

**IN THE COURT OF APPEALS 04/23/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95 CC 00432 COA**

**MOBILE MEDIC AMBULANCE SERVICE, INC. AND UNITED STATES FIDELITY AND  
GUARANTY COMPANY**

**APPELLANTS**

**v.**

**BERNARD WASHINGTON**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

ROBERT J. ARNOLD III

ATTORNEY FOR APPELLEE: D. ELIZABETH FEATHERSTON

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: THE WORKERS' COMPENSATION COMMISSION  
AFFIRMED THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT WASHINGTON WAS  
TEMPORARILY TOTALLY DISABLED AND REVERSED THE ADMINISTRATIVE LAW  
JUDGE'S ORDER HOLDING THAT EMPLOYER AND CARRIER WERE ENTITLED TO A  
CREDIT FOR UNEMPLOYMENT COMPENSATION PAID TO THE EMPLOYEE.

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

FRAISER, C.J., FOR THE COURT:

Mobile Medic Ambulance Service, Inc. (Employer) and United States Fidelity and Guaranty Company (Carrier) seek review of an order affirming the determination of the Workers' Compensation Commission (commission) that Bernard Washington was entitled to disability benefits. Employer and Carrier contend that the commission erred in finding Washington temporarily totally disabled after February 27, 1992. Washington cross appeals contending the commission exceeded its statutory authority in creating and granting a credit to Carrier for unemployment benefits paid Washington after termination by Employer. Substantial evidence supports the commission's finding of temporary total disability; therefore, we affirm the commission's finding. We further conclude that the cross appeal merits reversal.

## FACTS

On December 2, 1991, Bernard Washington, a twenty-nine-year-old male was injured in an automobile accident while in the course and scope of his employment with Employer. He was treated at Baptist hospital and released the day of the accident. He was subsequently treated by several members of the medical profession for symptoms of dizziness, weakness, memory problems, anxiety, and depression. He was also treated for lumbar strain, as well as medial nerve and bilateral elbow compression. All of the attending physicians agreed Washington's physical, mental, and emotional problems were causally related to the vehicular accident.

On June 3, 1992, Employer/Carrier filed their petition with the commission controverting Washington's right to benefits. Employer/Carrier, without admitting liability, sought determination and extent of claimant's disability, if any, and loss of wage earning capacity as a result of his work related injuries. Subsequent to an evidentiary hearing, the administrative law judge (ALJ) made findings of fact and conclusions of law, which include the following:

After being released from the Baptist Hospital claimant sought treatment from Dr. Ernest Rankin, his family physician. Dr. Rankin treated claimant for a period of time and later referred him to Dr. Timothy Summers after he began complaining of depression, nightmares, and other emotional and mentally related problems.

Dr. Timothy Summers, a psychiatrist, testified he first saw claimant on January 23, 1992, at which time claimant complained of dizziness, weakness, memory problems and anxiety. He gave a history relating his problems to his industrial accident. Dr. Summers did a cursory physical examination and an extensive mental evaluation of claimant. His findings show that claimant was very depressed and anxious and that he was suffering from a lumbar strain and a left medial nerve and bilateral elbow compression. Dr. Summers later referred claimant to a Dr. Butt for an MRI and EEC to determine if he had any brain damage. Both tests were negative. Dr. Summers treated claimant for his mental and emotional problems with psychotherapy and medication. After claimant assaulted his wife and began to physically threaten his children, Dr. Summers had him admitted to Charter Hospital on February 3, 1992. While there Dr. Summers concluded that claimant was suffering from major affective disorder and severe depression. While claimant was at Charter Dr. Summers treated him with group, individual and vocational therapy and

placed him on a medical regimen.

Claimant stayed in Charter Hospital for four days, afterward he saw Dr. Summers on a regular basis through November 2, 1992. After his November 2, 1992 visit with Dr. Summers he did not see him again until April 14, 1993, at which time claimant gave a history of having attention and behavior problems. Dr. Summers diagnosed him as being very depressed, irritable, suicidal and homicidal. Dr. Summers recommended that claimant be once again admitted in Charter, but carrier refused to authorize it.

Dr. Summers testified that claimant was temporary totally disabled during the period he saw him and that based on his familiarity with claimant's medical history and what he observed during his last visit with him he does not believe claimant would have been able to return to work as of June, 1993. Since he had not seen claimant since April, 1993, Dr. Summers was unable to give an opinion as to claimant's present condition. He causally relates all of claimant's problems to the injuries he sustained in his industrial accident.

....

Claimant began seeing Dr. Billy Fox, a clinical psychologist, on June 15, 1993. After administering a battery of psychological tests to claimant, Dr. Fox diagnosed him as suffering from post-traumatic stress disorder and severe depression, which he believes was caused by his accident. Dr. Fox has treated claimant with psychotherapy and psychological counseling on a regular basis since the initial visit and is presently seeing him on a weekly basis. He believes claimant has been temporarily totally occupationally disabled during the entire course of his treatment of him and that he needs to continue his course of treatment for several more months. Dr. Fox stated that he would prefer that claimant have additional occupational therapy along with more individual therapy and private rehabilitation therapy before returning to the work force. His testimony indicates that if claimant attempts to return to the work force and does not succeed it would likely be devastating to his mental status.

Dr. Richard Rhoden, a psychiatrist, testified that he evaluated claimant at the request of carrier on September 14, 1993 and October 7, 1993. His findings indicated that claimant had symptoms of post-traumatic stress disorder and depression, which he believes is caused by his industrial accident. Dr. Rhoden's testimony indicates that claimant's condition is improving but at this stage he could benefit from additional psychological or psychiatric treatment for his problems. He indicated that he would continue claimant on his present treatment plan.

Shirley Washington, claimant's spouse, testimony indicates that claimant has had emotional and psychological related problems since his industrial accident. She stated that claimant is prone to act more violent toward the children and constantly has mood changes. She further stated that he is very depressed, and easy to anger, problems he did not have prior to his accident.

All of the experts who testified in this cause indicate that claimant is in need of additional professional treatment for his mental and emotional problems and that those problems are

causally related to his industrial accident. Their testimony indicates claimant could benefit from additional psychological therapy and similar type treatment, which he is presently receiving from Dr. Fox. No evidence was presented which indicates that this treatment is not needed. Based on this unrefuted evidence, I have no choice but to conclude that claimant is in need of additional treatment for his mental related problems and that such problems were caused by his industrial accident. The evidence clearly shows the treatment he is presently receiving from Dr. Fox, and that recommended by Dr. Fox, is reasonable and necessary.

While admitting that claimant was temporarily totally occupationally disabled from the date of his industrial accident until February 27, 1992, employer and carrier contend that claimant sustained no additional period of temporary disability. The proof indicates that claimant drew unemployment compensation benefits from March, 1992 until September, 1992 and that he was steadily employed from September, 1992 through February, 1993. Though claimant drew unemployment compensation benefits during the period of March, 1992 through September, 1992, the weight of evidence, and for that matter, the undisputed evidence shows that he was temporarily totally occupationally disabled during this period because of injuries sustained in his industrial accident. Claimant is due temporary disability benefits for that period. Since claimant was employed from September, 1992 through February, 1993, it is obvious he was not temporarily totally occupationally disabled during that period; therefore, no benefit is due him during that period. Based upon claimant's testimony as to his condition during the period of March 1, 1992 through September 1, 1992, together with the corroborating testimony of Dr. Summers, I am inclined to find that claimant was temporarily totally occupationally disabled during this period. I also find based on the testimony of claimant and the supporting medical findings of Dr. Summers, Dr. Rhoden and Dr. Fox, that claimant has been temporarily totally occupationally disabled since February, 1993.

## CONCLUSIONS OF LAW AND FINDINGS OF FACT

Having heard the evidence presented by the parties and considered the same, I find a preponderance of such supports the following conclusions and findings:

1. Claimant was involved in an industrial accident on December 2, 1991;
2. Because of physical injuries sustained in his industrial accident claimant was temporarily totally occupationally disabled from December 2, 1991 through February 27, 1992. Because of mental related problems due to post-traumatic stress syndrome and depression caused by his industrial accident, claimant was temporarily totally occupationally disabled from March 1, 1992 through September 1, 1992 and he has been temporarily totally disabled since March 1, 1993;
3. Claimant is in need of additional treatment for mentally related problems which were caused by his industrial accident and the medical plan recommended by Dr. Billy Fox is reasonable and necessary.

On appeal, the commission affirmed the ALJ's award of medical and temporary total disability benefits but held as a matter of law that Employer/Carrier were entitled to a credit against temporary total benefits for all sums received by Washington for unemployment compensation during the compensable period. Employer/Carrier appealed to the Hinds County Circuit Court contending that the commission erred in affirming the ALJ's order finding Washington entitled to temporary total disability payments after February 27, 1992. Washington cross-appealed claiming error in that portion of the commission's order providing Employer/Carrier an off set against paid temporary total compensation for all sums received by Washington for unemployment compensation during the compensable period.

The commission's order was affirmed on appeal and cross appeal by the Hinds County Circuit Court. Employer/Carrier appeal, and Washington cross appeals from the circuit court's order. ISSUES

I. Whether the decision of the Workers' Compensation Commission finding that Washington was entitled to medical benefits and temporary total disability is supported by substantial evidence.

II. Whether the Workers' Compensation Commission exceeded its statutory authority by creating a credit to a workers' compensation carrier for unemployment benefits received by Washington while he was temporarily totally disabled.

## DISCUSSION

### I. WHETHER THE DECISION OF THE WORKERS' COMPENSATION COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellate review of compensation claims is narrowly restricted. It is well settled that "[t]he Commission is the ultimate fact finder." *Hardin's Bakeries v. Dependent of Harrell*, 566 So. 2d 1261, 1264 (Miss. 1990). "Accordingly, the Commission may accept or reject an administrative judge's findings." *Id.* In the case *sub judice*, the Mississippi Workers' Compensation Commission affirmed the order of the administrative law judge after thoroughly studying the record and the applicable law. Our standard of review is set forth in *Delta CMI v. Speck*:

Under settled precedent, courts may not hear evidence in compensation cases. Rather, their scope of review is limited to a determination of whether or not the decision of the commission is supported by the substantial evidence. If so, the decision of the commission should be upheld. The circuit courts act as intermediate courts of appeal. The Supreme Court, as the circuit courts, acts as a court of review and is prohibited from hearing

evidence or otherwise evaluating evidence and determining facts. "[W]hile appeals to the Supreme Court are technically from the decision of the Circuit Court, the decision of the commission is that which is actually under review for all practical purposes."

As stated, the substantial evidence rule serves as the basis for appellate review of the commission's order. Indeed, the substantial evidence rule in workers' compensation cases is well established in our law. Substantial evidence, though not easily defined, means something more than a "mere scintilla" of evidence, and that it does not rise to the level of "a preponderance of the evidence." It may be said that it "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion. Substantial evidence means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred."

*Delta CMI v. Speck*, 586 So. 2d 768, 772-73 (Miss. 1991) (citations omitted).

"This Court will reverse an order of the Workers' Compensation Commission only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence." *Mitchell Buick, Pontiac & Equip. Co. v. Cash*, 592 So. 2d 978, 980 (Miss. 1991) (citations omitted). To determine if the Workers' Compensation Commission erred, we must examine the record and be satisfied that substantial evidence existed upon which the commission could base its decision.

The record reflects that three medical expert witnesses testified at the administrative hearing: Dr. Timothy Summers, a psychiatrist; Dr. Billy Fox, a clinical psychologist; and Dr. Richard Rhoden, a psychologist, all three of whom had evaluated or treated Washington. Dr. Summers treated Washington from January 1992 through April 1994. During that time, Dr. Summers testified that Washington suffered from psychological and physical problems causally connected to his work related accident. Dr. Fox treated Washington from June 1993 through November 5, 1993, the date of the administrative hearing. Dr. Fox diagnosed Washington as suffering from post-traumatic stress disorder and depression caused by the work related accident. Dr. Rhoden evaluated Washington at the request of Carrier in September 1993. Dr. Rhoden diagnosed Washington as suffering from post-traumatic stress disorder and depression caused by the industrial accident. The expert opinions were further supported by the testimony of Washington and his wife.

The Workers' Compensation Commission's finding that Washington was temporarily totally disabled after February 7, 1992, until he reached maximum medical recovery is supported by substantial evidence. In compliance with our scope of review, we are without authority to reverse the commission's findings.

**II. WHETHER THE WORKERS' COMPENSATION COMMISSION EXCEEDED ITS STATUTORY AUTHORITY BY CREATING A CREDIT TO A WORKERS' COMPENSATION CARRIER FOR UNEMPLOYMENT BENEFITS RECEIVED BY THE CLAIMANT WHILE HE WAS TEMPORARILY TOTALLY DISABLED**

Whether a state administrative agency has statutory authority to create a novel defense and set off is a question of law. *Hardin's Bakery v. Taylor*, 631 So. 2d 201, 206 (Miss. 1994). Questions of law are reviewed *de novo*. *Weeks v. Thomas*, 662 So. 2d 581, 583 (Miss. 1995). Further, we review the commission's actions in light of the purpose of the Workers' Compensation Act.

The Act is social legislation which imposes liability without fault and is a radical departure from the common law. One of the primary purposes of the Act is to relieve society of the burden of supporting employees and their dependants because of economic loss due to injury or death in industrial accidents. The basis is the need of a substitute for the loss of wages and earning capacity and for the loss of support to those dependent upon the employee in case of death. It takes from the employee and his dependants the common law action in tort and substitutes a measure of fixed economic relief for accidental industrial injuries without reference to negligence or fault as to the cause of injury. On the other hand, it relieves industry from the risk of common law actions and substitutes an assumption of risk for all covered accidents, within prescribed monetary limits, regardless of negligence or fault from the causation viewpoint.

Vardaman S. Dunn, *Mississippi Workmen's Compensation* § 2 (3d ed. 1982) (citations omitted).

#### A. Statutory Authority

The Workers' Compensation Commission lacks authority to coordinate Mississippi wage loss legislation by fashioning a defense and set off for Employer/Carrier. Mississippi law dictates that administrative agencies have only the powers as are expressly granted to them or are necessarily implied within the four corners of the statute. *Jones v. Mississippi Employment Sec. Comm'n*, 648 So. 2d 1138, 1140 (Miss. 1995); *Wilkerson v. Mississippi Employment Sec. Comm'n*, 630 So. 2d 1000, 1001 (Miss. 1994); *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 538 So. 2d 367, 373 (Miss. 1989); *State ex rel. Pittman v. Mississippi Public Serv. Comm'n*, 520 So. 2d 1355, 1358 (Miss. 1987); *Farrish Gravel Co. v. Mississippi State Highway Comm'n*, 458 So. 2d 1066, 1068 (Miss. 1984); *Strong v. Bostick*, 420 So. 2d 1356, 1361 (Miss. 1982); *Golding v. Salter*, 234 Miss. 567, 584, 107 So. 2d 348, 354 (1958). Thus, the Workers' Compensation Commission cannot act absent express or implied authorization from the legislature found within the four corners of the Workers' Compensation Act.

In this case, the Workers' Compensation Commission did not cite any statutory authority granting or implying to itself the power to create a credit for Employer/Carrier. In fact, the Workers' Compensation Commission admits in its opinion that "the Mississippi Workers' Compensation Act contains no authorization for reducing benefits on this ground." Further, the commission found no implied power under which it might fashion a new defense and credit to Employer/Creditor. Our own research finds no authority in the Workers' Compensation Act granting the Workers' Compensation Commission such power.

After the commission concluded that it had no power under the Workers' Compensation Act to take

action, the commission decided to create new law regardless of its lack of authority. The commission stated:

Instead, to justify the credit which we hold the Employer and Carrier herein are entitled to, we must look to a bigger picture in which workers' compensation laws, employment security laws, social security laws and others are but pieces of an overall system of wage loss protection. Perhaps Professor Larson crystallized the point best when he wrote:

Wage-Loss legislation is designed to restore to the worker a portion, such as one-half to two-thirds, of wages lost due to the three major causes of wage loss: physical disability, economic unemployment, and old age. The crucial operative fact is that of wage loss; the cause of the wage loss merely dictates the category of legislation applicable. Now if a workman undergoes a period of wage loss due to all three conditions, it does not follow that he should receive three sets of benefits simultaneously and thereby recover more than his actual wage. He is experiencing only one wage loss and, in any logical system, should receive only one wage-loss benefit. This conclusion is inevitable, once it is recognized that workmen's compensation, unemployment compensation, nonoccupational sickness and disability insurance, and old age and survivor's insurance are all parts of a system based upon a common principle. If this is denied, then all coordination becomes impossible and social legislation becomes a grabbag of assorted unrelated benefits.

4 Larson, *The Law of Workmen's Compensation*, section 97.10 (1993).

We are unwilling to go on the record as supporting an uncoordinated "grabbag" approach to governmental mandated wage-loss protections. It is certainly hard to deny that the creation of an offset or credit of this type is more appropriately left to the legislature, but nonetheless, we feel that some "coordination must be achieved by assuming that all wage-loss legislation was meant to be interpreted as a consistent and harmonious general system.

The actions of the commission in overruling the ALJ's order created new law based on the dictates of public policy. The commission does not have authority granted or implied under the Workers' Compensation Act to "look at the big picture" en route to enacting new law based on public policy considerations. Such power is vested exclusively in the legislature.

Employer/Carrier attempt, in their reply brief, to find a grant of authority in the Workers' Compensation Act under section 71-3-85(3). They argue that the language of section 71-3-85(3) -- that the commission will have the "power to adopt rules and regulations and make or approve the forms relating to notice of injuries, payment of claims and other purposes" granted the commission the power to create a new defense and set off under the Workers' Compensation Act. *See* Miss. Code Ann. § 75-3-85(3) (1972). Employer/Carrier's argument is flawed.

While agencies have the power to promulgate rules, the action in the case *sub judice* is an

adjudication not rulemaking. "Perhaps the best guide to distinguishing rulemaking from adjudication is the simple observation that rulemaking resembles the enactment of a statute and adjudication resembles what a court does when it decides a case." Kenneth C. Davis, *Administrative Law Text* § 5.06 (1972). Because a grant of rulemaking power does not expand an agency's adjudicatory authority, section 71-3-85(3) is not proper statutory authority for the Workers' Compensation Commission's actions in this case. Moreover, section 71-3-85(3) simply outlines the procedural devices that the commission may utilize when acting pursuant to authority granted by another section of the Workers' Compensation Act. The portion of section 71-3-85(3) cited by Employer/Carrier does not grant the Workers' Compensation Commission authority either directly or by implication to create a novel defense and set off for Employer/Carrier even by promulgating a rule. Consequently, we must hold that the commission, however well-intentioned its actions, lacked authority to unilaterally legislate and create a new defense and credit to Employer/Carrier for unemployment compensation benefits received by Washington while receiving workers' compensation benefits.

#### B. Deference to the Legislature

Although Employer/Carrier failed to raise the point, we recognize that while the commission is forbidden to address Employer/Carrier's public policy argument, the judiciary is not. Broad public policy concerns, similar to those the Commission considered, and the detailed statutory coordination necessary to implement these changes are best left to the legislature. As Professor Larson writes, "[T]he optimum solution is to have this coordination achieved by the legislature, since detailed questions are certain to arise which can only be handled by carefully considered legislation." 4 Larson, *The Law of Workmen's Compensation*, § 97.20 (1995).

In Mississippi, coordination of wage compensation statutes via the legislature is not simply the "optimum solution." It is the exclusive constitutional avenue to coordinate wage compensation statutes. Separation of powers under the Mississippi Constitution and the mandates of judicial restraint compel this Court to leave any amendment of the Workers' Compensation Act to the legislature. The Mississippi Supreme Court has held that the judiciary of Mississippi is barred by the doctrine of separation of powers from amending the Workers' Compensation Act based on public policy considerations. *Kelly v. Mississippi Valley Gas*, 397 So. 2d 874, 877 (Miss. 1981). According to the Mississippi Supreme Court such changes are in the exclusive domain of the legislature. *Id.*

In *Kelly v. Mississippi Valley Gas*, 397 So. 2d 874 (Miss. 1981), the plaintiff, Kelly, argued that Mississippi should adopt a public policy exception to the employment at will doctrine when an employee is fired for asserting rights under the Workers' Compensation Act. *Id.* at 876. Kelly argued that a cause of action should be recognized under the Mississippi Workers' Compensation Act for a discharge based on his exercise of rights under the Act. Kelly noted that several other states had judicially adopted a similar remedy. In response the Mississippi Supreme Court stated:

The Mississippi Workmen's Compensation Law was adopted by the Legislature in the exercise of the legislative power vested exclusively in it under Article 1, Section 1 of the Constitution of 1890. *In order to preserve the separation of powers mandated by the Constitution, any amendments to the Workmen's Compensation Law or any public policy determinations of the law, likewise are vested exclusively in the Legislature.* The facts alleged by plaintiff in his declaration pose valid public policy questions for the legislative

department, not the judicial department of government. We therefore decline to adopt a public policy exception to the common law rule that an employment contract at will may be terminated by either party with or without justification, and decline to create a common law tort action against an employer by an employee who has been discharged for filing a workmen's compensation claim. *In our view, if we adopted the public policy exception requested in this case, we would be expressing a public policy different from that expressed by the Legislature in our Workmen's Compensation Law. This public policy decision is not only a proper, but an exclusive, subject for the Legislature to consider.*

*Id.* at 877 (emphasis added).

The case at bar presents a question similar to the question addressed in *Kelly*. Like *Kelly*, Employer/Carrier request that we judicially fabricate a remedy under the Workers' Compensation Act which was "adopted by the Legislature in the exercise of the legislative power vested exclusively in it under Article 1, Section 1 of the Constitution of 1890." However, we are bound by *Kelly* which states that "[i]n order to preserve the separation of powers mandated by the Constitution, any amendments to the Workmen's Compensation Law or any public policy determinations of the law, likewise are vested exclusively in the Legislature." *Id.* To hold otherwise would express a different public policy than that expressed by the legislature.

Indeed, the Mississippi Supreme Court has been extremely reluctant to allow the courts of Mississippi or the Workers' Compensation Commission to invade the domain of the legislature even where a decision would only interpret the Workers' Compensation Act in a novel but seemingly sensible manner. In *Hardin's Bakery v. Taylor*, 631 So. 2d 201, 207 (Miss. 1994), the Mississippi Supreme Court reversed a decision of the Workers' Compensation Commission holding a workers' compensation beneficiary sentenced to prison is no longer entitled to receive workers' compensation benefits. The Mississippi Supreme Court reversed the circuit court's affirmance of the commission's decision declaring that "[a]lthough it may be argued that one confined to prison has, for the duration of his confinement, no earning capacity, we believe that this is an issue the resolution of which is more appropriately left to the legislature." *Id.* (citing *Tullier v. Tullier*, 464 So. 2d 278 (La. 1985)).

Even if we were not prohibited from considering Employer/Carrier's argument by the doctrine of separation of powers advanced by the Mississippi Supreme Court in *Kelly*, we would be constrained by the mandates of judicial restraint enunciated in *Hardin's Bakery*. Thus, we are barred by the separation of powers and the mandates of judicial restraint from considering Employer/Carrier's public policy argument. That argument is more appropriately left to the legislature. We are not alone in holding that absent explicit or implicit statutory authority the judiciary should not recognize a defense for workers' compensation employers or carriers when an injured employee simultaneously receives both workers' compensation benefits and unemployment compensation. Several other courts have reached similar conclusions. See *Florence Enameling Co. v. Jones*, 361 So. 2d 564, 567 (Ala. Civ. App. 1978); *Allied Paper Inc. v. Davis*, 342 So. 2d 363, 366 (Ala. Civ. App. 1976); *Richardson Homes Corp. v. Shelton*, 336 So. 2d 1367, 1369 (Ala. Civ. App. 1976); *Parise v. Industrial Comm'n*, 492 P.2d 426, 428 (Ariz. Ct. App. 1971); *Neuberger v. City of Wilmington*, 453 A.2d 804, 806 (Del.

Super. Ct. 1982); *Wells v. Jones*, 662 S.W.2d 849, 851 (Ky. Ct. App. 1983); *Murray v. Augusta*, 394 A.2d 1171, 11173 (Me. 1978); *Edwards v. Curtis*, 387 A.2d 223, 224 (Me. 1978).

## CONCLUSION

Finally, we find the commission's solution to Professor Larson's "grabbag" or double recovery" problem particularly disturbing not only because it exceeds the Workers' Compensation Commission's authority, but also because commission's elimination of claimant's double recovery in this case would simply unjustly enrich workers' compensation employers and carriers at the expense of Mississippi's unemployed workers. The commission's willingness to appropriate funds designated to spread and lighten the burden of unemployment, "which now so often falls with crushing force upon the unemployed worker," illuminates the legislature's wisdom in not granting the commission authority to amend or create remedies available under the Workers' Compensation Act. Even though a wage-loss compensation system that precludes a benefits "grabbag" is a laudable goal, a system which remedies double recovery by permitting insurance carriers a windfall profit at the expense of the State Unemployment Compensation Fund would violate the purpose of both the Workers Compensation Act and Mississippi Unemployment Security Law as stated by the Mississippi Legislature.

We agree with the Workers' Compensation Commission and Professor Larson that wage loss legislation should be coordinated to avoid multiple recovery for the same lost earnings under different wage compensation statutes. We too are opposed to a "grabbag" system of recovery; nonetheless, we cannot adopt the commission's decision for two reasons. First, the commission is without statutory authority to coordinate Mississippi or federal wage compensation legislation, and second, we will not remove an employee's hand from the "grabbag" just to insert instead Employer/Carrier's hand into the pockets of the people of Mississippi.

In *Richardson Homes*, the Alabama Court of Civil Appeals held that Shelton, an injured worker, who simultaneously received temporary total disability payments under Alabama's workers' compensation law and unemployment benefits, was not precluded from double recovery absent a statutory prohibition. *Id.* The court added that if anyone were entitled to recovery of the duplicated benefits it would be the unemployment fund, not the workers' compensation carrier. *Richardson Homes*, 336 So. 2d at 1369; *see also Williams v. Molded Elec., Inc.*, 233 N.W.2d 895, 896 (Minn. 1975).

We agree. The ultimate resolution of this issue as well as the consequent statutory coordination lies with the legislature.

For all of the forgoing reasons, the circuit court's affirmation of the Workers' Compensation Commission's holding that Employer/Carrier were entitled to a set off for unemployment compensation benefits is overruled, and the circuit court's affirmation of the commission's finding that Washington was temporarily totally disabled is affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY AFFIRMING THE WORKERS' COMPENSATION COMMISSION'S FINDING THAT WASHINGTON IS ENTITLED TO TEMPORARY TOTAL BENEFITS IS AFFIRMED AND THE COURT'S AFFIRMANCE OF THE WORKERS' COMPENSATION COMMISSION'S HOLDING THAT APPELLEES WERE ENTITLED TO A CREDIT FOR**

**UNEMPLOYMENT BENEFITS RECEIVED BY WASHINGTON IS REVERSED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**