel, Inc., 989 So.2d 969, 972 (Miss. Ct. App. 2008); Parker v. Ashley Furniture Indust., 164 So.3d 1081 (Miss. Ct. App. 2015).

<sup>97</sup> Miss. Code Ann. § 71-3-17(c)(1)-(24) and (26).

<sup>98</sup> See e.g., Batesville Casket Co. v. Ales, 1998 Miss. App. LEXIS 643 (Miss. Ct. App. Aug. 18, 1998)(separate awards for partial loss of use of thumb and for partial loss of use of hand).

<sup>99</sup> Miss. Code Ann. § 71-3-17(c)(17) and (20).

<sup>100</sup> Miss. Code Ann. § 71-3-17(c).



Permanent partial disability awards for scheduled injuries are computed by establishing a percentage of industrial loss of use or industrial disability. This percentage is always no less than the medical anatomical impairment rating assigned by the physician. If a claimant has no permanent loss of wage-earning capacity, the award will be limited to an amount based upon the medical anatomical impairment rating.<sup>101</sup>

If a claimant has a permanent industrial loss of use, then "the proper measure of compensation is dependent upon two factors: (1) the degree of functional loss of use as demonstrated by the medical evidence; and (2) the impact that the loss of function of the scheduled member has on the worker's ability to perform the normal and customary duties associated with their usual occupation."<sup>102</sup> The Commission ultimately decides the extent of loss of industrial use.<sup>103</sup> The focus for a scheduled injury is on a claimant's inability to perform the typical duties of her usual employment with employer as opposed to other employment.<sup>104</sup> Where a permanent partial disability renders a claimant unable to perform the normal and customary duties associated with their usual occupation at the time of the injury, there is a rebuttable presumption of total occupational loss of use of the member subject to other proof of claimant's ability to earn the same wages as being earned at the time of the injury.<sup>105</sup> Rebuttal evidence of usual employment is shown by all evidence concerning wage-earning capacity,

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<sup>101</sup> Walker v. Cantrell, 577 So.2d 1243 (Miss. 1991); Sampson v. MTD Prods., 225 So. 3d 541 (Miss. App. Ct. 2017) (no award for industrial lost of use where a claimant returned to work at the same rate of pay).

<sup>102</sup> Goodlow v. Marietta-American, 919 So.2d 149 (Miss. Ct. App. 2005).

<sup>103</sup> Smith v. Masonite Corp., 48 So.3d 565 Miss. Ct. App. 2010).

<sup>104</sup> McCarty Farms, Inc. v. Banks, 773 So.2d 380 (Miss. 2000); Howard Industries, Inc. v. Robbins, 176 So.3d 113 (Miss. Ct. App. 2015) (Claimant entitled to 90% industrial loss of use based upon a 45% impairment rating where he was not able to return to his former (usual) employment).

<sup>105</sup> McGowan v. Orleans Furniture, Inc., 586 So.2d 163 (Miss. 1991); Sanderson Farms, Inc. v. Jessie, 185 So. 3d 397 (Miss. Ct. App. 2015); but see, Wash. Cty. Bd. of Supervisors v. Smith, 2020 Miss. App. LEXIS 537 (Miss. Ct. App. Sept. 15, 2020) (where claimant could not return to former position, presumption of 100% loss of use applied, which was not rebutted).

including a claimant's education and training, her age, the continuance of pain, and any other related circumstances.<sup>106</sup> The Mississippi Supreme Court has affirmed a Commission decision holding that a claimant had a 100% industrial loss of use with a medical impairment rating of 40%.<sup>107</sup> A claimant is always entitled to compensation for the medical or functional loss of his body part, regardless of whether the functional loss impacts his wage earning capacity.<sup>108</sup>

Permanent partial disability benefits for scheduled injuries are determined by multiplying 66 2/3% times the lower of a claimant's average weekly wage or the statutory weekly maximum times the permanent industrial disability rating (either the medical anatomical impairment rating or a percentage for industrial loss of use) times the number of weeks listed in the statutory schedule for the injury.<sup>109</sup> If a claimant can establish that she is permanently and totally disabled as a result of a scheduled injury, the claim is not limited to the schedule but must be treated as a non-scheduled injury.<sup>110</sup> If a question exists as to whether an injury is scheduled or non-scheduled, it is the effect upon a claimant's occupational capabilities which is controlling, as opposed to the point of impact upon the body.<sup>111</sup>

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<sup>106</sup> Meridian Professional Baseball Club v. Jensen, 828 So.2d 740 (Miss. 2002)(25% permanent partial disability to arm upheld where claimant able to return to usual duties but not able to return as semi-professional baseball player); Hathorn v. ESCO Corp., 224 So.3d 543 (Miss. Ct. App. 2016) (usual employment is broader in scope than job held at the time of the injury); Mueller Indus. v. Waits, 283 So.3d 1137 (Miss. Ct. App. 2019) (claimant not required to make work search to prove industrial loss of use).

<sup>107</sup> Piggly Wiggly v. Houston, 464 So.2d 510 (Miss. 1985); McCarty Farms, Inc. v. Kelly, 811 So.2d 250 (Miss. Ct. App. 2001); Logan v. Klausner Furniture Corp., 238 So. 3d 1134 (Miss. 2018).

<sup>108</sup> Enmon Enterprises v. Snyder, 175 So.3d 541 (Miss. Ct. App. 2015).

<sup>109</sup> Miss. Code Ann. § 71-3-17.

<sup>110</sup> Smith v. Jackson Construction Co., 607 So.2d 1119 (Miss. 1992); see also, Lott v. Hudspeth Ctr., 26 So.3d 1044 (Miss. 2010).

<sup>111</sup> Alumax Extrusions, Inc. v. Wright, 737 So.2d 416 (Miss. Ct. App. 1998) (injury to rotator cuff and sternoclavicular joint is loss of use of scheduled arm); Ard v. Marshall Durbin Companies, 818 So.2d 1240 (Miss. Ct. App. 2002).

To claim a partial disability, a claimant must demonstrate that, despite "reasonable" efforts, she is unable to secure other employment.<sup>112</sup> A claimant need not show that the inability to obtain other employment is due to her impairment.<sup>113</sup> Deciding what constitutes "reasonable" efforts is not easy and is based primarily on the evidence presented to the Commission which considers several factors in making a determination: economic and industrial aspects of the community; jobs available locally;<sup>114</sup> particular nature of the claimant's disability; and, the claimant's educational background, including work skills.<sup>115</sup> It is not always necessary for a claimant to perform a job search to establish a claim for permanent and total disability.<sup>116</sup>

"Non-scheduled" injuries include all other disabilities not specifically labeled by the Act as scheduled.<sup>117</sup> Most often these non-scheduled claims involve internal injuries with the most common being for various back ailments. These claims can include aggravation of cancer or hypertension. The calculation of benefits for non-scheduled injuries uses a similar formula to scheduled injuries. Benefits are determined by multiplying 66 2/3% of the difference between a claimant's average weekly wage and a claimant's wage earning capacity thereafter "in the same employment or otherwise."<sup>118</sup>

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<sup>112</sup> Dunn, §72.1 at 85; Sardis Luggage Co. v. Wilson, 374 So.2d 826 (Miss. 1979); Smith v. Tronox, LLC, 76 So.3d 774 (Miss. Ct. App. 2011) (claim of total industrial loss of use denied since employer was not given opportunity to accommodate restrictions and vocational rehabilitation was not accepted).

<sup>113</sup> Georgia Pacific Corp. v. Taplin, 586 So.2d 823 (Miss. 1991); see also, Dulaney v. National Pizza Co., 733 So.2d 301 (Miss. Ct. App. 1998).

<sup>114</sup> Goolsby Trucking Co., Inc. v. Alexander, 982 So.2d 1013 (Miss. Ct. App. 2008).

<sup>115</sup> Georgia Pacific Corp. v. Taplin, 586 So.2d 823 (Miss. 1991); Lifestyle Furnishings v. Tollison, 985 So.2d 352 (Miss. Ct. App. 2008); Dunn §72.1 at 85 (claim for total disability rejected since job search was not reasonable).

<sup>116</sup> Ameristar Casino-Vicksburg v. Rawls, 2 So.3d 675 (Miss. 2008); but see, Airtran, Inc. v. Byrd, 987 So.2d 905 (Miss. 2007)(job search required even though employee declared disabled by Social Security Administration); Howard Industries, Inc. v. Hardaway, 191 So.3d 1257 (Miss. Ct. App. 2015) (failure to perform adequate job search in scheduled injury case may be relevant, but not conclusive).

<sup>117</sup> Miss. Code Ann. § 71-3-17(c)(25).

<sup>118</sup> Miss. Code Ann. § 71-3-17(c)(25).

It is very significant that Mississippi law places very little value in a medical impairment rating when evaluating a non-scheduled claim. The key is whether a claimant has a permanent loss of wage-earning capacity. Several factors must be considered: (1) increase in general wage levels, (2) increased maturity or training, (3) longer hours worked, (4) sympathy wages, (5) temporary and unpredictable character of post-injury earnings,<sup>119</sup> (6) employee's inability to work, (7) employee's failure to be hired elsewhere,<sup>120</sup> and (8) continuance of pain and other related circumstances.<sup>121</sup> If a claimant returns to her same or other employment at the same or greater rate of pay as her pre-injury earnings, there is a presumption that he does not have a permanent loss of wage-earning capacity and, therefore, is not entitled to any permanent award for the non-scheduled injury.<sup>122</sup> This is true notwithstanding the fact that the claimant has received a significant medical anatomical impairment rating.<sup>123</sup> A claimant may rebut the presumption by presenting evidence such as post-injury medical limitations,<sup>124</sup> the assistance of

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<sup>119</sup> Neshoba County General Hospital v. Howell, 999 So.2d 1295 (Miss. Ct. App. 2009).

<sup>120</sup> Lott v. Hudspeth Ctr., 26 So.3d 1044 (Miss. 2010) (claimant must show unemployability due to injury in question and not general economic conditions); Smith v. Johnston Tombigbee Furniture Manufacturing Co., 43 So.3d 1159 (Miss. Ct. App. 2010) (claimant required to show failed job search was related to work injury).

<sup>121</sup> Guardian Fiberglass v. LeSueur, 751 So.2d 1201 (Miss. Ct. App. 1999); Levi Strauss v. Studaway, 930 So.2d 481 (Miss. Ct. App. 2006).

<sup>122</sup> Weathersby v. Miss. Baptist Health System, Inc., 195 So. 3d 877 (Miss. Ct. App. 2016); McKenzie v. Howard Indus., 2020 Miss. App. LEXIS 35 (Miss. Ct. App. Feb. 11, 2020) (Employer accommodated permanent restrictions at a higher rate of pay than AWW).

<sup>123</sup> International Paper Co. v. Kelley, 562 So.2d 1298 (Miss. 1990); Hanson v. Dolgencorp, Inc., 150 So.3d 146 (Miss. Ct. App. 2014).

<sup>124</sup> Gill v. Harrah's Entertainment, Inc., 35 So.3d 1227 (Miss. Ct. App. 2010); Nixon v. Howard Indus., 249 So.3d 1088 (Miss. Ct. App. 2018) (presumption of no loss of wage earning capacity overcome by claimant's vocational expert).

co-workers, or cost of living increases<sup>125</sup> to explain increased wages.<sup>126</sup> If a claimant cannot put forth evidence to rebut that presumption, permanent disability benefits should not be awarded.<sup>127</sup>

The fact that a claimant returns to employment at the same or greater rate of pay does not mean he is not entitled to an award.<sup>128</sup> Whether a claimant has a permanent loss of wage-earning capacity is a subjective standard.<sup>129</sup> An employer's decision on whether to allow a claimant to return to work is the most significant factor in determining permanent loss of wage-earning capacity.<sup>130</sup> Where a claimant at maximum medical improvement reports back to her employer for work, and the employer refuses to reinstate or rehire her, then it is presumed the claimant has met her burden of showing total disability.<sup>131</sup> If an employer fails to allow a claimant to return to work at the same rate of pay performing the same or similar work, there is a presumption the claimant has a permanent loss of wage-earning capacity.<sup>132</sup> To avoid this liability, an employer must rebut the presumption with proof claimant is capable of working at the same or similar work at the same or greater rate of pay.<sup>133</sup> However, a claimant may resume regular employment

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<sup>125</sup> Gregg v. Natchez Trace Electric Association, 64 So.3d 473 (Miss. 2011) (claimant with permanent no climbing restrictions met presumption by showing the increased wages were due to cost of living increases).

<sup>126</sup> Cooper Tire & Rubber Co. v. Harris, 837 So.2d 789 (Miss. Ct. App. 2003); Wright v. University of Miss. Med. Ctr., 75 So.3d 78 (Miss. Ct. App. 2011) (permanent disability denied where claimant's post-injury wages equaled her average weekly wage).

<sup>127</sup> International Paper Co. v. Kelley, 562 So.2d 1298 (Miss. 1990); Conley v. City of Jackson, 115 So.3d 908 (Miss. Ct. App. 2013).

<sup>128</sup> Napier v. Franklin Manufacturing Co., 797 So.2d 1032 (Miss. Ct. App. 2001); Howard Industries, Inc. v. Robbins, 176 So.3d 113 (Miss. Ct. App. 2015).

<sup>129</sup> University of Miss. Med. Ctr. v. Rainey, 926 So.2d 938 (Miss. Ct. App. 2006); Lopez v. Zachry Construction Corp., 22 So.3d 1235 (Miss. Ct. App. 2009).

<sup>130</sup> Imperial Palace Casino v. Wilson, 960 So.2d 549 (Miss. Ct. App. 2006).

<sup>131</sup> Marshall Durbin v. Hall, 490 So.2d 877 (Miss. 1986); Howard Industries, Inc. v. Satcher, 183 So.3d 907 (Miss. Ct. App. 2016).

<sup>132</sup> DiGrazia v. Park Place Entertainment, 914 So.2d 1232 (Miss. Ct. App. 2005); Thompson v. Wells-Lamont Corp., 362 So.2d 638 (Miss. 1978).

<sup>133</sup> Whiddon v. Southern Concrete Pumping, LLC., 114 So.3d 18 (Miss. Ct. App. 2013) (no permanent loss of wage earning capacity where vocational counselor found claimant with college degree could earn more than average weekly wage); Itta Bena Plantation III & Benchmark Ins. Co. v. Gates, 282 So.3d 721 (Miss. Ct. App. 2019) (Employer/carrier rebutted presumption of total disability with vocational expert; award of 75% loss of wage earning capacity based in part on vocational expert opinion of "loss of access"

and later be terminated for reasons unrelated to the impairment without a finding of a compensable injury.<sup>134</sup> Where a claimant has a scheduled injury and a non scheduled injury arising from the same work incident, a claimant may not pyramid benefits and receive in excess of the maximum weekly benefits provided by the statute during any one period.<sup>135</sup>

(B) Medical Benefits:

Compensation for medical expenses is a critical element to most workers' compensation claims. Potentially, there are no maximum monetary or time limits for an employer/carrier's liability. In other words, medical benefits are available for life.<sup>136</sup>

In order for a medical expense to be compensable it must be (1) reasonable; (2) necessary; (3) causally related to the claimant's employment;<sup>137</sup> and (4) otherwise come within the scope of medical benefits required to be furnished. Paying medical expenses is not optional. The Act states that the employer/carrier "shall furnish" (i.e., authorize) medical expenses meeting the above criteria.<sup>138</sup> However, the employer/carrier may suspend compensation and benefits where a claimant follows the advise of one treating physician when that advice is opposed to the advice of numerous other treating physicians.<sup>139</sup>

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to labor market).

<sup>134</sup> Alumax Extrusion, Inc. v. Wright, 737 So.2d 416 (Miss. Ct. App. 1998); U.S. Rubber Reclaiming v. Dorsey, 744 So.2d 829 (Miss. Ct. App. 1999); Hayes v. Howard Indus., 284 So.3d 787 (Miss. Ct. App. 2019); but see, Howard Industries Inc. v. Wheat, 295 So.3d 592 (Miss. Ct. App. 2020) (decision by Employer to terminate Claimant 6 months after return to work because of misrepresentation on old job application found to be insufficient; award for partial loss of wage earning capacity affirmed).

<sup>135</sup> Walls v. Hodo Chevrolet Co., 302 So.2d 862, 867 (Miss. 1974); Tucker v. BellSouth Telecommunications, Inc., 130 So.3d 96 (Miss. Ct. App. 2013).

<sup>136</sup> Miss. Code Ann. § 71-3-15(1).

<sup>137</sup> Pulliam v. Miss. State Hudspeth Regional Ctr., 147 So.2d 864 (Miss. Ct. App. 2014) (disc herniation and cervical spine issues found not to be work related) (reversed on other grounds); Perez v. Howard Industries, Inc., 150 So.3d 141 (Miss. Ct. App. 2014) (shoulder condition found not to be work related).

<sup>138</sup> White v. Hattiesburg Cable Co., 590 So.2d 867 (Miss. 1991) (Mississippi Supreme Court requires reasonable and necessary chiropractic expenses to be authorized under the Act).

<sup>139</sup> Blackwell v. Howard Industries, 243 So.3d 774 (Miss. Ct. App. 2018).

Under Mississippi law, the employer/carrier has the initial right to select the physician, hospital, and other necessary care needed to treat a claimant.<sup>140</sup> The claimant may accept the services furnished by the employer or can choose her own physician.<sup>141</sup> A physician to whom an employer refers a claimant shall only constitute the claimant's selection if she accepts in writing the employer's referral as her own selection.<sup>142</sup> The medical services selected by either party must be competent, "reasonably convenient" to the claimant's home or place of injury, and "reasonably suited" to the nature of the injury.<sup>143</sup> A physician to whom the employee is referred by this employer shall not constitute the employee's selection unless the employee accepts in writing the referral as his own selection.<sup>144</sup>

Beginning on or after July 1, 2012, if a claimant treats with a physician for six months or undergoes surgery for her work injury, that physician shall be deemed the claimant's selection.<sup>145</sup> A claimant's selection of physician is limited to only one treating physician who may refer claimant to only one other physician per specialty or sub-specialty,<sup>146</sup> even if the referral physician is in the same specialty as the treating physician.<sup>147</sup> Except in emergencies, any additional doctor must be authorized by the employer/carrier who is not required to pay for medical treatment where a claimant did not properly request the treatment.<sup>148</sup> If a claimant seeks treatment from a physician not authorized by the employer/carrier and the Commission bases its findings upon the physician's opinion, the employer/carrier must pay those costs.<sup>149</sup> Further, case

<sup>140</sup> Miss. Code Ann. § 71-3-15.

<sup>141</sup> Mississippi Workers' Compensation Commission General Rule 9.

<sup>142</sup> Miss. Code Ann. § 71-3-15(1).

<sup>143</sup> R.C. Petroleum, Inc. v. Hernandez, 555 So.2d 1017 (Miss. 1990); see, Miss. Workers' Compensation Medical Fee Schedule, VIII (A) and (B).

<sup>144</sup> Miss. Code Ann. § 71-3-15(1).

<sup>145</sup> Miss. Code Ann. § 71-3-15(1).

<sup>146</sup> Miss. Code Ann. § 71-3-15(3).

<sup>147</sup> Miller v. Johnson Controls, 138 So.3d 248 (Miss. Ct. App. 2014).

<sup>148</sup> Mosby v. Farm Fresh Catfish Co., 19 So.3d 789 (Miss. Ct. App. 2009).

<sup>149</sup> Jordan v. Hercules, 600 So.2d 179 (Miss. 1992); Allegrezza v. Greenville Manufacturing Co., 122 So. 3d 719 (Miss. 2013) (reimbursement for medical treatment denied where treatment found to be not

law and the Act mandate that as long as a particular treatment is deemed "necessary and reasonable" by a competent treating physician, the employer/carrier is obligated to furnish such treatment.<sup>150</sup> Thus, it is recommended that claimants be required to execute selection of physician forms upon initial treatment by a physician. The Commission rules on a case-by-case basis on disputes about these requirements and its decision is conclusive, if supported by substantial evidence.<sup>151</sup>

In 2010, the medical fee provider schedule, a cost containment system and a utilization review scheme, was amended to include most types of medical services.<sup>152</sup> Effective November 1, 2013, the Utilization Review Rules were amended to shorten deadlines for consideration of reasonableness and medical necessity of services and to require physicians licensed in Mississippi and trained in the same specialty as the requesting medical provider to consider the request. New penalties are also included in the amendments. An employer/carrier will not be required to pay for medical treatment where a claimant did not properly utilize the medical fee schedule rules.<sup>153</sup>

(C) Maintenance for Vocational Rehabilitation:

At the Commission's discretion and direction, a claimant may receive additional compensation to undergo vocational rehabilitation. Such compensation may not exceed \$25.00 per week for more than 52 weeks for claims on or after July 1, 2012.<sup>154</sup> For claims prior to July 1, 2012, this compensation may not exceed \$10.00. While there is no current statutory obligation

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reasonable or necessary for recovery).

<sup>150</sup> Spann v. Wal-Mart Stores, Inc., 700 So.2d 308 (Miss. 1997); Hardaway Co. v. Bradley, 887 So.2d 793 (Miss. 2004).

<sup>151</sup> R.C. Petroleum, Inc. v. Hernandez, 555 So.2d 1017 (Miss. 1990); Moore's Feed Store, Inc. v. Hurd, 100 So.3d 1011 (Miss. Ct. App. 2012).

<sup>152</sup> See, Mississippi Workers Compensation Medical Fee Schedule (effective July 1, 2010).

<sup>153</sup> Fleming Enterprises v. Henderson, 741 So.2d 309 (Miss. Ct. App. 1999) (reimbursement denied for out of state treatment where fee schedule was not followed).

<sup>154</sup> Miss. Code Ann. § 71-3-19.



for an employer/carrier to provide vocational rehabilitation services, retention of vocational rehabilitation professionals is often recommended in the interest of both the claimant and employer/carrier.

(D) Death Benefits:

The Act provides several forms of benefits in the event of a compensable death claim. Some of these benefits were increased by the 2012 amendments to the Act.<sup>155</sup> These include an initial lump sum benefit to the surviving spouse, an amount for reasonable funeral expenses subject to a statutory limitation, and a weekly benefit for certain family members who were dependents of the deceased employee as of the time of death. Possible beneficiaries are spouses, children, grandchildren, brothers and sisters, parents, and grandparents.<sup>156</sup> Certain beneficiaries are preferred over others and benefits are subject to the maximum limitations of the Act.<sup>157</sup> The Act should be carefully reviewed before any benefits are paid. Although some presumptions apply, the burden of proof is on the beneficiary to prove entitlement to death benefits.<sup>158</sup>

(E) Other Benefits and Credits:

Claimants are not allowed to receive double compensation or duplicate payments, even if an employer mistakenly makes payments. Where the payments of wages or other monies are intended to be in lieu of compensation,<sup>159</sup> they will be deducted from the claimant's final award. There are exceptions to this rule where it affirmatively appears the payment by the employer was

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<sup>155</sup> Miss. Code Ann. § 71-3-25.

<sup>156</sup> Miss. Code Ann. § 71-3-25.

<sup>157</sup> Dunn, §§ 197-228 at 247-82.

<sup>158</sup> Union Camp, Inc. v. Dependents of McCall, 426 So.2d 796 (Miss. 1983); Descendants of Gilmer v. Nolan Sistrunk Trucking, Inc., 892 So.2d 825 (Miss. Ct. App. 2004).

<sup>159</sup> Price v. Omnova Solutions, Inc., 17 So.3d 104 (Miss. Ct. App. 2009).

a donation, gratuity, or benevolent in nature, rather than a substitute for compensation,<sup>160</sup> or where a claimant was entitled to the salary received based on her past service to the employer.<sup>161</sup>

Employers may also receive credit for payments made by voluntary pension plans, provided the plan is funded solely by the employer.<sup>162</sup> The credit is limited to the weekly amount of workers' compensation benefits that the employer would be obligated to pay.<sup>163</sup> No credit will be allowed for payments made by collateral sources where a claimant, directly or indirectly, earned or paid for the benefit.<sup>164</sup> Such non-credited sources include a claimant's or employer's health or disability plan<sup>165</sup> and an employee-funded pension plan.<sup>166</sup> The Act provides that the compensation carrier, after notice, must reimburse medical benefits paid by the employer or claimant's health, accident, or other insurance company.<sup>167</sup>

If maximum medical improvement is reached before the hearing and subsequent order by the Administrative Law Judge, and the carrier or employer continues to pay compensation, then credit for excess payments shall be allowed in future payments.<sup>168</sup> Although, if an employer/carrier makes payments in excess of the final award, no repayment by the claimant can be compelled.<sup>169</sup> A Court of Appeals decision held that an employer/carrier could not receive a credit toward temporary total benefits for the time a claimant actually received unemployment benefits.<sup>170</sup> It is always prudent for the employer and/or carrier to investigate the availability of a

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<sup>160</sup> City of Kosciusko v. Graham, 419 So.2d 1005 (Miss. 1982).

<sup>161</sup> Pet, Inc., Dairy Division v. Roberson, 329 So.2d 516 (Miss. 1976).

<sup>162</sup> Western Electric, Inc. v. Ferguson, 371 So.2d 864 (Miss. 1979).

<sup>163</sup> South Central Bell Telephone v. Aiden, 474 So.2d 584 (Miss. 1985).

<sup>164</sup> Dunn, § 45.2 at 33 (Supp. 1990).

<sup>165</sup> Bowen v. Magic Mart of Corinth, 441 So.2d 548 (Miss. 1983); White v. Jordan, 11 So.3d 755 (Miss. Ct. App. 2008).

<sup>166</sup> Western Electric, Inc. v. Ferguson, 371 So.2d 864 (Miss. 1979).

<sup>167</sup> Miss. Code Ann. § 71-3-15(7).

<sup>168</sup> Pet, Inc., Dairy Division v. Roberson, 329 So.2d 516 (Miss. 1976).

<sup>169</sup> Miss. Code Ann. § 71-3-7(d).

<sup>170</sup> Mobile Medic Ambulance Service, Inc. v. Washington, 687 So.2d 781 (Miss. Ct. App. 1996).

credit when it is learned that a claimant has received payments from another source while she is eligible for workers' compensation benefits.

(F) Penalties and Interest:

The Act provides that an employer/carrier must file a notice of controversion within 14 days after receiving notice of an injury or risk the imposition of a mandatory 10 percent penalty<sup>171</sup> upon each installment of compensation not paid.<sup>172</sup> The employer/carrier must also file a Form B-3 (Initial Report of Injury) with the Commission along with any medical reports received and a summary of reasons why the claim is being controverted.<sup>173</sup> This interpretation of the penalty provision as mandatory has bad faith implications since the Court has arguably placed an affirmative duty upon every employer/carrier to either accept or controvert a claim.

The Act further provides a 20% penalty on all awards if not paid within 14 days after becoming due or if an appeal is not filed.<sup>174</sup> The Commission has determined this statute has no application to an Order authorizing lump sum payments or approving the settlement of a claim of compensation in a lump sum.<sup>175</sup> A \$100.00 penalty may also be assessed if a final report of payment (Form B-31) is not filed within 30 days from the date of the final payment.<sup>176</sup> Additionally, the Act provides that interest at the legal rate is due from the date of an award. Under certain circumstances, pre-award interest may be assessed from the date the claim is first controverted by a claimant.<sup>177</sup>

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<sup>171</sup> Lanterman v. Roadway Express Inc., 608 So.2d 1340 (Miss. 1992) (statutory provision allowing penalty to be excused if failure results from conditions over which employer has no control is to be narrowly interpreted).

<sup>172</sup> Miss. Code Ann. § 71-3-37(5).

<sup>173</sup> MWCC Procedural Rule 2; Miss. Code Ann. § 71-3-37(4).

<sup>174</sup> Miss. Code Ann. § 71-3-37(6).

<sup>175</sup> Ricky Bolan Estate v. Turner Supply, MWCC No. 93-0781-E-8763 (Full Comm'n Order, Jan. 26, 1995).

<sup>176</sup> Miss. Code Ann. § 71-3-37(7).

<sup>177</sup> Miss. Code Ann. § 75-17-7; see also, Lanterman v. Roadway Express Inc., 608 So.2d 1340 (Miss. 1992).

## VI. DEFENSES AND WAYS TO REDUCE LIABILITY

A variety of affirmative defenses are available to employers and carriers to minimize or to completely avoid liability for an otherwise compensable injury. An employer/carrier has the burden of going forward with all of these defenses.

### (A) Jurisdiction:

Because of our federal system of government, compensation claims may arise under the concurrent jurisdiction of two states or between a state and the federal government. A careful review of a claimant's status, duties, and the circumstances of the injury may determine where and how the claim should be brought.

Claims filed in other jurisdictions may or may not bar a subsequent claim in Mississippi.<sup>178</sup> Transportation and maritime employment are covered under federal law, not the Act.<sup>179</sup> A subsequent claim is barred in Mississippi if the act in the state where the first claim is brought provides that its award shall be exclusive.<sup>180</sup> If allowed, a subsequent award may be subject to a credit in favor of the employer/carrier in the state where the original award was obtained.<sup>181</sup> A Mississippi resident hired and injured in other states may not invoke the jurisdiction of the Commission.<sup>182</sup>

In addition, only those employers with five or more employees are subject to the Act. A sole proprietor, partner, and certain employees with ownership interests can "opt out" of

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<sup>178</sup> Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980).

<sup>179</sup> Miss. Code Ann. §71-3-5; see also, Valley Towing Co. v. Allen, 109 So.2d 538 (Miss. 1959) (state claim dismissed since claimant alleges Jones Act seaman status); Kimbrough v. Fowler's Pressure Washing, LLC, et al, 170 So.3d 609 (Miss. Ct. App. 2015).

<sup>180</sup> Harrison Co. v. Norton, 146 So.2d 327 (Miss. 1962).

<sup>181</sup> Southland Supply Co., Inc. v. Patrick, 397 So.2d 77, 79 (Miss. 1981).

<sup>182</sup> Rice v. Burlington Motor Carriers, Inc., 839 So.2d 602 (Miss. Ct. App. 2003); see also, Williams v. Mattress Direct, 120 So.3d 439 (Miss. Ct. App. 2013) (Louisiana resident employed by a Louisiana employer injured in Mississippi may elect Louisiana law to control); Stewart v. Dynamic Environmental Services, LLC, 245 So. 3d 543 (Miss. Ct. App. 2018) (Mississippi resident hired, employed, and injured in Texas lacks jurisdiction in Mississippi).

coverage and are not counted for purposes of reaching the mandatory number of workers.<sup>183</sup> This issue can create a serious dilemma for an employer with less than five employees since it may not be protected by the exclusiveness of remedy provided by the Act and may be exposed to general tort liability.<sup>184</sup> Farm laborers may also be exempted under the Act.<sup>185</sup>

(B) Apportionment:

Under the Act, the doctrine of apportionment serves to proportionately reduce liability for permanent disability benefits by the amount which a pre-existing condition contributes to the disability of a claimant following a compensable injury.<sup>186</sup>

To have an award apportioned in its favor, an employer/carrier must establish that (1) there was a pre-existing physical handicap, disease or lesion; (2) it is supported by medical findings; and (3) it is a material contributing factor in the results following the injury.<sup>187</sup> If these conditions are met, the compensation otherwise payable can be reduced by the proportion the pre-existing condition contributed to the injury.<sup>188</sup> The reduction in benefits is not made up from any other source. In claims arising before July 1, 2012, the pre-existing condition had to materially contribute to the disability following the injury and had to be "occupationally

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<sup>183</sup> Concert Systems USA, Inc. v. Weaver, 33 So.3d 1186 (Miss. Ct. App. 2005) (paid officers can be employees); Harper v. Banks, Finley, White & Co. of Miss., P.C., 167 So. 3d 1155 (Miss. 2015) (Court found jurisdiction since employer did not opt out in writing); see also, Southeastern Auto Broker v. Graves, 210 So. 3d 1012 (Miss. Ct. App. 2015)(jurisdictional coverage; all employees included where three entities operated essentially as one.

<sup>184</sup> Miss. Code Ann. §71-3-5.

<sup>185</sup> Bradford Seafood Co. v. Alexander, 785 So.2d 321 (Miss. Ct. App. 2001) (oyster shuckers not entitled to exemption); Yates v. Triple D. Inc., 295 So.3d 586 (Miss. Ct. App. 2020).

<sup>186</sup> Miss. Code Ann. § 71-3-7.

<sup>187</sup> Delta Drilling Co. v. Cannette, 489 So.2d 1378 (Miss. 1986).

<sup>188</sup> Delta Drilling Co. v. Cannette, 489 So.2d 1378 (Miss. 1986); Harper v. Banks, Finley, White & Co., 167 So. 3d 1155 (Miss. 2015) (Court apportioned death award for stroke due to aggravation of pre-existing high blood pressure.)

disabling" for apportionment to be applicable.<sup>189</sup> For claims on or after July 1, 2012, a pre-existing condition no longer has to be occupationally disabling for apportionment to apply.<sup>190</sup>

(C) Statute of Limitations:

If a mentally competent adult claimant fails to file a claim with the Commission within two years of the date of injury or death, any right to compensation is barred.<sup>191</sup> If any compensation (other than medical benefits or burial expenses) is paid to a claimant, then the two year statute of limitations no longer applies.<sup>192</sup> Thereafter, a one year statute of limitations applies from the date of the last compensation payment.<sup>193</sup>

The one year statute of limitations is based on the Act, regulations of the Commission, and case law. The rule is that an otherwise compensable claim is barred if the claimant does not receive compensation or incur medical expenses, or file a claim within one year from the proper filing of a Form B-31 (Notice of Final Payment) with the Commission.<sup>194</sup>

The same statute provides that a claim for compensation is barred unless an employer receives notice of the injury within 30 days after the event.<sup>195</sup> Despite the language of the statute, the Supreme Court has ruled that, unless prejudice to an employer results, a claimant's failure to

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<sup>189</sup> Stuart's Inc. v. Brown, 543 So.2d 649 (Miss. 1989); but see, Peco Foods of Mississippi, Inc. v. Keyes, 820 So.2d 775 (Miss. Ct. App. 2002)(apportionment denied where insufficient evidence of occupational disability prior to injury).

<sup>190</sup> Miss. Code Ann. § 71-3-7(2).

<sup>191</sup> Miss. Code Ann. § 71-3-35(1). Note that statute runs starting with the "injury" and not the date of "accident." Thus, the results of an accident may not become compensable until well after the two year limit. See, Struthers Wells-Gulfport, Inc. v. Bradford, 304 So.2d 645 (Miss. 1974).

<sup>192</sup> Speed Mechanical, Inc. v. Taylor, 342 So.2d 317 (Miss 1977); Baker v. IGA Super Valu Food Store, 994 So.2d 186 (Miss. Ct. App. 2008).

<sup>193</sup> Speed Mechanical, Inc. v. Taylor, 342 So.2d 317 (Miss. 1977)(citing Miss. Code Ann. §71-3-53); Hancock v. Mississippi Forestry Commission, 878 So.2d 1058 (Miss. Ct. App. 2004).

<sup>194</sup> ABC Manufacturing Corp. v. Doyle, 749 So.2d 43 (Miss. 1999) (the filing of an Employer's Notice to Controvert (Form B-52) does not prevent the statute from barring a claim); Gaillard v. North Benton County Health Care, 180 So.3d 842 (Miss. Ct. App. 2015) (claimant had one year from the day of dismissal in which to reopen claim when claim was dismissed because claimant failed to file a prehearing statement).

<sup>195</sup> Miss. Code Ann. § 71-3-35(1); MWCC Procedural Rule 17; see also, Brown v. F. W. Woolworth Co., 348 So.2d 236 (Miss. 1977).

give any notice of the injury within 30 days will not bar her claim, as long as the claim is filed with the Commission within the statutory two year period.<sup>196</sup>

In latent injury cases, the Supreme Court has held the statute of limitations begins to run when a claimant "knew or should have known" that he/she has incurred a compensable injury and disability.<sup>197</sup> A claimant's awareness of the injury should arise from recognizing the "nature, seriousness and probable compensable character" of the injury.<sup>198</sup> Thus, if a claimant is aware that he has suffered a compensable injury at the time of the accident, the statute begins to run whether or not the full effect or ultimate degree of disability is immediately apparent.<sup>199</sup>

The two year statute of limitations was tolled and not enforced in the following situations: where an employer intentionally misrepresented the existence of workers' compensation insurance and failed to file the proper notice of a claimant's fatality;<sup>200</sup> under the doctrine of equitable estoppel where an employer did not file a Notice of Controversion (Form B-52) and the claimant was told the employer would file the claim;<sup>201</sup> under the doctrine of equitable estoppel where intentional misrepresentations were made which reasonably caused the injured employee not to file a claim;<sup>202</sup> and under the doctrine of equitable estoppel where the adjuster told claimant "not to worry about anything" and that did not need an attorney.<sup>203</sup>

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<sup>196</sup> Adolphe Lafont USA, Inc. v. Ayers, 958 So.2d 833 (Miss. Ct. App. 2007).

<sup>197</sup> Tabor Motor Co. v. Garrard, 233 So.2d 811 (Miss. 1970); City of Jackson v. Sandifer, 125 So.3d 681 (Miss. Ct. App. 2013).

<sup>198</sup> Quaker Oats Co. v. Miller, 370 So.2d 1363 (Miss. 1979) (citing 3 Larson, § 78.41); Nicholson v. International Paper Co., Inc., 51 So.3d 995 (Miss. Ct. App. 2010).

<sup>199</sup> Dunn, § 249 at 304 (citing Casey v. Deeson Cash Grocery, 246 So.2d 534 (Miss. 1971)); Johnson v. City of Jackson, Miss., 211 So.3d 767 (Miss. Ct. App. 2016).

<sup>200</sup> Holbrook v. Albright Mobile Homes, Inc., 703 So.2d 842 (Miss. 1997).

<sup>201</sup> McCrary v. City of Biloxi, 757 So.2d 978 (Miss. 2000).

<sup>202</sup> Brock v. Hankins Lumber Co., 786 So.2d 1064 (Miss. Ct. App. 2000); but see, Tupelo Public School District v. Parker, 912 So.2d 1070 (Miss. Ct. App. 2005).

<sup>203</sup> Dietz v. South Miss. Regional Ctr., 231 So.3d 219 (Miss. Ct. App. 2017); but see, McInturff v. Yellow Roadway Corp., 2019 Miss. App. LEXIS 169 (Miss. Ct. App. Apr. 23, 2019) (court held 2 year statute barred claim even though claimant alleged misrepresentations).

Failure to file a Form B-3 (Notice of Injury) is a factor considered in the evaluating whether an employer is estopped for asserting the statute of limitations defense.<sup>204</sup> Further, wages "paid in lieu" of compensation will toll the statute of limitations.<sup>205</sup> There is a presumption that when a claimant is paid his usual salary and does no or so little work for a period such that the wages were not earned, the continued payment of a salary is in lieu of compensation.<sup>206</sup>

Be aware that even if a claimant fails to establish a loss of wage-earning capacity, a claim can be reopened anytime prior to one year after the date of the last payment of compensation,<sup>207</sup> if there is a material change in her condition or a mistake has been made by the Commission in a determination of a material fact.<sup>208</sup> Also, if a claimant fails to establish a loss of wage-earning capacity, she can reopen the claim at a later date if there is a material change in her condition or a mistake has been made by the Commission in a determination of fact.<sup>209</sup> The claim to reopen must be based upon evidence that was available at the time of the original hearing before the

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<sup>204</sup> Prentice v. Schindler Elevator, 13 So.3d 1258 (Miss. 2009); McInturff v. Yellow Roadway Corp., 2019 Miss. App. LEXIS 169 (Miss. Ct. App. Apr. 23, 2019).

<sup>205</sup> Parchman v. Amwood Products, Inc., 988 So.2d 346 (Miss. 2008); Ladner v. Zachry Construction, 130 So. 3d 1085(Miss. 2014)(held claimants wages in lieu of compensation although claimant worked as filing clerk, stand by attendant and hole watcher).

<sup>206</sup> Lindsay Logging, Inc. v. Watson, 44 So.3d 388 (Miss. Ct. App. 2010); but see, McInturff v. Yellow Roadway Corp., 2019 Miss. App. LEXIS 169 (Miss. Ct. App. Apr. 23, 2019) (claimant's utilization of sick leave/vacation without being directed and without medical documentation did not constitute wages in lieu of compensation).

<sup>207</sup> Smith v. Compfirst, 186 So. 3d 873 (Miss. Ct. App. 2015) ("compensation" includes medical services; claimant petitioned to open her case 10 years after her final disability payment because she continued to receive ongoing medical services and time limit had not yet run).

<sup>208</sup> Miss. Code Ann. § 71-3-453; Dunn, § 80 at 93; Broadway v. International Paper, Inc., 982 So.2d 1010 (Miss. Ct. App. 2008); see also, North Miss. Med. Ctr. v. Henton, 317 So.2d 373 (Miss. 1975) (failure to obtain or hold employment deemed a material change in condition); Bailey Lumber Co. v. Mason, 401 So.2d 696 (Miss. 1981)(failure of an illiterate and unrepresented claimant to understand the full extent of her disability and the compensation available deemed a material mistake of fact); Georgia-Pacific Corp. v. Gregory, 589 So.2d 1250 (Miss. 1991) (deterioration in medical condition deemed a material change in condition); but see, Sims v. Ashley Furniture Industry, 964 So.2d 625 (Miss. Ct. App. 2007) (termination of an employee 10 days after a settlement became final did not constitute a material change in condition or mistake).

<sup>209</sup> Miss. Code Ann. §71-3-53 (Rev. 2011); see also, Dunn, § 80 at 93; Curry v. Ashley Furniture, 296 So.3d 193 (Miss. Ct. App. 2020); Mabus v. Mueller Indus., 310 So.3d 1192 (Miss. Ct. App. 2020).



Commission.<sup>210</sup> The Commission may at any time enforce its orders for payment of compensation, including medical benefits.<sup>211</sup>

(D) Independent Contractor:

The Act clearly excludes independent contractors from workers' compensation coverage under a third-party employer's policy.<sup>212</sup> Difficulties arise in determining a subcontractor's status as either "independent contractor" or "employee," even though the Act defines both terms. Difficulties can also arise in an "upside-down" compensation case where a claimant seeks to be an independent contractor so that she may sue the employer in tort.<sup>213</sup> The primary tests to ascertaining "independent contractor" status are the "right to control" test and the "nature of the work" test.<sup>214</sup> Any number of factors or criteria may be examined in quantifying and qualifying the "control" an employer may exercise over an employee.<sup>215</sup> The "nature of the work" test examines additional aspects of the employment, including how skilled the work is, whether the work is a separate calling, and whether the work is continuous, on-going, or a completed project.<sup>216</sup>

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<sup>210</sup> Jackson v. GSX Polymers, Inc., 107 So.3d 1049 (Miss. Ct. App 2013); see also, Garcia v. Super Sagless Corp., 975 So.2d 267 (Miss. Ct. App. 2006) (dismissal of a case for claimant's failure to file a pre-trial statement constituted a rejection sufficient to bar the claim); Cook v. Home Depot, 81 So.3d 1041 (Miss. 2012)(claim barred by one year statute of limitations which began with order dismissing claim for lack of prosecution).

<sup>211</sup> Cleveland v. Advance Auto Parts, 305 So.3d 1144 (Miss. 2020) (relying on Miss. Code § 71-3-37, Commission ordered employer/carrier to pay bills pursuant to settlement order).

<sup>212</sup> Miss. Code Ann. §71-3-3(d).

<sup>213</sup> Mathis v. Jackson County Board of Supervisors, 912 So.2d. 564 (Miss. Ct. App. 2005).

<sup>214</sup> Brown v. L.A. Penn & Son, 227 So.2d 470 (Miss 1969)(right of control rather than actual exercise of control is primary test); Manfredi v. Harrell Contracting Group, LLC, 228 So. 3d 807 (Miss. Ct. App. 2016) (Claimant found to be employee of subcontractor and not general contractor applying the "control test" and the "nature of work" test).

<sup>215</sup> Seventeen factors are listed in Dunn, § 130 at 153-54. See also, Miss. Employment Security Commission v. PDN, Inc., 586 So.2d 838, 841-42 (Miss. 1991); Fortner v. Specialty Contr., LLC, 217 So. 3d 736 (Miss. Ct. App. 2017).

<sup>216</sup> Davis v. Clarion Ledger, 938 So.2d 905 (Miss. Ct. App. 2006).

Under some circumstances, a general contractor may be liable for compensation benefits to the employees of a subcontractor.<sup>217</sup> If the subcontractor fails to secure compensation coverage for its employees, then the general contractor is liable for any compensable injuries those employees suffer.<sup>218</sup> In effect, the employees of a subcontractor without compensation insurance become the statutory employees of the general contractor.<sup>219</sup> A general contractor is also liable for employees of subcontractors even where the subcontractor has less than 5 employees.<sup>220</sup> General contractors do benefit, however, because they are afforded the protection from suit offered by the exclusiveness of liability provision.<sup>221</sup> Immunity has been extended to both a general and subcontractor in an action by an employee of a subcontractor who had secured workers' compensation insurance for its injured worker.<sup>222</sup> Even if a general contractor requires (but does not confirm) the subcontractor to procure compensation insurance, the contractor meets its burden of "securing" coverage under the Act and becomes entitled to the protection of Section 71-3-9.<sup>223</sup> In the absence of a written contract, however, the question of whether a company was a subcontractor or material man was held to be a jury question.<sup>224</sup> Immunity is not available where an employee is injured by a purposeful and willful act of the

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<sup>217</sup> Miss. Code Ann. § 71-3-5 (motor carriers must carry workers' compensation insurance for owner/operators unless a certificate of insurance is furnished by the owner/operator to the motor carrier.)

<sup>218</sup> Miss. Code Ann. § 71-3-7.

<sup>219</sup> Mills v. Barrett, 56 So.2d 485, 486-87 (Miss. 1952).

<sup>220</sup> Builders & Construction Assoc. of Miss. v. Laser Line Construction Co., LLC, 220 So. 3d 964 (Mis. 2017).

<sup>221</sup> Miss. Code Ann. § 71-3-9; Doubleday v. Boyd Construction Co., 418 So.2d 823 (Miss. 1982); Thornton v. W. E. Blain & Sons, Inc., 878 So.2d 1082 (Miss. Ct. App. 2004) ("substantial certainty" test rejected and immunity upheld).

<sup>222</sup> Washington v. Tem's Junior, Inc., 981 So.2d 1047 (Miss. Ct. App. 2008); Hibbler v. Ingalls Shipbuilding Shipyard, 298 So.3d 1022 (Miss. Ct. App. 2019).

<sup>223</sup> Crowe v. Brasfield & Gorrie General Contractor, Inc., 688 So.2d 752 (Miss. 1996); see also, Castillo v. M.E.K. Construction, Inc., 741 So.2d 332 (Miss. Ct. App. 1999).

<sup>224</sup> APAC-Mississippi, Inc. v. Goodman, 803 So.2d 1177 (Miss. 2002).

employer.<sup>225</sup> A premises owner who purchases workers compensation insurance for employees of a general contractor are not entitled to indemnity.<sup>226</sup> However, an owner who hires a general contractor who's employee is then injured is generally not a statutory employer.<sup>227</sup>

In Mississippi, a person may be employed by more than one employer and both employers gain immunity from common law negligence actions. The "dual employment" or "loaned servant" doctrine has been applied to protect both a temporary employment agency and the employer for which a claimant was performing services.<sup>228</sup> It is generally determined on a case by case basis utilizing several factors, including the terms of the employment contract.<sup>229</sup>

For example, a subcontractor who authorized the general contractor to deduct his workers' compensation premiums from the gross proceeds was found to have "secured" compensation and be entitled to immunity from a suit for damages by the family of an employee who died on the job.<sup>230</sup>

(E) Intervening Cause:

A claimant's disability, or portion thereof, may in fact be caused by an event subsequent to her injury. Normally, when an injury arises out of and in the course of employment, every natural consequence (including the claimant's conduct) that flows as a direct and natural result

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<sup>225</sup> Hurdle v. Holloway, 848 So.2d 183 (Miss. 2003); Bevis v. Linkous Construction Co., Inc., 856 So.2d 535 (Miss. Ct. App. 2003).

<sup>226</sup> Thomas v. Chevron U.S.A., Inc., 212 So.3d 58 (Miss. 2017).

<sup>227</sup> Rollins v. Hinds Cty. Sheriff's Dept., 306 So.3d 702 (Miss. 2020) (owner of contractor company was not a statutory employer).

<sup>228</sup> Northern Electric Co. v. Phillips, 660 So.2d 1278 (Miss. 1995); see also, Russell v. Orr, 700 So.2d 619 (Miss. 1997) (doctrine not extended to protect a hospital from a suit for malpractice by an employee when the employee sought treatment as a member of the general public).

<sup>229</sup> Jones v. James Reeves Contractors, Inc., 701 So.2d 774 (Miss. 1997); James v. Dedeaux, 217 So.3d 785 (Miss. Ct. App. 2017).

<sup>230</sup> Miss. Code Ann. § 71-3-9; Lamar v. Thomas Fowler Trucking, Inc., 956 So.2d 878 (Miss. 2007).

from that injury also “arises out” of the employment and is compensable.<sup>231</sup> It does not matter how long the chain of causation lasts as long as all of its links can be traced back to the original injury.<sup>232</sup> If an independent intervening cause interrupts the chain at any point, then the liability of the employer ceases.<sup>233</sup>

In order to determine whether a particular event is an independent cause, the Supreme Court adopted the “quasi-course of employment” standard.<sup>234</sup> Under this standard, an employer should provide compensation for activities undertaken by a claimant following his injury which, although take place outside the time and space limits of the employment and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.<sup>235</sup>

(F) Fraudulent Inducement:

Fraudulent inducement occurs where an employee knowingly misrepresents their physical condition in order to obtain employment.<sup>236</sup> If fraudulent inducement is proven, then benefits may be denied for an otherwise compensable injury.<sup>237</sup> In order to successfully assert this defense, an employer must show that:

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<sup>231</sup> Medart Div. of Jackes-Evans Manufacturing v. Adams, 344 So.2d 141 (Miss. 1977) (citing 1 Larson, §13); see also, Walker v. Pine Trailer Limited Partnership, 708 So.2d 99 (Miss. Ct. App. 1998) (back injury deemed compensable where injury occurred during physical therapy for work-related knee injury).

<sup>232</sup> Kelly Brothers Construction, Inc. v. Windham, 410 So.2d 1322 (Miss. 1982) (citing Burnley Shirt Corp. v. Simmons, 204 So.2d 451, 454 (Miss. 1967)).

<sup>233</sup> Burnley Shirt Corp. v. Simmons, 204 So.2d 451 (Miss. 1967); see also, United Methodist Senior Services v. Ice, 749 So.2d 1227 (Miss. Ct. App. 1999)(intervening cause not attributable to second employer, so first employer held liable for compensable injury); Husley v. Fountainbleau Mngmt. Services, 186 So.3d 440 (Miss. Ct. App. 2016) (second injury for second employer constitutes independent intervening cause of first injury for first employer).

<sup>234</sup> Burnley Shirt Corp. v. Simmons, 204 So.2d 451 (Miss. 1967).

<sup>235</sup> Burnley Shirt Corp. v. Simmons, 204 So.2d 451 (Miss. 1967) (citing 1 Larson, § 13.11).

<sup>236</sup> Emerson Electric Co. v. McLarty, 487 So.2d 228 (Miss. 1986).

<sup>237</sup> Cawthon v. Alcan Aluminum Corp., 599 So.2d 925 (Miss. 1991).

- 1) Employee knowingly and willingly made a false representation as to his physical condition;
- 2) Employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
- 3) A causal connection between the false representation and the injury.<sup>238</sup>

Despite several appeals, the Supreme Court has thus far refused to expressly enforce this defense against otherwise compensable claims.<sup>239</sup>

(G) Deviation:

If an employee undertakes some action or purpose of his own, separate from his employment and for purely personal reasons, then the employment relationship is considered temporarily suspended.<sup>240</sup> Any injury during this period does not occur “in the course of employment” and thus is not compensable.<sup>241</sup> Once the personal mission ends and the employee returns to his work duties, the employment relationship resumes.<sup>242</sup>

To satisfy the “in the course of” test, the injury must result from an activity which is “(1) in its overall contours actuated at least in part by a duty to serve the employer, or (2) reasonably incidental to the employment.”<sup>243</sup> Ultimately, whether a deviation occurs will be decided upon the particular facts of the case with the abiding condition that for claims prior to July 1, 2012, the

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<sup>238</sup> Emerson Electric Company v. McLarty, 487 So.2d 228 (Miss. 1986); see also, 1C Larson, §47.53 (1991).

<sup>239</sup> See, I.B.S. Manufacturing Co. v. Dependents of Cook, 241 Miss. 256 (1961); Cawthon v. Alcan Aluminum Corp., 599 So.2d 925 (Miss. 1991).

<sup>240</sup> Dunn, § 171 at 207.

<sup>241</sup> Huey v. RGIS Inventory Specialists, 168 So.3d 1145 (Miss. Ct. App. 2014) (deviation found for “road-rage” confrontation); Haney v. Fabricated Pipe Inc., 203 So.3d 725 (Miss. Ct. App. 2016) (employee deviated when he climbed 25 feet into a tree on his break and fell).

<sup>242</sup> Dunn, § 171 at 208; see also, Houston ex rel. Houston v. Minisystems, Inc., 806 So.2d 292 (Miss. Ct. App. 2001).

<sup>243</sup> Big "2" Engine Rebuilders v. Freeman, 379 So.2d 888 (Miss. 1980).

Act must be liberally applied and doubt must be resolved in favor of the claimant.<sup>244</sup> For example, the claim of a claimant who died in an accident in a company vehicle, after leaving a company party where alcohol was served, was held not to be compensable where there was no evidence claimant was on a service call and his blood alcohol level was high.<sup>245</sup> Employers should be aware, however, that by denying a claim they may be exposed to potential liability for negligence.<sup>246</sup>

(H) Going and Coming Cases:

With few exceptions, hazards encountered by employees while going to or coming from their regular place of work are neither incident to their employment nor compensable.<sup>247</sup> The Supreme Court has established the following exceptions to this rule:

- 1) Where employer furnishes the means of transportation or reimburses employee;<sup>248</sup>
- 2) Where employee performs some duty in connection with his employment at home;<sup>249</sup>
- 3) Where the injury results from a hazardous parking lot furnished by employer;<sup>250</sup>

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<sup>244</sup> Dunn, § 182 at 66 (Supp. 1990); Total Transportation Inc. v. Shores, 968 So.2d 400 (Miss. 2007).

<sup>245</sup> Tommy Brooks Oil Co. v. Leach, 722 So.2d 708 (Miss. 1998).

<sup>246</sup> In re Estate of Shelby Brown, Jr. v. Pearl River Valley Opportunity, Inc., 627 So.2d 308 (Miss. 1993) (the Court refused to extend the exclusive remedy provisions of the Act to an employer who successfully defended a workers' compensation claim where the employee drowned in a swimming pool at a time of deviation from his assigned work).

<sup>247</sup> Miller Transporters v. Dependents of Seay, 350 So.2d 689 (Miss. 1977) (citing Aetna Finance Company v. Bourgojn, 174 So.2d 495 (Miss. 1965)); Lambert v. Energy Drilling Co., 2021 Miss. App. LEXIS 114 (Miss. Ct. App. Mar. 16, 2021).

<sup>248</sup> Dixie Products Co., Inc. v. Dillard, 770 So.2d 965 (Miss. Ct. App. 2000); Gas v. Edmonds, 167 So.3d 1258 (Miss. Ct. App. 2014) (claim compensable when employee was injured on his way to work in company truck while not being paid).

<sup>249</sup> Lane v. Hartson-Kennedy Cabinet Top Co, Inc., 981 So.2d 1063 (Miss. Ct. App. 2008).

<sup>250</sup> Jesco, Inc. v. Cain, 954 So.2d 537 (Miss. Ct. App. 2007).

- 4) Where place of injury, although owned by one other than employer, is in such close proximity to employer's premises as to be, in effect, a part of such premises;<sup>251</sup>
- 5) Where employer designates route workers must use and an accident occurs because of a "special hazard" peculiar to the route or an "extra hazard" to which the general public is not exposed;<sup>252</sup>
- 6) Where employee is on a special mission or errand for employer, or is accommodating employer in an emergency;<sup>253</sup>
- 7) Where employee's work entails travel away from the employer's premises, his employment continues during the trip except when a distinct departure on a personal errand is shown;<sup>254</sup> and
- 8) Where employee, although not working, is engaged in activities of personal comfort such as brushing teeth, drinking water and going to the bathroom.<sup>255</sup>
- 9) Where employee has a "dual purpose" of business and personal, a claim may be compensable.<sup>256</sup>

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<sup>251</sup> Green v. Glen Oaks Nursing Ctr., 722 So.2d 147 (Miss. Ct. App. 1998)(employee assaulted at night in adjoining parking lot).

<sup>252</sup> Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc., 416 So.2d 963 (Miss. 1982); Bouldin v. Miss. Dept. of Health, 1 So.3d 890 (Miss. Ct. App. 2008) ("the threshold doctrine").

<sup>253</sup> Lane v. Hartson-Kennedy Cabinet Top Co., Inc., 981 So.2d 1063 (Miss. Ct. App. 2008).

<sup>254</sup> Financial Inst. Ins. Serv. v. Hoy, 770 So.2d 994 (Miss. Ct. App. 2000) (traveling salesperson fell in hotel bathroom at night); Choctaw Resort Development Enterprise v. Applequist, 161 So.3d 1134 (Miss. Ct. App. 2015).

<sup>255</sup> Bouldin v. Miss. Dept. of Health, 1 So.3d 890 (Miss. Ct. App. 2008) (citing Collums v. Caledonia Manufacturing Co., 115 So.2d 672 (Miss. 1959) ("the personal comfort doctrine").

<sup>256</sup> E & M Motel Mgmt. Inc. v. Knight, 231 So.2d 179 (Miss. 1970); Simms v. Delta Fuel, 308 So.3d 859 (Miss. Ct. App. 2020) (Claimant's contention of dual purpose of business and personal was not supported by substantial evidence).

This rule does not include errands or tasks performed per an employer's instruction or request which takes employee beyond his regular work site.<sup>257</sup> An employee claiming an exception to the general rule has the burden of proving he comes within one of the exceptions.<sup>258</sup>

(I) Third Party Claims:

The Act allows claimants or their dependents to file suit against any other party responsible for their injury or death. A claimant is still entitled to receive compensation, but the employer/carrier must be notified within 15 days of filing suit and afforded an opportunity to intervene.<sup>259</sup> Although their role is limited,<sup>260</sup> if employer/carrier joins the action, either is entitled to be reimbursed from the proceeds of the suit for the compensation and medical expenses they paid.<sup>261</sup> If the claimant or dependents fail to recover, then no credit or reimbursement to the carrier is permitted.<sup>262</sup> The "borrowed servant doctrine" may be a defense to a third party claim.<sup>263</sup>

Where the claimant files a third party action, intervention by the carrier is required to validate or enforce a claim to the proceeds recovered by a claimant in a third party action.<sup>264</sup>

In some cases, the employer/carrier can sue a third party on behalf of itself and/or the claimant or his beneficiaries for the injury or death of the claimant. Though in all instances, any settlement between the parties before a suit is filed is subject to approval by the Commission.<sup>265</sup>

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<sup>257</sup> Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc., 416 So.2d at 963 (Miss. 1982).

<sup>258</sup> Miller Transporters v. Dependents of Seay, 350 So.2d 689 (Miss. 1977); Mooneyhan v. Boyd Tunica, Inc., 850 So.2d 119 (Miss. Ct. App. 2002).

<sup>259</sup> Miss. Code Ann. § 71-3-71.

<sup>260</sup> Merchants Co. v. Hutchinson, 199 So.2d 813 (Miss. 1967) (before employer/carrier is reimbursed, claimant's legal fees are paid).

<sup>261</sup> St. Paul Travelers Ins. Co. v. Burt, 982 So.2d 992 (Miss. Ct. App. 2008); see, Booth v. Southern Hens, Inc., 244 So.3d 888 (Miss. Ct. App. 2018).

<sup>262</sup> Harris v. Magee, 573 So.2d 646 (Miss. 1990); Johnson v. T & T Farms, Inc., 283 So.3d 1130 (Miss. Ct. App. Apr. 9, 2019).

<sup>263</sup> James v. Dedeaux, 217 So.3d 785 (Miss. Ct. App. 2017).

<sup>264</sup> Liberty Mutual Ins. Co. v. Shoemake, 111 So.3d 1207 (Miss. 2013).

<sup>265</sup> Miss. Code Ann. § 71-3-71.



If no such approval is given or sought, then the settlement is not binding upon the employer/insurer.<sup>266</sup>

The Supreme Court has held that a carrier is not entitled to share in the proceeds recovered by a claimant from the employer's uninsured motorist insurer.<sup>267</sup> The carrier can be reimbursed from any punitive damages awarded to the claimant.<sup>268</sup> Under Mississippi Code §71-3-71, a carrier is entitled to reimbursement regardless of whether the claimant has been made whole.<sup>269</sup> A Medicaid lien has been held to take precedence after legal costs and before a claimant's recovery.<sup>270</sup> A third party claim must be filed within three years from when the employee knew or should have known of workers compensation coverage.<sup>271</sup>

(J) Intoxication, Illegal Drug Use, & Improper Prescription Medication Use:

Prior to July 1, 2012, the Act only expressly disallowed compensation for injuries which were a proximate result of a claimant's intoxication. Illegal drug use and improper use of prescription medication were added in the 2012 amendments.<sup>272</sup> Previously, the burden was upon the employer to prove a claimant's drinking (or drug use)<sup>273</sup> caused his injury,<sup>274</sup> and in order to meet that burden, an employer/carrier had to show that the claimant was intoxicated (or inhibited by drug use) at the time of the accident and that was the proximate cause of the injury, not just a

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<sup>266</sup> Powe v. Jackson, 109 So.2d 546 (Miss. 1959).

<sup>267</sup> Cossitt v. Nationwide Mutual Ins. Co., 551 So.2d 879 (Miss. 1989); Miss. Ins. Guaranty Assoc. v. Blakeney, 54 So.3d 203 (Miss. 2011).

<sup>268</sup> Miss. Power Co. v. Jones, 369 So.2d 1381, 1387-88 (Miss. 1979).

<sup>269</sup> Miss. Code Ann. § 71-3-71; Federated Mutual Ins. Co. v. McNeal, 953 So.2d 658 (Miss. 2006); Armstrong v. Miss. Farm Bureau Casualty Ins. Co., 66 So.3d 188 (Miss. Ct. App. 2010) (jury verdict establishes "made whole" amount).

<sup>270</sup> Mississippi Division of Medicaid v. Pittman, 171 So.3d 583 (Miss. Ct. App. 2015).

<sup>271</sup> Jarrett v. Dillard, 167 So.3d 1207 (Miss. Ct. App. 2014) (reversed on other grounds).

<sup>272</sup> Miss. Code Ann. §71-3-7.

<sup>273</sup> Edwards v. World Wide Personnel Services, Inc., 843 So.2d 730 (Miss. Ct. App. 2002).

<sup>274</sup> Murphy v. Jac-See Packing Co., 208 So.2d 773 (Miss. 1968).

contributing factor.<sup>275</sup> Under the 2012 amendments, if claimant tests positive for alcohol, illegal drugs, or improperly used prescription drugs, or refuses to be tested, a legal presumption is made that this was the cause of claimant's injury.<sup>276</sup>

Mississippi has its own statutory scheme regarding drug and alcohol testing of employees.<sup>277</sup> All employers are allowed under the scheme to voluntarily elect whether or not to conduct drug and alcohol testing.<sup>278</sup> Under the 2012 amendments, the results of tests, regardless of who administered them, are then considered admissible evidence solely on the issue of causation in the determination of intoxication if the tests were performed in compliance with Mississippi law.<sup>279</sup> The testing must be in compliance with Miss. Code Ann. §71-7-1, et seq.<sup>280</sup>

(K) Willful Intent to Injure:

This defense encompasses three potential circumstances: (1) where a claimant intentionally injures himself or others; (2) where a co-employee (including an employer or superior) either intentionally or accidentally injures a claimant; and (3) where a third party intentionally injures a claimant.

The Act forbids any compensation for injuries sustained by a claimant which were proximately caused by the claimant's willful intent to injure or kill himself or another.<sup>281</sup> If an employee takes his own life through an uncontrollable impulse, without any conscious volition

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<sup>275</sup> Sanderson Farms, Inc. v. Deering, 909 So.2d 1169 (Miss. Ct. App. 2005); Walker v. Williams Transport, LLC, 139 So.3d 117 (Miss. Ct. App. 2014).

<sup>276</sup> Miss. Code Ann. § 71-3-121.

<sup>277</sup> Miss. Code Ann. § 71-7-1, et seq.

<sup>278</sup> Miss. Code Ann. § 71-7-3(1).

<sup>279</sup> Miss. Code Ann. § 71-3-121; McCall v. Sanderson Farms, Inc., 231 So.3d 240 (Miss. Ct. App. 2017) (where claimant was forced to wait several hours while injured to be tested but finally left against employer direction without the test, claim was found to be compensable).

<sup>280</sup> Miss. Code Ann. §71-7-5.

<sup>281</sup> Miss. Code Ann. §71-3-7; Smith v. Tippah Electric Power Assoc., 138 So.3d 900 (Miss. 2014) (Commission and court of Appeals reversed since proof insufficient to establish lineman intentionally grabbed wire to electrocute himself).

to cause death, and the mental condition was caused by a work injury, then the death is compensable.<sup>282</sup> There are defenses to these types of cases.<sup>283</sup>

Injuries resulting from an employer's or fellow employee's negligence are compensable.<sup>284</sup> In order to avoid the Act's exclusivity provision, a claimant must prove: (1) the injury was caused by a malicious or willful act of another employee with the actual intent to injure,<sup>285</sup> (2) while acting in the course of employment and in furtherance of the claimant's business, and (3) the injury must not be compensable under the Act.<sup>286</sup> A claim by an employee against his personal uninsured motorist carrier for injuries sustained due to the negligence of a co-employee was not allowed.<sup>287</sup> Willful or malicious actions by co-employees or an employer may allow an employee to seek remedies at common law instead of workers' compensation.<sup>288</sup>

A claimant's injuries caused by the willful or malicious act of a third person may be compensable.<sup>289</sup> The Act provides that, in order to obtain compensation for such an injury, a claimant must show that: (1) a willful act of a third person was directed against him, (2) because

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<sup>282</sup> Prentiss Truck & Tractor Co. v. Spencer, 87 So.2d 272, 276-79 (Miss. 1956); Dan K. Hill, Jr. v. MDMR, MWCC No.: 1407275-M-7077 (suicide compensable where medical records related mental condition to employment).

<sup>283</sup> City of Jackson v. Brown, 235 So.3d 190 (Miss. Ct. App. 2017) (patrolmen claimant who initiated high speed chase without a seatbelt was entitled to compensation; no reckless disregard or willful intent to injure).

<sup>284</sup> Dunn, § 161 at 190.

<sup>285</sup> Franklin Corp. v. Tedford, 18 So.3d 215 (Miss. 2009); Estate of Gorman v. State, 307 So.3d 421 (Miss. 2020).

<sup>286</sup> Griffin v. Futorian Corp., 533 So.2d 461 (Miss. 1988); McCool v. Coahoma Opportunities, Inc., 45 So.3d 711 (Miss. Ct. App. 2010).

<sup>287</sup> Wachtler v. State Farm Mutual Auto. Ins. Co., 835 So.2d 223 (Miss. 2003); Steen v. Metropolitan Property and Casualty Ins. Co., 858 So.2d 186 (Miss. Ct. App. 2003).

<sup>288</sup> Miller v. McRae's, Inc., 444 So.2d 368 (Miss. 1984) (false imprisonment action held not barred by Act); Blailock v. O'Bannon, 795 So.2d 533 (Miss. 2001) (assault, battery and false imprisonment by co-employee not barred by Act); see also, Davis v. Pioneer, Inc., 834 So.2d 739 (Miss. Ct. App. 2003) (employee injured in fight at work who accepted workers' compensation benefits may still assert claim against co-employee and employer for damages).

<sup>289</sup> Miller v. McRae's, Inc., 444 So.2d 368 (Miss. 1984) ("third person" refers to stranger to employer-employee relationship or co-employee acting outside course and scope of employment).

of his employment, (3) while employed and working on the job.<sup>290</sup> Thus, assaults or other acts committed for “personal” reasons are not “because of employment” and not compensable injuries.<sup>291</sup> The “because of employment” test will be met even if the relationship is tenuous or if employment “creates a ‘zone of special danger.’”<sup>292</sup> A ‘zone of special danger’ is met when employment conditions expose the employee to the hazard of an assault.<sup>293</sup> An increased risk may result from the nature or location of the work performed by an employee.

When the cause of injury is a hazard brought to the workplace or created by the injured employee in violation of the employer's rules, the claim may not be compensable. The basis of the defense, sometimes known as the “imported danger doctrine,” is whether the hazard has any relationship to the employment.<sup>294</sup> For example, where an employee was injured by an exploding firecracker brought to the workplace by a co-employee in violation of the employer's rules, the claim was adjudicated not to be compensable.<sup>295</sup> Though, where a farm worker was injured while being driven home after drinking beer at his workplace after hours, the “imported danger doctrine” was rejected and the claim deemed compensable.<sup>296</sup>

(L) Acts of God:

Generally, employer/carrier is not responsible for accidents directly resulting from acts of God since the injury is not causally related to the employment. If an employee, however, by

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<sup>290</sup> Miss. Code Ann. §71-3-3(b).

<sup>291</sup> Dunn, § 162 at 193; see also, Newell v. Southern Jitney Jungle Co., 830 So.2d 621 (Miss. 2002) (claim of employee shot at work by estranged husband dismissed); Total Transportation Inc. v. Shores, 968 So.2d 400 (Miss. 2007).

<sup>292</sup> Tanks v. Lockheed Martin Corp., 417 F.3d 456 (5<sup>th</sup> Cir. 2005).

<sup>293</sup> Dunn, §162 at 58 (Supp. 1990); Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982).

<sup>294</sup> Dunn, §159 at 188-89.

<sup>295</sup> Mathis v. Nelson's Foodland, Inc., 606 So.2d 101 (Miss. 1992).

<sup>296</sup> Hurdle v. Holloway, 848 So.2d 183 (Miss. 2003).

reason of his duties is exposed to a danger from the elements, the claim will be compensable.<sup>297</sup>

Therefore, this defense is rarely available to an employer/carrier.

(M) Average Weekly Wage:

It is absolutely essential to the calculation of the correct compensation rate that the average weekly wage of a claimant be established. Many times the average weekly wage is first identified when the employer/carrier reports the claimant's wage rate on the Employer's First Report of Injury form. This initial information is generally not sufficient to calculate an accurate average weekly wage. It is recommended that an accurate average weekly wage always be calculated since the correct average weekly wage is often substantially different than the information contained in the initial report of injury. The Act provides that the average weekly wage is calculated based upon an average of the earnings<sup>298</sup> from employer in the 52 week period immediately prior to the date of a claimant's injury.<sup>299</sup> If the claimant lost more than seven days during such period, although not in the same week, then the earnings for the remainder of such 52 week period shall be divided by the number of weeks remaining after the lost time has been deducted. If a claimant did not work for the full 52 week period prior to the date of injury, the earnings are to be divided by the number of weeks, or parts thereof, during which the claimant earned wages, provided the results are "just and fair to both parties." If a claimant worked for so short a time that an average would be "impracticable," the average weekly wage "earned by a

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<sup>297</sup> Pigford Brothers Construction Co. v. Evans, 83 So.2d 622 (Miss. 1955); Dunn, § 158 at 186.

<sup>298</sup> Woods v. Anderson Tully Co., MWCC No. 94-06217-F-3694-A-00 (Full Comm'n Order, Nov. 8, 1996)(contributions made by the employer to fund a fringe benefit for an employee in the form of group health insurance are not to be included in the calculation of the average weekly wage.)

<sup>299</sup> Piney Woods Country Life School v. Young, 946 So.2d 805 (Mis. Ct. App. 2006) (average weekly wage includes all wages earned from the employer with whom the employee became injured, including part-time work that is different from the employee's main duties).

person in the same grade employed at the same or similar work in the community” can be used.<sup>300</sup>

The daily compensation benefit payable in any case shall be the total weekly compensation benefit divided by five, as opposed to seven.<sup>301</sup> Where a claimant works “two weeks on and two weeks off” the average weekly wage calculation includes the “weeks off.”<sup>302</sup> In a latent injury case, it has been held that the correct date with which to measure the average weekly wage is the date claimant is forced to quit work for medical reasons, or stated differently, “when the injury becomes complete,” as opposed to the date of the original accident.<sup>303</sup> Where a claimant worked alternatively for two separate legal entities owned by the same person, only the earnings from the business for whom claimant worked at the time of injury was included in the average weekly wage.<sup>304</sup>

(N) Independent/Employer Medical Examination:

At all times, the employer/carrier has the right to require a claimant be examined by a physician chosen by the employer/carrier for the purpose of evaluating temporary or permanent disability or medical treatment.<sup>305</sup> Compensation benefits may not be suspended without an order from the Commission when a claimant refuses medical treatment.<sup>306</sup> This type of examination may not be “independent” since the employer/carrier selects the examiner, but is more accurately termed an Employer’s Medical Examination (EME). Upon proper motion, the Commission can

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<sup>300</sup> Miss. Code Ann. § 71-3-31.

<sup>301</sup> See, Mississippi Workers’ Compensation Commission General Rule 10 (effective April 1, 2001).

<sup>302</sup> Mixon v. Grey Wolf Drilling Co., LP, 62 So.3d 414 (Miss. Ct. App. 2010).

<sup>303</sup> J. H. Moon & Sons, Inc. v. Johnson, 753 So.2d 445 (Miss. 1999); University of Miss. Med. Ctr. v. Smith, 909 So.2d 1209 (Miss. Ct. App. 2005).

<sup>304</sup> Kukor v. Northeast Tree Service, Inc. and Jay’s Service Co., 77 So.3d 1134 (Miss. Ct. App. 2011).

<sup>305</sup> MWCC General Rule 9.

<sup>306</sup> Miss. Code Ann. §§ 71-3-15(1) and 71-3-37(3); see also, Cooper Lighting HID v. Brisco, 749 So.2d 199 (Miss. Ct. App. 1999).

also be requested to appoint an independent medical examiner to perform an Independent Medical Examination (IME) for evaluating the claimant's condition.

The Commission may accept the findings of an employer's examining physician over the findings of a treating physician so long as those findings are supported by credible evidence or an independent medical examination.<sup>307</sup> An Independent/Employer Medical Examination physician must be provided all relevant information for his opinion to be considered.<sup>308</sup>

(O) Vocational Rehabilitation:

Many times it is recommended that the employer/carrier retain the services of a vocational rehabilitation expert to assist in evaluating a non-scheduled injury claim or a scheduled claim where there is exposure to a permanent and total disability claim. There is no express authority under the Act to require a claimant to be interviewed or meet with a vocational rehabilitation expert. With or without the claimant's cooperation, the vocational rehabilitation expert can provide specific rates of pay and job opportunities for the claimant. The job opportunities identified should be within a reasonable distance of claimant's residence.<sup>309</sup> A new trend is for vocational experts to present testimony regarding "loss of access" to the labor market in addition to jobs available to the injured worker within medical restrictions.<sup>310</sup>

(P) Surveillance:

An option to the employer/carrier in evaluating a claim is surveillance which may be used to determine whether a claimant is accurately relating physical limitations. If surveillance suggests that the claimant has exaggerated existing problems, the employer/carrier generally

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<sup>307</sup> Hardaway Co. v. Bradley, 887 So.2d 793 (Miss. 2004); Burton v. Nissan N. Am., 305 So.3d 1163 (Miss. Ct. App. 2020); Howard Industries Inc. v. Wheat, 295 So.3d 592 (Miss. Ct. App. 2020).

<sup>308</sup> Jarrett v. Dillard, 167 So.3d 1207 (Miss. Ct. App. 2014) (reversed on other grounds).

<sup>309</sup> Goolsby Trucking Co., Inc. v. Alexander, 982 So.3d 1013 (Miss. Ct. App. 2008).

<sup>310</sup> See, Itta Bena Plantation III & Benchmark Ins. Co. v. Gates, 282 So.3d 721 (Miss. Ct. App. 2019); McKenzie v. Howard Indus., 2020 Miss. App. LEXIS 35 (Miss. Ct. App. Feb. 11, 2020).

should not unilaterally suspend compensation benefits. Rather, surveillance should be presented to an expert, such as a doctor, to see whether the surveillance is sufficient for the expert to testify that claimant has fewer or no physical limitations.<sup>311</sup> Surveillance may also be presented to the claimant's attorney as a settlement tool or at the workers' compensation hearing. Under Mississippi law, if the claimant's attorney has propounded discovery requests regarding surveillance, the employer/carrier must disclose the surveillance prior to the hearing.<sup>312</sup>

## **VII. SECOND INJURY FUND**

The Act contains a second injury fund provision, whereby a claimant who previously lost all or partial use of a scheduled member and thereafter suffers another injury causing the loss of use of another of these parts which renders the claimant permanently disabled, can receive payment from this fund for the remainder of the compensation (450 weeks) to which he would be entitled after payment is made by the employer/carrier for the second injury.<sup>313</sup> In other words, the fund pays for permanent disability benefits exceeding the amount for which the employer/carrier is liable simply for the loss of use of the second scheduled member. Due to its restricted terms, the Second Injury Fund is often not available.

## **VIII. SETTLING CLAIMS**

There are several avenues available to an employer/carrier for resolution of workers' compensation claims. The most obvious method is adjudication through the Commission level and, if necessary, the courts. Another means involves one of two settlement types. The first type is the "lump sum" or "13(j)" settlement, which only disposes of liability for indemnity benefits

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<sup>311</sup> See, Lee v. Singing River Hospital System, 908 So.2d 159 (Miss. Ct. App. 2005).

<sup>312</sup> Williams v. Dixie Electric Power Assoc., 514 So.2d 332 (Miss. 1987); Congleton v. Shellfish Culture, Inc., 807 So.2d 492 (Miss. Ct. App. 2002)(surveillance disclosed after deposition and before trial).

<sup>313</sup> Miss. Code Ann. § 71-3-73.



and is rarely used.<sup>314</sup> The other type is the “compromise” or “9(i)” settlement which is generally preferred since it can eliminate all liability under the Act, including liability for medical benefits, past, present, and future.<sup>315</sup> The Commission must approve each type of settlement.<sup>316</sup> Where a claimant dies after the petition is filed, and the Commission approved settlement without knowledge of claimant's death, judgment will be upheld based upon the best interest of the claimant's dependants.<sup>317</sup>

Under federal law, Medicare is a secondary payer in workers’ compensation cases<sup>318</sup> and is prohibited from being primarily responsible for medical services of its beneficiaries<sup>319</sup> in connection with work-related injuries. Medicare is entitled to be reimbursed for past and future expenditures to set off an amount designated in a settlement toward future medical expenses including medications.

The Central Office of the Centers for Medicare and Medicaid Services (CMS) aggressively protect Medicare’s right to reimbursement for payments made and to be made.<sup>320</sup> If a settlement is not approved by CMS, CMS can file a claim against an employer/carrier to recoup the amount of medical benefits paid up to the amount of the workers’ compensation settlement. The law provides that Medicare may be entitled to collect double damages from the

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<sup>314</sup> Miss. Code Ann. § 71-3-37(10).

<sup>315</sup> Miss. Code Ann. §71-3-29; see also, Barton v. Peco Foods of MS, Inc., MWCC No. 03-05132 (Full Comm'n Order, Oct. 13, 2004) (Comm’n sets forth rules for Section 9(i) orders).

<sup>316</sup> Miss. Workers’ Compensation Commission Procedural Rule 15.

<sup>317</sup> Taylor v. Reliance Well Serv., 220 So.3d 260 (Miss. Ct. App. 2017).

<sup>318</sup> 42 U.S.C. § 1395y.

<sup>319</sup> A claimant may apply for Social Security Disability Income (SSDI) benefits assuming he is totally disabled per the terms of the Social Security Act, and within five months of applying, the claimant qualifies for SSDI. Once the claimant receives SSDI benefits for twenty-four months, he qualifies for Medicare.

<sup>320</sup> As of January 1, 2011, workers’ compensation carriers and self-insured plans became subject to mandatory reporting requirements as defined by Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (PL 110-173).

employer or carrier.<sup>321</sup> At this time, CMS has declared that claimants (who are not yet Medicare beneficiaries) should only submit their settlements for CMS review when the claimant has a “reasonable expectation” of Medicare enrollment within 30 months of settlement and the anticipated total settlement amount for future medical expenses and disability/lost wages is expected to be greater than \$250,000.00.<sup>322</sup> Claimants who are already Medicare beneficiaries must always consider Medicare’s interests prior to settlement of their compensation claim regardless of whether the settlement exceeds \$250,000.00.<sup>323</sup> CMS will not review a Medicare beneficiary’s settlement if the gross amount is \$25,000.00 or less.<sup>324</sup>

## **IX. CLOSING THE CASE**

Another means of finalizing workers' compensation claims is the filing of a “Notice of Final Payment” (Form B-31) with the Commission.<sup>325</sup> This procedure changed with the Mississippi Workers’ Compensation Commission newly adopted Rules of Procedure which became effective January 18, 2018.

The law remains the same that the Form B-31 shall be sent to the Commission within thirty (30) days after the last payment of compensation (disability or medical benefits).<sup>326</sup> When the Form B-31 is properly filed, it establishes a one year statute of limitations within which to file subsequent applications for benefits, which is notated on the face of the form (the Commission’s official form has not changed).

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<sup>321</sup> 42 U.S.C. § 1395y(b)(2)(B)(ii); see, Humana Medical Plan, Inc. v. Western Heritage Ins. Co., 832 F.3d 1229 (11th Cir. 2016) (court awarded double damages and reimbursement where parties failed to pay Medicare lien).

<sup>322</sup> See, CMS Internal Memo, May 11, 2011.

<sup>323</sup> 42 C.F.R. § 411.46.

<sup>324</sup> See, CMS Internal Memo, May 11, 2011.

<sup>325</sup> MWCC Rule 2.17

<sup>326</sup> Miss. Code Ann. § 71-3-37(7).

If no work related medical expenses are incurred within the one-year period, then there is no further liability for benefits by the Employer/Carrier.<sup>327</sup> If any medical expenses are incurred within the one-year period, an Amended Form B-31 must be properly filed and another one-year statute of limitations commences to run.<sup>328</sup> If the Amended B-31 only reflects additional medical expenses incurred but not billed prior to the filing of the first Form B-31, the claim will still be barred by the statute.<sup>329</sup> Also, if a claim for additional benefits or a preliminary medical report (Form B-9) is filed within that one-year period, the statute is tolled and a new Amended Form B-31 must be filed. It is not necessary that the claim be a formal Petition. A simple letter from a claimant or a Form B-9 from a physician may be sufficient.<sup>330</sup>

The new rule retains the basic requirement that the Claimant receive formal notice that the one-year statute of limitations begins.<sup>331</sup> The rule change affects the process for properly filing the B-31. The rule states to be effective there must be proof Claimant or his attorney received notice of the filing of the Form B-31 (“acknowledged delivery”). The best way for the B-31 to be properly filed is for the Claimant to sign and date the B-31. The new rule states the presence of Claimant’s signature will constitute “acknowledged delivery” of the B-31 to the Claimant. The new rule does not require the filed signed B-31 to be delivered to the Claimant and his attorney. If claimant is represented and the attorney is recognized by the Commission, the Commission will electronically provide the attorney proper notice of the filed B-31.

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<sup>327</sup> Miss. Code Ann. § 71-3-53.

<sup>328</sup> Brown v. F.W. Woolworth Co., 348 So.2d 236 (Miss. 1977); Broadway v. International Paper, Inc., 982 So.2d 1010 (Miss. Ct. App. 2008).

<sup>329</sup> McCrimon v. Red Arrow Car Wash, 859 So.2d 395 (Miss. Ct. App. 2003).

<sup>330</sup> Harper v. North Miss. Med. Ctr., 601 So.2d 395 (Miss. 1992); Barr v. Conoco Chemicals, Inc., 412 So.2d 1193 (Miss. 1982).

<sup>331</sup> Staple Cotton Serv. Assn. v. Russell, 399 So.2d 224 (Miss. 1981); Leggett & Platt and Fidelity and Guaranty Ins. Co. v. Brinkley, 150 So.3d 106 (Miss. Ct. App. 2014).

The new rule makes clear the Form B-31 does not need to be signed for the Commission to accept it to be filed. The rule still requires the unsigned Form B-31 be delivered to the Claimant or his attorney. (As stated, the Commission will electronically send the filed unsigned B-31 to Claimant's attorney if the attorney is registered with the Commission.) The new rule has abolished the requirement that only U. S. Certified Mail be utilized to establish acknowledged delivery. Rather, any recognized method of acknowledged delivery will be accepted (for example, UPS or email). Therefore, the former case law rule that suggested the Form B-31 be forwarded to the Claimant before it is filed, appears to no longer be required. The new rule states notice to a claimant's attorney is notice to a claimant. As stated, when a B-31 is electronically filed, Claimant's attorney receives a filed copy. Unless an unrepresented Claimant is registered as an attorney of record, the unrepresented Claimant will not receive a filed copy. Therefore, an unrepresented Claimant should receive a copy of the filed B-31 to fully protect the interests of the Employer and Carrier.<sup>332</sup>

Therefore, the following recommendations are made if an unrepresented Claimant refuses or neglects to sign:

- (1) Be sure the Form is completed correctly and required information is furnished.
- (2) The unsigned Form B-31 should be filed with the Commission.
- (3) The unsigned, filed B-31 should be sent by some means where there is an "acknowledged delivery" to the unrepresented Claimant.
- (4) The transmittal letter to the Claimant should state the case is being closed, the Form B-31 has been filed with the Commission and is enclosed for the Claimant's

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<sup>332</sup> The practice of sending a Claimant or attorney a copy of the transmittal letter enclosing the Form B-31 to be filed with the Commission may constitute adequate notice but is not best practice.

review, the Form B-31 is a final report and settlement or constitutes a final receipt, and Claimant has a right or opportunity to be heard by the Commission.

If this procedure is followed, the one-year statute of limitation commences on the date Claimant receives notice of the unsigned, filed Form B-31.

## **X. EX PARTE COMMUNICATION WITH MEDICAL PROVIDERS**

“Ex parte” means “done for, in behalf of, or on the application of one party only.”<sup>333</sup> The issue in workers’ compensation is when and under what circumstances an employer/carrier may communicate with the medical provider of a claimant on an “ex parte” basis, i.e., without the prior knowledge or consent of the injured employee or his legal representative. For many years, free and open “ex parte” communication with medical providers was customary, based on an interpretation of a statute in the Act which states: “[m]edical and surgical treatment ... shall not be deemed to be privileged insofar as carrying out the provisions of this chapter is concerned.”<sup>334</sup> In 1996, however, the Supreme Court held with respect to personal injury litigation (not workers’ compensation) that ex parte communication was prohibited and “evidence obtained from ex parte contacts, without prior patient consent, by the opposing party which is subsequently used during a legal proceeding, is inadmissible.”<sup>335</sup> Thereafter, the Commission considered the issue of ex parte communication. In a lengthy opinion, the Full Commission held that:

[O]nce formal litigation has been commenced by the filing of petition to controvert or equivalent . . . non-consensual ex parte contact with treating physicians may not be initiated by the Employer, the Carrier, their legal representatives or agents . . . We wish to emphasize that the holding herein is limited to non-consensual ex parte communication or contact in a pending, controverted workers’ compensation claim. Ex parte contact may certainly occur if consented to by the claimant or his legal representative. Absent patient consent,

<sup>333</sup> Black’s Law Dictionary (4<sup>th</sup> Ed. 1968).

<sup>334</sup> Miss. Code Ann. § 71-3-15(6); but see, Cooper’s Inc. of Miss. v. Long, 224 So.2d 866 (Miss. 1969).

<sup>335</sup> Scott v. Flynt, 704 So.2d 998 (Miss. 1997).

however, ‘formal discovery, on the record, with notice and an opportunity to other parties to be present and to participate in the proceeding, is simply the fairest and most satisfactory means of obtaining discovery from a treating physician’. . . We also discourage in the strongest possible terms any disputes between the parties over the propriety of routine administrative and clerical matters which are usually undertaken ex parte by the employer or carrier, such as the scheduling of appointments, communication regarding authorization for treatment, or communications concerning the acquisition of medical records and the payment of charges. Such matters are hardly considered discovery in any significant sense and we fully expect a claimant or his attorney not to interpose any objection to such matters . . . .<sup>336</sup>

The Commission also held that instead of an automatic rule excluding evidence for ex parte violations, remedies to address violations would be considered and used on a case-by-case basis.<sup>337</sup> The exclusion of evidence for ex parte violations has been approved by the Commission and Court of Appeals.<sup>338</sup>

Therefore, at this time it is acceptable in a normal workers’ compensation case for employer/carriers and their representatives to conduct free and open ex parte communications with the claimant’s medical providers until a petition to controvert is filed or the claimant directs that no ex parte communication be conducted. Employer/carriers may wish to consider requesting all claimants to execute a written consent specifically authorizing ex parte communication in order to substantially reduce the risk of important evidence being excluded by an Administrative Law Judge. Further, communication is not considered ex parte if the claimant or his legal representative participates in the communication or if it is “return to work” information provided by the doctor to the employer.<sup>339</sup> A letter to a physician has been approved

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<sup>336</sup> Hinson v. Miss. River Corp., MWCC No. 94-19422-F-4717 (Full Comm'n Order, Aug. 1, 1996) (Petition for Interlocutory Appeal to the Mississippi Supreme Court denied Feb. 4, 1998).

<sup>337</sup> Hinson v. Miss. River Corp., MWCC No. 94-19422-F-4717 (Full Comm'n Order, Aug. 1, 1996).

<sup>338</sup> Walker Manufacturing Co. v. Butler, 740 So.2d 315 (Miss. Ct. App. 1998); see also, Johnson v. Memorial Hospital at Gulfport, 732 So.2d 864 (Miss. 1999)(exclusion of entire testimony of non-party physician is not warranted for ex parte contact).

<sup>339</sup> Thornton v. StatCare, PLLC, 988 So.2d 387 (Miss. Ct. App. 2008).

where 1) notice is given to the Claimant or attorney and 2) Claimant or attorney has acquiesced to the communication.<sup>340</sup>

## **XI. BAD FAITH CLAIMS**

Bad faith claims are the exception to the workers' compensation exclusivity rule. A bad faith claim is an independent tort and may be filed against the employer, carrier, and/or the third party administrators based on the willful denial of a claim without reasonable grounds. Some suits have even been filed against individual adjusters.<sup>341</sup>

These claims are dangerous for two important reasons. First, cases are not tried before the Commission and instead can be tried by a jury in either a state or federal court with proper jurisdiction. Second, damages are not capped as in typical workers' compensation cases and can be quite substantial. Thus, prudent employer/carriers should take precautions to ensure grounds for such claims are avoided. While punitive damages are available, the Mississippi legislature placed statutory limits on punitive damages in 2004 based on the net worth of the defendant.<sup>342</sup>

In order to establish a bad faith claim, a plaintiff must show: “(1) a contract of workers’ compensation insurance existed between the defendant and the plaintiff’s employer; (2) the carrier denied the plaintiff’s compensable workers’ compensation claim without a legitimate or arguable reason; and (3) the denial of benefits constitutes a willful and intentional or malicious wrong.”<sup>343</sup> Bad faith can also be based upon an unreasonable delay in resolving a claim or a failure to “conduct a reasonably prompt investigation of all relevant facts.”<sup>344</sup> A workers’

<sup>340</sup> Jones v. University of Miss. Med. Ctr., 309 So.3d 1135 (Miss. Ct. App. 2021).

<sup>341</sup> See, Pilate v. American Federated Ins. Co., 865 So.2d 387 (Miss. Ct. App. 2004).

<sup>342</sup> Miss. Code Ann. § 11-1-65; See, Learmonth v. Sears, Roebuck and Co., 710 F.3d 249 (5<sup>th</sup> Cir. 2013) (federal court upheld constitutionality of statutory limits).

<sup>343</sup> AmFed Companies, LLC v. Jordan, 34 So.3d 1177 (Miss. Ct. App. 2009); Chapman v. Coca-Cola Bottling Co., 180 So.3d 676 (Miss. Ct. App. 2015) (bad faith claim denied where claimant admitted a legitimate and arguable reason to deny the claim existed).

<sup>344</sup> James v. State Farm Mutual Auto. Ins. Co., 743 F.3d 65 (5<sup>th</sup> Cir. 2014) (case remanded to lower court to determine whether periods of inactivity during the investigation were negligence or intentional acts of delay); Lott v. Corinthian, Inc., 210 So.3d 1024 (Miss. Ct. App. 2015) (failure of claimant to sign

compensation claimant cannot maintain an independent action for bad faith denial of benefits until the underlying claim for benefits is final.<sup>345</sup> A plaintiff must bring a bad faith claim within three years of the final disposition of the workers' compensation claim,<sup>346</sup> or within three years of an award of benefits (whether temporary or permanent) that is final (with all appeals exhausted for that specific award even though the claim may remain open).<sup>347</sup>

An "arguable reason"<sup>348</sup> is "a reason sufficiently supported by credible evidence as to lead a reasonable [employer] to deny the claim."<sup>349</sup> Decisions which are made in good faith, although ultimately determined to be wrong, generally do not constitute bad faith or warrant punitive damages.<sup>350</sup> Likewise, a negligent refusal to pay benefits does not constitute bad faith and, therefore, should not subject an employer/carrier to the imposition of punitive damages.<sup>351</sup> In cases where the carrier lacks an arguable basis to deny a claim, but the carrier's conduct does not rise to the level of malice, the jury may award extra-contractual damages to include reasonably foreseeable costs and expenses.<sup>352</sup>

Both federal and state courts have held that the opinion of a treating physician advising that no disability exists constitutes an arguable reason for denying benefits.<sup>353</sup> Conversely, if an

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medical- release authorization is valid explanation for at least one month delay in investigating the claim).

<sup>345</sup> Hardaway v. Howard Industries, Inc., 2011 So.3d 718 (Miss. Ct. App. 2016).

<sup>346</sup> Harper v. Cal-Maine Foods, Inc., 43 So.3d 401 (Miss. 2010); Miss. Code Ann. § 15-1-49.

<sup>347</sup> See, Patrick v. Wal-Mart, 681 F.3d 614 (5<sup>th</sup> Cir. 2012).

<sup>348</sup> An "arguably-based denial" by an insurer is one which has been rendered after fair and good-faith dealing with the disputed claim. See, Andrew Jackson Life Ins. Co. v. Williams, 566 So.2d 1172 (Miss. 1990); USAA v. Lisanby, 57 So.3d 1172 (Miss. 2010).

<sup>349</sup> Bullock v. Gottfried Corp., 403 Fed. Appx. 947 (5<sup>th</sup> Cir. 2010) (internal citations and quotations omitted).

<sup>350</sup> Bullock v. Gottfried Corp., 403 Fed. Appx. 947 (5<sup>th</sup> Cir. 2010)

<sup>351</sup> See, Gallagher Bassett Services, Inc. v. Jeffcoat, 887 So.2d 777 (Miss. 2004) (\$3.5 million verdict reversed and rendered where adjuster's conduct was negligent).

<sup>352</sup> Liberty Ins. Corp. v. Tutor, 309 So.3d 493 (Miss. Ct. App. 2019) (extra contractual damage award reversed where insurer's first notice of injury was the Petition to Controvert and time to investigate and accept claim as compensable was reasonable) (citing Universal Life Ins. Co. v. Veasley, 610 So. 2d 290 (Miss. 1992)).

<sup>353</sup> Peel v. American Fidelity Ins. Co., 680 F.2d 374 (5<sup>th</sup> Cir. 1982).



in-house medical expert opines that no disability exists without sufficient information, then there is no arguable reason for denying benefits.<sup>354</sup> While registered nurses and in-house vocational rehabilitation specialists can play a valuable role in evaluating claims, these individuals' opinions should never be used as the sole bases in denying benefits.

Following the advice of counsel may also be an arguable reason for denying a claim if it was sought and relied upon in good faith. In order to successfully plead advice of counsel as an arguable basis for a denial, the carrier should seek the advice of counsel early on in the claim, the advice relied upon should be from independently retained counsel, and the attorney giving the advice should have been given a full and fair disclosure of the facts.<sup>355</sup> Be aware, however, that if advice of counsel is used as a defense, this may result in a waiver of attorney/client privilege and cause defense counsel to be a potential witness in the case.<sup>356</sup>

Bad faith claims must be determined on a case by case basis. The following listing of grounds supporting bad faith awards does, however, give an idea of what to avoid:

- Never terminate benefits only because the claimant reached MMI or because the claimant failed to attend a doctor's appointment;<sup>357</sup>
- Failure of the claims adjuster to make an adequate initial investigation of the claim or to continue to investigate a claim during its pendency;<sup>358</sup>
- Ignoring internal claims procedure while investigating the claim;<sup>359</sup>
- Withholding benefits to force a settlement;<sup>360</sup>

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<sup>354</sup> Bankers Life & Casualty Co. v. Crenshaw, 483 So.2d 254 (Miss. 1985), aff'd 486 U.S. 71 (1998); United American Ins. Co. v. Merrill, 978 So.2d 613 (Miss. 2007).

<sup>355</sup> Employers Mutual Casualty v. Tompkins, 490 So.2d 897 (Miss. 1986).

<sup>356</sup> Jackson Medical Clinic for Women, P.A. v. Moore, 836 So.2d 767 (Miss. 2003).

<sup>357</sup> See, MWCC General Rule 9 for proper procedure.

<sup>358</sup> Eichenseer v. Reserve Life Ins. Co., 682 F.Supp. 1355 (N.D. Miss. 1988).

<sup>359</sup> Fedders Corp. v. Boatright, 493 So.2d 301 (Miss. 1986).

<sup>360</sup> Travelers Indemnity Co. v. Wetherbee, 368 So.2d 829 (Miss. 1979).

- Denying a claim based upon suspicion and innuendo without direct proof to refute the insured's sworn statement;<sup>361</sup>
- Failing to pay the physical medical anatomical rating awarded by two separate doctors when the claimant attained maximum medical improvement;<sup>362</sup>
- Denying claim based upon opinion of in-house medical expert that was not supported by the records;<sup>363</sup>
- Delaying investigation and action after learning of errors reported by a claimant;<sup>364</sup>

The foregoing case law provides examples of what has been found to constitute bad faith.

Other suggestions for avoiding bad faith suits include:

- (1) Encourage prompt reporting of injuries. Act as quickly as possible and avoid unexplained delays. A lack of communication and delays, especially when not explained, lead to unhappy claimants. Unhappy claimants are more likely to pursue further remedies.
- (2) Thoroughly and promptly investigate each claim. A thorough investigation involves obtaining "all available medical information relevant to the ... claim and interview[ing] all employees or individuals who have knowledge relevant to the claim."<sup>365</sup> There is no rule of thumb as to how long an investigation can take before the delay in payment becomes an unreasonable delay. However, if the investigation is not completed within 14 days, the filing of a form B-52 (Employer's Notice of Controversion) should be considered.<sup>366</sup> Courts have held,

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<sup>361</sup> State Farm Mutual Auto. Ins. Co. v. Grimes, 722 So.2d 637 (Miss. 1998).

<sup>362</sup> Miss. Power & Light Co. v. Cook, 832 So.2d 474 (Miss. 2002).

<sup>363</sup> United American Ins. Co. v. Merrill, 978 So.2d 613 (Miss. 2007).

<sup>364</sup> AmFed Companies, LLC v. Jordan, 34 So.3d 1177 (Miss. Ct. App. 2009).

<sup>365</sup> Pilate v. American Federated Ins. Co., 865 So.2d 387 (Miss. Ct. App. 2004).

<sup>366</sup> See, Miss. Code Ann. § 71-3-37(2).

however, that a one month delay due to an oversight was merely negligent and did not rise to the level of bad faith. Similarly, a six week delay was not found to be bad faith.<sup>367</sup> What is important is whether the carrier is *actively* investigating the claim.<sup>368</sup> An employer/carrier has an obligation to continue an investigation as long as the claim exists.<sup>369</sup> Failure to do so may rise to bad faith.

- (3) Denials should be made only where there is a legitimate and arguable basis for doing so. The reason for the denial must be well documented.
- (4) Act objectively and professionally. Do not record disparaging comments or observations. Keep notations professional, accurate, and unbiased. It is important to remain open minded and objective when analyzing each individual claim. Do not follow bright line rules and assume that the claim fits a specific framework. Instead, pay careful attention to the specific facts of each claim as the “usual” outcome may not be the correct course of action. Assume that your entire claims file will be discoverable in any action filed.
- (5) Once the petition to controvert is filed, proceed cautiously in communications with medical providers so as to avoid ex parte communications.
- (6) Seek advice of counsel prior to denying a claim. Advice of counsel is an affirmative defense that can defeat a bad faith claim, however, it is not an absolute defense.<sup>370</sup>

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<sup>367</sup> Pilate v. American Federated Ins. Co., 865 So.2d 387 (Miss. Ct. App. 2004).

<sup>368</sup> Pilate v. American Federated Ins. Co., 865 So.2d 387 (Miss. Ct. App. 2004).

<sup>369</sup> Eichenseer v. Reserve Life Ins. Co., 682 F.Supp. 1355 (N.D. Miss. 1988); Gregory v. Continental Ins. Co., 575 So.2d 534 (Miss. 1990) (an insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment).

<sup>370</sup> See, AmFed Companies, LLC v. Jordan, 34 So.3d 1177 (Miss. Ct. App. 2009).

## **XII. FRAUD**

Mississippi's criminal misrepresentation law, found at Miss. Code Ann. §71-3-69, states:

Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining or wrongfully withholding any benefit or payment under this chapter is guilty of a felony and on conviction thereof may be punished by a fine of not to exceed Five Thousand dollars (\$5,000.00) or double the value of the fraud, whichever is greater, or imprisonment not to exceed three (3) years, or by both fine and imprisonment.<sup>371</sup>

There are no Supreme Court decisions defining the phrase “or wrongfully withholding any benefit or payment.”

The Office of the Attorney General has an Insurance Integrity Enforcement Bureau to investigate and prosecute claims of insurance abuses and crimes involving insurance. The Act specifically includes workers' compensation insurance and requires the Commission to impose an assessment on each workers' compensation carrier and self-insurer.<sup>372</sup> The Commission has referred at least one case to the Bureau for investigation of fraud.<sup>373</sup>

Incidents of workers' compensation insurance fraud should be referred to the Assistant Attorney General's Office by written communication. A letter will suffice as long as it contains sufficient factual descriptions of the fraudulent activity and an accurate identification of the person committing the fraud. The fraud identified can be “a misleading, false statement or representation” and such statement or misrepresentation must be “for the purpose of obtaining a workers' compensation benefit.” Under the new statute “active” concealment is also a criminal act.

A claimant cannot be prosecuted for fraud if two years or more have elapsed since obtaining a workers' compensation benefit by fraud.<sup>374</sup> Even if found guilty of committing fraud,

<sup>371</sup> Miss. Code Ann. § 71-3-69 (amendment effective July 1, 1995).

<sup>372</sup> Miss. Code Ann. § 7-5-301, *et seq.*

<sup>373</sup> Zimmerman v. Howard Transportation, Inc., 820 So.2d 697 (Miss. Ct. App. 2000).

<sup>374</sup> Miss. Code. Ann. § 99-1-7.

a claimant does not forfeit his right to other benefits, so long as the benefits are otherwise due to the claimant. The Attorney General has the discretion to pursue or not to pursue a case of workers' compensation fraud against a claimant.

To refer a claim of workers' compensation fraud, contact the following: The Office of the Attorney General, Insurance Fraud Unit, Post Office Box 22947, Jackson, Mississippi, 39225-2947 -or- call 888-528-5780.

#### **XIV. CONCLUSION**

The foregoing summary contains only highlights or excerpts of the Mississippi Workers' Compensation Act. It is designed to provide the reader with a guide to identify many common legal issues which frequently arise in the handling of workers' compensation claims. This summary is not a complete treatise on these issues and does not address all issues which may arise in the handling of workers' compensation claims. The reader is advised to always consult with an attorney familiar with the Act before making any decision which may adversely affect the interests of an employer or carrier.

## **ABOUT THE FIRM**

Heidelberg Steinberger, P.A., is located in the southeastern part of Mississippi with offices in Pascagoula and Lucedale. The firm is presently comprised of 7 lawyers with approximately 10 additional staff who primarily practice in the field of general civil defense, including the defense of state/federal workers' compensation, medical malpractice, products liability, environmental, and maritime claims. The firm also specializes in employment law, bankruptcy, family law, and general business representation. Heidelberg Steinberger, P.A., maintains a reputation among members of the Bench and Bar for aggressively representing the best interests of its clients in accordance with the highest professional standards.

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