

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2014-WC-00935-COA

**FRANCIENE SMITH A/K/A FRANCIENCE
SMITH A/K/A FRANCINE SMITH**

APPELLANT

v.

**COMPFIRST/L.C. INDUSTRIES AND LEGION
INSURANCE COMPANY**

APPELLEES

DATE OF JUDGMENT:	06/11/2014
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANT:	STEVEN HISER FUNDERBURG
ATTORNEY FOR APPELLEES:	LORI JORDAN GRAHAM
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIBUNAL DISPOSITION:	DENIED CLAIMANT'S REQUEST TO REOPEN CASE
DISPOSITION:	REVERSED AND REMANDED - 07/28/2015
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., ISHEE AND MAXWELL, JJ.

MAXWELL, J., FOR THE COURT:

¶1. While the doctrine of res judicata applies to Mississippi workers' compensation claims, there is a statutory exception. Under Mississippi Code Annotated section 71-3-53 (Rev. 2011), the Mississippi Workers' Compensation Commission has discretionary authority to "terminate, continue, reinstate, increase, or decrease such compensation, or award compensation" in an otherwise-final compensation case. But it can only do so if there is either "a change in conditions or . . . a mistake in a determination of fact." Miss. Code Ann. § 71-3-53. This discretionary authority also has a time limit. The Commission may only

review a compensation case “at any time prior to one (1) year after” the last payment of compensation or the rejection of a claim, but not after. *Id.*

¶2. Our review here shows the Commission erred in rejecting Franciene Smith’s request to review her decade-old compensation award by misinterpreting section 71-3-53’s time limitation. Instead of reading section 71-3-53 as granting authority to reopen a case at “any time *prior to* one (1) year after date of the last payment of compensation . . . or at any time *prior to* one (1) year after the rejection of a claim,” the Commission ruled it could only reopen a case *during* the one year after the last payment of compensation or rejection of a claim. And because Smith’s claim had never been rejected nor had she received a final compensation payment—due to her ongoing medical bills—the Commission found section 71-3-53’s provisions had never been “triggered.” So it ruled it had no statutory authority to avoid the preclusive effect of *res judicata* on Smith’s compensation award.

¶3. But the fact the one-year period had not yet been “triggered” actually leads to the opposite result. Smith filed her motion to reopen “*prior to* one (1) year after” her final compensation payment. Thus, under section 71-3-53, the Commission does have jurisdiction to review Smith’s case—that is, if it first finds Smith has shown her conditions have changed or her original award was based on a mistake of fact.

¶4. Because the Commission erroneously interpreted section 71-3-53, we must reverse the Commission’s order denying Smith’s request to reopen her case. We remand this case back to the Commission to decide if Smith proved a change in conditions that warrants

reopening her claim.

Background Facts and Procedural History

I. 2002 Compensation Award

¶5. After a 2001 work-connected injury to her right shoulder, Smith filed a petition to controvert. In 2002, the administrative judge (AJ) found Smith had suffered a total loss of use of her upper-right extremity. This loss entitled her to permanent partial disability. But the AJ found “the record, as a whole, [did] not support a finding of permanent total disability despite the fact [Smith’s employer] terminated [Smith] and there is significant proof that [she] has pursued other employment unsuccessfully.” Instead, the AJ found Smith was temporarily totally disabled for the days she did not work between June 9, 2001, and June 3, 2002. And she ordered Smith be compensated for this period. The AJ also ordered Smith’s employer and its insurance carrier to pay for all medical services and supplies connected to the injury.

¶6. Smith elected to receive her permanent partial disability and temporary total disability in a lump-sum payment. She received her final disability payment on June 29, 2004. And her employer, L.C. Industries, and its insurance carrier, Legion Insurance Company,¹ informed Smith of the finality of this payment. Though final notice of payment was given via Form B-31 filed with the Commission on December 10, 2004, the record shows her

¹ Apparently, the insurance carrier, Legion Insurance Company, went into liquidation in 2004, at which point the Mississippi Insurance Guaranty Association stepped in to pay for Smith’s medical benefits.

employer and its carrier continued paying her injury-related medical expenses.

II. 2013 Request to Reopen

¶7. In May 2013, Smith filed a “motion to reopen” her compensation case, citing two reasons why her case should be reopened. The first was that she had “required significant medical treatment since the [2002] hearing on the merits.” Her second given reason was her supposed inability “to perform sustained gainful employment since the [Commission’s] prior order.” As she saw it, she had been “rendered permanently and totally disabled as a result of her work connected injury.” She asked the Commission to reopen her case and set a hearing so she could try to prove she is permanently and totally disabled.

¶8. The AJ granted her request. But Smith’s employer appealed to the Commission, which reversed. The Commission held that Smith’s claim was barred by *res judicata*, and because section 71-3-53 had never been “triggered,” the statutory exception did not apply.

¶9. Upset with the Commission’s decision, Smith timely appealed. *See* Miss. Code Ann. § 71-3-51 (Rev. 2011) (conferring right to appeal to the Mississippi Supreme Court from a final Commission order within thirty days of its entry).

Discussion

I. Commission’s Interpretation of Section 71-3-53

¶10. In appeals of Commission orders, this court’s standard of review is somewhere between *de novo* and deference. While the generally stated standard of review is that “[a]n agency’s interpretation of its governing statutes is . . . *de novo*,” our supreme court has said

we must conduct this review “with deference to the agency’s interpretation.” *Miss. State & Sch. Emps’ Life & Health Plan v. KCC, Inc.*, 108 So. 3d 932, 939 (¶20) (Miss. 2013). “[W]hen determining the most reasonable and appropriate interpretation of a statute, the agency’s interpretation is an important factor that usually warrants strong consideration.” *Diamond Grove Ctr., LLC v. Miss. State Dep’t of Health*, 98 So. 3d 1068, 1071 (¶9) (Miss. 2012). So “unless an agency’s interpretation of a governing statute is repugnant to the plain meaning,” we “are to defer to the agency’s interpretation.” *KCC*, 108 So. 3d at 939 (¶20). Put a bit differently, we only “give no weight to an agency interpretation” if it “is so plainly erroneous or so inconsistent with either the underlying regulation or statute as to be arbitrary, capricious, or contrary to the unambiguous language or best reading of a statute.” *Id.* Here, we find the Commission’s interpretation of section 71-3-53 is contrary to the unambiguous language of the statute. Thus, we afford it no weight.

¶11. The Commission was correct that this statutory section contains two “triggering events.” However, these specific events do not trigger the statute’s application. Rather, they trigger the *running out* of the statute’s application. In other words, the final payment of compensation or the rejection of a claim are not statutory prerequisites. What these events really mark is the one-year countdown to when the statute’s applicability *ends* and the door to reopening a compensation award is slammed shut. As section 71-3-53 clearly states, the discretionary authority to review a final compensation award—or rejection of a claim—is available to the Commission “*at any time prior to one (1) year after date of the last payment*

of compensation, whether or not a compensation order has been issued, *or at any time prior to one (1) year after the rejection of a claim.*” Miss. Code Ann. § 71-3-53 (emphasis added).

¶12. When the Commission makes an award, as it did in this case, the statute confers jurisdiction to review that award at any time until one year after the final payment of compensation. For purposes of section 71-3-53, “compensation” includes medical services. *Broadway v. Int’l Paper, Inc.*, 982 So. 2d 1010, 1012 (¶8) (Miss. Ct. App. 2008); *see also* John R. Bradley & Linda A. Thompson, *Miss. Practice Series: Miss. Workers’ Compensation* § 7:21 (2014). Though almost a decade passed after Smith received her final disability payment, the fact she continued to receive ongoing medical services means the authority granted in section 71-3-53 has not run out.² *See Broadway*, 982 So. 2d at 1012 (¶8) (holding that the employer’s continual furnishment of prescription drugs tolled the one-year period after final payment from ever beginning).

II. Commission’s Discretion

¶13. Still, just because section 71-3-53’s time limit has not yet run does not necessarily mean Smith’s case must be reopened. The statute says “the [C]ommission *may* . . .

² The Commission found Smith’s employer has yet to make “the final payment of compensation,” a fact neither party challenges on appeal. But we note that “final payment of compensation” is a term of art. Bradley & Thompson, *Miss. Workers’ Compensation*, at § 7:21. And this term must be understood in the context of Mississippi Code Annotated section 71-3-37(7) (Rev. 2011), which requires notice to the employee before closing out a compensation claim, and the Commission’s Procedural Rule 17, which directs notice be provided through Form B-31. Bradley & Thompson, *Miss. Workers’ Compensation*, at § 714; *see also Broadway*, 982 So. 2d at 1012 (¶7) (discussing interplay between section 71-3-53, section 71-3-37(7), Rule 17, and Form B-31).

review[.]” It does not dictate the Commission *shall* review. Miss. Code Ann. § 71-3-53. Unlike the right to judicial review of a final Commission order,³ section 71-3-53 does not create a right for any interested party to reopen a claim. *See Bradley & Thompson, Miss. Workers’ Compensation*, at § 7:14. This section instead gives the Commission *discretionary* authority to reconsider a claim. *See id.* So it is up to the Commission to decide to exercise that authority.

¶14. Further, the Commission’s authority is expressly limited to circumstances where there has been “a change in conditions” or “a mistake in a determination of fact.” Miss. Code Ann. § 71-3-53. Typically “a change in conditions” means “a change in physical conditions due to the original injury which affects an employee’s earning capacity or ability to work.” *N. Miss. Med. Ctr. v. Henton*, 317 So. 2d 373, 375 (Miss. 1975) (citations omitted). But it can also mean “[a] change in the claimant’s ability to get or to hold employment or to maintain prior economic levels[.]” *Id.* “The burden of proof for showing a change in conditions is on the party, whether claimant or employer, asserting the change.” *Id.* If this “preponderance of the evidence” burden is not met, “the petition to reopen should be denied and the original order maintained.” *Id.*

¶15. On appeal, Smith’s employer argues she failed to make the required showing of a change in condition. It asks us to uphold the Commission’s order for this reason. But in

³ *See* Miss. Code Ann. § 71-3-51 (governing right to appeal a final Commission order).

ruling section 71-3-53 had no application whatsoever, the Commission never considered whether Smith established by a preponderance of the evidence that her conditions had changed. For this reason, we reverse the Commission's order and remand for the Commission to determine if Smith established the necessary change in condition to reopen her claim and, if so, whether it should exercise its discretionary authority and reopen her claim.

¶16. THE JUDGMENT OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, FAIR AND JAMES, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION. WILSON, J., NOT PARTICIPATING.

CARLTON, J., DISSENTING:

¶17. I respectfully dissent from the majority's decision to "reverse the Commission's order and remand for the Commission to determine if Smith established the necessary change in condition to reopen her claim and, if so, whether it should exercise its discretionary authority and reopen her claim." I concur with the decision below by the Commission finding that Smith's request to reopen her claim is barred by the doctrine of res judicata.⁴ The record

⁴ In *North Mississippi Medical Center v. Henton*, 317 So. 2d 373, 376 (Miss. 1975), the supreme court held that an application to reopen a workers' compensation case may not be used as a substitute for an appeal. In *Henton*, the supreme court ultimately found that no abuse of discretion occurred where the Commission refused to reopen the case due to an alleged change of conditions. *Id.*; see also *Rea v. Foamex*, 133 So. 3d 855, 860-61 (¶¶25-26) (Miss. Ct. App. 2013).

reflects that Smith attempted to substitute an application to reopen her claim as an appeal from a previously adjudicated claim wherein the Commission issued a final order in 2004 without an appeal.

¶18. In applying the doctrine of res judicata, the Commission found that the June 3, 2004 final order of the AJ determined that Smith suffered a significant industrial loss of use of her right upper extremity, and that in the same June 3, 2004 order, the AJ found “the record, as a whole, does not support a finding of permanent and total disability.” The Commission acknowledged that since neither party appealed the 2004 decision of the AJ, the June 2004 final order of the AJ became a final order of the Commission, pursuant to Mississippi Workers’ Compensation Commission Procedural Rule 10.⁵ The Commission further provided that Smith’s instant claim for permanent and total disability was previously adjudicated, as established by the 2004 order rejecting Smith’s contention that she was permanently and totally disabled as a result of her right-shoulder injury. The Commission found that the 2004 order instead awarded Smith total industrial loss of use of the right upper extremity.

¶19. Since the date of the June 2004 order, the Commission observed that Smith had continued to receive benefits, and the employer/carrier continued to pay, to present date, for medical treatment for her right shoulder. The Commission thus found Smith’s current claim

⁵ See Miss. Code Ann. § 71-3-47 (Rev. 2011) (statutory authority for the Commission rules to determine practice and procedure in settlement and adjudication of claims before the Commission).

for permanent and total disability to be barred by res judicata. Instructively, the Commission further explained Smith misplaced her reliance on Mississippi Code Annotated section 71-3-53 (Rev. 2011) as authority for her instant action.⁶

¶20. The Commission found section 71-3-53 inapplicable.⁷ The Commission explained that section 71-3-53 requires one of two occurrences to trigger the limitations period in a claim. Section 71-3-53 states:

Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or *because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation*, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, *review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation*. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury; and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation in such manner and by such method as may be determined by

⁶ See John R. Bradley & Linda R. Thompson, *Mississippi Workers' Compensation* § 7:14 (Thompson-West 2012) (providing that “the one-year limitations provision of [section] 71-3-53 operates in conjunction with [Mississippi Code Annotated section] 71-3-37(7) [(Rev. 2011)] and the Commission’s Procedural Rule 17 and Form B-31. Form B-31 is specified in Rule 17 as the notice which is required before closing a matter as called for in [section] 71-3-37(7). The statute allows for a matter to be reopened at [the] Commission’s initiative or on [the] motion of any party in interest during a given one-year period.”).

⁷ See Miss. Workers’ Comp. Comm’n Proc. Rule 17; *see also McLemore v. Jackson Tile Mfg. Co.*, 252 So. 2d 781, 782-83 (Miss. 1971) (addressing application of Rule 17 and finding that the statute authorizing a claim to be reopened for a mistake of fact or changed condition must be read with the statute requiring final notice by filing a Form B-31 and final payment).

the commission.

(Emphasis added). The Commission explained that to trigger the statutory time period wherein a claim may be reopened, the statute requires either a “last payment of compensation” or a “rejection of a claim.” The Commission acknowledged that neither requirement occurred in this case,⁸ since Smith was still receiving compensation payments and since her claim was not adjudicated or rejected. The Commission provided that since neither of the two statutory conditions had occurred, then the statute failed to apply to allow the instant attempt by Smith to reopen her claim.

¶21. With respect to the rejection of the claim, the Commission found that Smith’s claims for total and permanent disability were not rejected, and that her claim was allowed to proceed to a hearing before an AJ where she was awarded benefits in 2004 based upon the injury to her right shoulder. Therefore, no last payment or rejection of a claim occurred to trigger the commencement of the one-year statute-of-limitations period as required by section 71-3-53. *See Empire Home Builders v. Guthrie*, 187 So. 2d 17, 18-19 (Miss. 1966) (one-year limitation period does not begin until notice is given to the claimant by the filing of a Form B-31 with the Commission on behalf of the employer).

¶22. Regarding last payment of compensation, the Commission found that “medical

⁸ *See City of Kosciusko v. Graham*, 419 So. 2d 1005, 1008-09 (Miss. 1982) (finding a claim for further disability benefits barred where continued medical services to the claimant meant no Form B-31 was filed, and the one-year limitation period had not begun to run); *see also Henton*, 317 So. 2d at 376 (statutory reopening and review procedures fail to provide an alternative to normal review and appeal procedures).

benefits had been provided by the Employer/Carrier since the date of the AJ's order; and the Commission found that no Form B-31 had been filed indicating the final or 'last payment of compensation' in the claim." Citing *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 46 (¶11) (Miss. 1999), the Commission explained that "[s]ection 71-3-53 operated in conjunction with [Mississippi Code Annotated section] 71-3-37(7) [(Rev. 2011)] . . . , which allows a case to be closed only after the employer has given notice to the employee by a form prescribed by the Commission."⁹ The Commission then provided that without final payment of compensation or rejection of the claims, section 71-3-53 fails to apply to allow Smith's instant claim be reopened before the Commission.¹⁰ See Bradley & Thompson, *Mississippi Workers' Compensation* § 7:20.¹¹

¶23. As discussed, the Commission's decision found Smith's instant claim barred by res

⁹ See *McLemore*, 252 So. 2d at 783-84; Miss. Workers' Comp. Comm'n Proc. Rule 17.

¹⁰ I note that section 71-3-53 allows review of a compensation case and issuance of a new compensation order that may terminate, continue, reinstate, increase, or decrease such compensation or award compensation one year after date of the last payment of compensation. In this case, no rejection of claim occurred, and therefore, that statutory trigger is inapplicable to the analysis of this case.

¹¹ Bradley & Thompson, *Mississippi Workers' Compensation* section 7:20 provides:

Section 71-3-53 contains language of express authorization for supervision and further action by the commission during the one year "after date of the last payment of compensation whether or not a compensation order has been issued[.]" Such reopening has been recognized as proper *after voluntary payments* and also *after payment following an award*. The language "after date of the last payment of compensation" is a term of art.

judicata, and the Commission explained that Smith was previously determined by a 2004 final order to not be permanently and totally disabled with regard to her right-shoulder injury. The Commission explained that “the [AJ] determined that Smith sustained 100 [percent] loss of industrial use to her right upper extremity[,]” but the AJ also found that Smith “was not permanently and totally disabled as a result of the right shoulder injury.” The Commission provided that even though Smith filed no appeal from the order of the AJ, she nonetheless now attempts to relitigate her permanent-disability claim.¹² I respectfully submit that the record and the applicable law supports the Commission’s determination that Smith’s claim for permanent and total disability has already been adjudicated and determined in 2004. Smith raised no appeal from that 2004 order and, as discussed, that 2004 order became the final order of the Commission. The Commission found that “[e]xcept to the extent that section 71-3-53 provides otherwise, the doctrine of res judicata applies in [workers’] compensation cases[,] as in other cases, if the prerequisites for such exist.” (Citing *Knox Glass Co. v. Evans’ Dependents*, 246 So. 2d 89, 90-91 (Miss. 1971); *Consumer Disc. Store v. Warren*, 221 So. 2d 112, 112 (Miss. 1969); *Proctor v. Ingalls Shipbuilding Corp.*, 254 Miss. 907, 915, 183 So. 2d 483, 486 (1966)). The Commission, citing *Fleming Enterprises Inc. v. Henderson*, 741 So. 2d 309, 314-15 (¶19) (Miss. Ct. App. 1999), explained that “an

¹² The Commission also provided that in so holding, it would “not preclude consideration of the claims involving future compensable consequences such as a claimant subsequently injured en route to medical treatment for the [workers’] compensation injury.” See *Charles N. Clark Assocs., v. Robinson’s Dependents*, 357 So. 2d 924, 928-29 (Miss. 1978).

[AJ's] order that is not timely appealed is final and conclusive as to the issues adjudicated.”

¶24. I respectfully submit that the Commission astutely recognized that since the instant claim was previously adjudicated by the AJ and also fails to fall within the requirements of section 71-3-53, then “the doctrine of res judicata prevents the reopening of the exact issue previously adjudicated by the [AJ].” Smith’s reliance on section 71-3-53 is misplaced, as this statute is not an alternative or substitute for a timely appeal of a decision by the AJ or the Commission.