

**IN THE COURT OF APPEALS 04/09/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CC-00392 COA**

**F.W. HENDRIX COMPANY, INC. AND UNITED STATES FIDELITY AND GUARANTY  
COMPANY**

**APPELLANTS**

**v.**

**C & I INSULATION COMPANY AND FIDELITY AND CASUALTY COMPANY OF NEW  
YORK**

**APPELLEE**

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

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

DAVID B. MCLAURIN

ATTORNEY FOR APPELLEE:

GLENN F. BECKHAM

NATURE OF THE CASE: CIVIL: WORKER'S COMPENSATION

TRIAL COURT DISPOSITION: AWARD APPORTIONED BETWEEN CARRIERS

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

Floyd W. Hendrix was killed in an automobile accident on his way to oversee work being performed by two of his businesses. Both of his companies were insured for workers' compensation. The administrative judge found that Hendrix was killed in the course and scope of duty for both of his businesses and ordered his benefits to be allocated by his liability carriers based on the average weekly wage he was paid by each company. One company paid Hendrix a higher salary than the other. Thus, one insurance carrier was ordered to pay more benefits than the other. This decision was affirmed by the full Workers' Compensation Commission and the Lee County Circuit Court. The carrier which was ordered to pay more benefits now appeals to this Court, arguing that both companies should be responsible for equal amounts. We disagree and affirm the decision of the administrative judge, the Workers' Compensation Commission, and the Lee County Circuit Court.

#### STATEMENT OF THE FACTS

On August 4, 1991, Floyd W. Hendrix (Hendrix) was killed in an automobile accident in Tupelo, Mississippi. At the time of his accident, Hendrix was en route to Tiptonville, Tennessee, where he was to oversee the work of two companies engaged as subcontractors on a construction project. Hendrix was the owner and president of both subcontracting companies: the F.W. Hendrix Company, Inc. and the C & I Insulation Company. Both companies were "sub-chapter S corporations" engaged in the construction business. Since the accident, both of these companies have been engaged in bankruptcy proceedings and no longer exist. Both companies were insured for workers' compensation. The F.W. Hendrix Company was insured by United States Fidelity and Guaranty Company (USF&G). The C & I Insulation Company was insured by Casualty Company of New York (CCNY).

Hendrix's wife sought to recover from both companies. The administrative judge hearing the case found that Hendrix was employed by both companies at the time of his death. It was also found that Hendrix was acting in the course and scope of his employment for both companies when he was killed. At the time of his death, the F.W. Hendrix Company paid Hendrix a salary of \$1,000.00 per week. The C & I Insulation Company paid him a salary of \$600.00 per week. Thus, the award was allocated by and between the employers and carriers based on the wages that each employer paid to the decedent. The decision was appealed by USF&G to the full Workers' Compensation Commission and the Lee County Circuit Court. Both appeals affirmed the decision of the administrative judge. USF&G now appeals to this Court and argues that the Mississippi Workers' Compensation Commission did not have jurisdiction to apportion the compensation award between both it and CCNY because the commission is "an administrative agency and not a court of law." It further argues that both companies should share liability equally in order "not to advantage or disadvantage either employer/carrier."

#### ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION HAD JURISDICTION TO DETERMINE THE APPORTIONMENT OF COMPENSATION AWARD BETWEEN CARRIERS.

This jurisdictional claim was made by USF&G for the first time in the Circuit Court of Lee County, only after this case had been appealed from the administrative judge and the full commission. As such, this issue is procedurally barred from our review. *See Richey v. City of Tupelo*, 361 So. 2d 995, 998 (Miss. 1978) (workers' compensation case which held that errors must be assigned at the initial appeal to the full commission or would be procedurally barred from review).

**II. WHETHER THE ADMINISTRATIVE JUDGE ERRED BY ORDERING APPORTIONMENT OF LIABILITY BETWEEN THE CARRIERS TO BE BASED ON AVERAGE WEEKLY WAGE EARNED BY EACH EMPLOYER.**

As noted by the administrative judge, there is no Mississippi statute or case directly addressing the allocation among more than one employer/carrier of the responsibility to pay workers' compensation benefits and medical expenses. However, other jurisdictions, pursuant to common law and/or statute, have held that under such circumstances, the liability for payment of benefits should be in proportion to the wages paid by each employer. *See, e.g., Kahl v. Baudoin*, 449 So. 2d 1334, 1337 (La. 1984) (joint employers of sheriff who was killed in the line of duty were liable for payment of workers' compensation survivor's benefits according to respective wage liability); *United States Fire Ins. Co. v. City of Atlanta*, 217 S.E. 2d 647, 648 (Ga. 1975) (off-duty police officer working as security guard who was killed while attempting to quell a disturbance at a theater was jointly employed and as such, both employers were liable for compensation in proportion to their wage liability); *United States Fidelity & Guar. Co. v. American Employer's Ins. Co.*, 315 So. 2d 822, 825 (La. Ct. App. 1975); *Hunt v. Regent Dev. Corp.*, 143 N.E.2d 892, 893 (N.Y. 1957).

Accordingly, we believe that the joint employer which was paying the higher wage should not be allowed to benefit from the dual employment circumstance by being required to pay an amount less than it would have had to pay had it been the sole employer. Neither employer/carrier should be advantaged nor disadvantaged simply because of a dual employment situation. In light of the reasoning, logic, and sound substantive opinions from other jurisdictions, we cannot find that the administrative judge committed reversible error by allocating the liability according to the average weekly wage paid by each employer.

**THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANTS.**

**FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**