IN THE SUPREME COURT OF MISSISSIPPI

MARVIN CHESTNUT — APPELLANT/CLAIMANT

VS. — CAUSE NO. 2006-WC-01985

DAIRY FRESH CORPORATION — APPELLEES/EMPLOYER

AND

GREAT AMERICAN ASSURANCE COMPANY — CARRIER



ORAL ARGUMENT REQUESTED

# BRIEF OF APPELLEE

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| **MARVIN CHESTNUT** | **APPELLANT/CLAIMANT** |
| **VS.** | **CAUSE NO. 2006-WC-01985** |
| **DAIRY FRESH CORP.** | **APPELLEES/EMPLOYER** |
| **AND** | |
| **GREAT AMERICAN ASSURANCE CO.** | **CARRIER** |

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications, or recusal:

| | |
|---|---|
| Marvin Chestnut | Appellant |
| Michael Adelman | Attorney for Appellant |
| J. Andrew Hughes | Attorney for Appellee |
| Diary Fresh Corporation | Employer |
| Great American Assurance Company | Carrier |

Respectfully submitted, this the 20th day of April, 2007.

J. ANDREW HUGHES, ESQ.

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**BRIEF OF APPELLEE**

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**STATEMENT OF THE ISSUES**

1. Whether the Opinion of the Administrative Judge, the Full Commission Order and the Circuit Court Order were supported by substantial evidence in holding that the Claimant reached maximum medical improvement on August 18, 2003, and that no additional temporary disability benefits are owed by the Employer and Carrier?

2. Whether the Opinion of the Administrative Judge, the Full Commission Order and the Circuit Court Order were supported by substantial evidence in holding that the Claimant failed to prove that he suffered a loss of wage-earning capacity which would entitle him to receive permanent disability benefits?

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# BRIEF OF APPELLEE

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## STATEMENT OF THE CASE[1]

The Claimant reported an injury to the Employer and Carrier on November 4, 2002. At the time of the injury, the Claimant's average weekly wage was $528.48 (stipulated). The Employer and Carrier admitted the injury, provided all reasonable and necessary medical per the Claimant's "choices of physician", and provided temporary disability benefits from January 6, 2003, to August 18, 2003 (stipulated). The Claimant reached

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1 References are to the transcript (T-), designated exhibits, and the one (1) volume of pleadings and other miscellaneous documents fo the Mississippi Workers' compensation Commission (WC-) and the one (1) volume of pleadings and other miscellaneous documents of the Forrest County Circuit Clerk (CP).

maximum medical improvement on August 18, 2003, but has never given the Employer the opportunity to accommodate his work restrictions. T. 50-51, Claimant's testimony.

Transcript Exhibits 1 and 2, firmly establish that it is the opinions of both Dr. Patterson and Dr. Antinnes that the Claimant was at maximum medical improvement as of August 18, 2003, and that the Claimant is fully capable of gainful employment. See T. Exhibits 1 and 2.

After a formal hearing on the merits on July 27, 2005, and a complete review of the evidence, the Administrative Judge found that the Claimant reached maximum medical improvement on August 18, 2003, and that the Claimant failed to establish a loss of wage earning capacity which would entitle him to receive permanent partial disability benefits. (WC.80).

Having thoroughly studied the record in the cause and the applicable law, the Full Commission affirmed the "Order of the Administration Judge", by Order dated June 15, 2006. (WC. 83). Claimant then appealed to the Forrest County Circuit Court (WC. 84), which affirmed the Full Commission (RE-80).

## STIPULATIONS

1. The Claimant suffered an admittedly compensable injury on November 4, 2002. (WC. 67).

2. The Claimant's average weekly wage at the time of the accident was $528.47. (WC. 67).

3. The Employer/Carrier paid temporary total disability benefits for a period from January 6, 2003, to August 18, 2003, at a weekly rate of $322.90, totaling $10,378.93. (WC. 67).

4. Employer and Carrier paid Claimant permanent partial disability benefits in "good faith" from August 19, 2003, to February 7, 2004, at a rate of $322.90 ($7,963.87). (WC . 68).

5. All medical expenses have been paid. (W.C. 68).

## FACTS

Claimant was fifty (50) years of age at the time of the hearing. T. 9. While the Claimant did complete the seventh ($7^{th}$) grade, he does have limited ability to read and write. T. 9.

Claimant's past employment includes work for Ingall's in the paint department in the 1970's. Claimant worked

for Ingall's again in the 1990's in the shipping department for three (3) months. T. 18-20.

In 1999 or 2000, Claimant began working for the Employer. For the first ten (10) or eleven (11) months, he stacked milk in a cooler. That position required a great deal of lifting, including overhead work. Next, Claimant used a forklift to move, separate, and stack pallets. He also dumped unsold milk. In the process for disposing of that milk, Claimant first stacked six (6) trays - each tray contained four (4) cartons of milk - on a dolly. He then pushed the dolly onto an eighteen (18) wheeler and unloaded the trays. In that way he stacked 2,000 trays on the truck, which took two and half (2 ½) to three (3) hours to complete. Next, the truck was moved to the dump area. There Claimant used a dolly to unload the eighteen (18) wheeler. Then he dumped the cartons in a dumpster where they were crushed, causing the milk to drain from the dumpster through a hose into a truck. From time to time, Claimant climbed onto the top of the truck to see how much mild was in the truck. T. p. 22-32.

The Claimant suffered an admitted work injury on November 4, 2002. T. p. 4, 9, 10. Claimant testified that he went to the emergency room at Forrest General Hospital on the date of the accident. T. 11. Claimant was placed on light duty and continued to work for approximately two (2) weeks. T. 11. After the emergency room visit at Forrest General, Claimant consulted with a chiropractor, Gary Lett and Lett ultimately referred he Claimant to Dr. Michael Patterson, a specialist in orthopedic surgery. T. 11 and T. Exhibit 1, p. 4. Ultimately, the Claimant was seen by two (2) separate specialist, Dr. Patterson and Dr. James Antinnes. T. Exhibits 1 and 2. See the "Medical Testimony" portion of the Brief of Appellee for specific reference to medical information.

As it will be established under "Medical Testimony" that the Claimant was able to work and was released, the Claimant's own testimony specifically sets forth:

> Q. Have you made any attempt whatsoever to go back to Dairy Fresh, to contact Dairy Fresh, to ask them if they have any jobs available for you whatsoever?
> A. No, sir.

> Q. Have you made any attempt other than the little side job, the little landscaping job that you talked about during direct examination, have you made any attempt whatsoever to call, go fill out an application, seek employment anywhere since the start of this injury?
> A. No, sir.

T. 50-51.

Durwood Dees testified on behalf of the Employer and Carrier. T. 62. Mr. Dees was the distribution manager and the Claimant's supervisor at the time of the injury. T. 63. Mr. Dees is responsible for placing employees and currently has individuals working light duty at the facility. T. 64. Mr. Dees testified that in the Claimant's standard position the heaviest thing that would have to be lifted from the ground is a full gallon of milk (8.65 lbs). T. p. 66-67.

Most importantly, Mr. Dees testified that he had not seen or heard from the Claimant since 2002 when he worked two (2) weeks of light duty. T. 63. In fact, Mr. Dees testified that positions were available within the Claimant's restrictions, but he was never given the opportunity to provide a position because the Claimant never contacted him. T. 69.

## MEDICAL TESTIMONY

### 1. Dr. Michael Patterson

Dr. Michael Patterson, an orthopedic surgeon, testified through his deposition. When Dr. Patterson first examined Claimant on January 6, 2003, the Claimant complained of pain in his back and legs. T. Exhibit 1,Deposition of Dr. Michael Patterson, p. 5.

After a period of conservative treatment, Dr. Patterson began a round of tests. A nerve conduction study on April 24, 2003, suggest chronic L5 bilateral radiculopathy; however, a lumbar myelogram on May 12, 2003, was negative. In addition, Dr. Patterson interpreted a post-myelogram CT scan performed that same day as showing moderate compression of the nerve root at the L5 level, although two radiologists read the scan as normal. Thinking that surgery was appropriate, Dr. Patterson ordered a discogram, which the Carrier denied. T. Exhibit 1, p. 6-8.

Without a confirming discogram, Dr. Patterson was unwilling to proceed with surgery, so he called for a functional capacity evaluation that was performed on

August 7, and 8, 2003. That evaluation found that Claimant could lift from the floor thirty (30) pounds occasionally and fifteen (15) pounds frequently; lift overhead twenty (20) pounds occasionally; carry thirty-five (35) pounds occasionally and twenty (20) pounds frequently; push sixty-five (65) pounds occasionally, thirty (30) pounds frequently, and fifteen (15) pounds continuously; and pull seventy(70) pounds occasionally, thirty-five (35) pounds frequently, and fifteen (15)pounds continuously. The evaluation also found that Claimant could crawl, crouch, kneel, and work overhead occasionally; and, sit, stand, walk, bend, squat, climb stairs and ladders, and rotate frequently. Overall, the evaluation indicated the Claimant could work at the light level and had an impairment rating of ten percent (10%). T. Exhibit 1, attached Medical Records of Dr. Patterson, FCE dated August 7-8, 2003.

Dr. Patterson agreed with the results of the functional capacity evaluation. For that reason on August 18, 2003, Dr. Patterson found that Claimant was at maximum medical improvement, assigned him a whole body

impairment rating of ten percent (10%), and released him to return to work with the restrictions contained in the evaluation. T. Exhibit 1, attached Medical Records of Dr. Patterson dated August 18, 2003.

In September 2003, Claimant switched his care from Dr. Patterson to Dr. Antinnes; however, on April 2, 2004, Claimant returned to Dr. Patterson to obtain his opinion of a discogram that had been performed on March 30, 2004. Dr. Patterson agreed with the pain management physician who had conducted the test that the discogram showed a concordant pain response at the L4-5 level. Based on that result Dr. Patterson recommended a fusion at that level. T. Exhibit 1, p. 8. Then on July 21, 2004, Dr. Patterson took Claimant off work. T. Exhibit 1, p. 8.

Later in 2004, Dr. Patterson watched the videotape of Claimant. In an August 12, 2004, letter to Mr. Chestnut's attorney, Dr. Patterson described what he had seen on the tape and indicated that the video had caused him to change his mind about the advisability of surgery for Claimant:

> In reviewing the video tape, I note

> that Marvin is able to bend 90 degrees at the waist, lean forward until his thighs are touching the bumper and retrieve a spare tire which probably weighs somewhere in the neighborhood of 40 pounds in my experience of changing tires. He then lifts the tire, brings it to his waist, turns and walks around to a friend and hands the tire to him.
>
> One may be in pain and still do this. He may even be a sever pain and do this. However, I must say that I do not think that I can make Marvin any more functional than this by performing surgery on him.
>
> After seeing the video tape, I change my recommendations. I will not recommend surgery in Marvin's case.

T. Exhibit 1, attached correspondence of Dr. Patterson dated August 12, 2004.

About three (3) weeks later on September 1, 2004, Dr. Patterson determined that Mr. Chestnut was at maximum medical improvement and referred the Claimant for a second functional capacity evaluation. T. Exhibit 1, attached Medical Record of Dr. Patterson dated September 1, 2004. The results of the second evaluation, however, were the same as the first, so on October 19, 2004, Dr. Patterson gave Mr. Chestnut a ten percent (10%) whole body impairment rating and released him to work at the light level with the work restrictions outlined in the

2003 functional capacity evaluation. T. Exhibit 1, attached Medical Records of Dr. Patterson dated October 19, 2004.

**2. Dr. James A. Antinnes**

Dr. James A. Antinnes, an orthopedic surgeon who specializes in spine surgery, testified through his deposition. T. Exhibit 2, p. 3-4. When Dr. Antinnes first examined Mr. Chestnut on November 19, 2003, the Claimant complained of pain in his low back radiating down his legs. T. Exhibit 2, p.4. Because a recent MRI was negative and Mr. Chestnut had already received a course of conservative treatment by Dr. Patterson, Dr. Antinnes recommended a discogram. T. Exhibit 2, p. 6.

Dr. Antinnes did not see Mr. Chestnut again until five (5) months later on April 29, 2004. In the meantime, Mr. Chestnut had the discogram, which was concordant at the L4-5 level. Based on the discogram and Mr. Chestnut's continuing complaints of unbearable pain, Dr. Antinnes recommended a fusion. T. Exhibit 2, p. 7-8. However, after viewing the video tape, Dr. Antinnes changes his mind about the surgery, as shown by this exchange in his

June 28, 2004, deposition:

> Q. And based upon your review of his abilities and activities in that videotape, would you currently recommend surgical intervention?
>
> A. Absolutely not. What I saw him perform in that video, I don't feel I could make him better - I don't feel I could make him more functional than he was at the activities he performed and certainly I can't image him being able to do those types of things even with a good outcome from a surgery like this. I don't feel that surgery is recommended at all.

T. Exhibit 2, p. 10.

During his cross-examination testimony, Dr. Antinnes returned to the effect the video had on his opinions:

> Q. Okay. And what your testimony is is that you could not get him to a more functioning place than what was shown on the videotape?
>
> A. Yea. I don't think that I can. I mean he was able to get in and out of a car. When we had our discussion, he made it sound to me like every minute of his day was misery, and that's where I felt obliged to at least try to offer him something to try to reduce his symptoms. What I saw on his videotape, he was not in misery 24 hours a day. In fact, he was getting in and out of cars. He helped somebody change a tire, bending down and picking out - probably the worst thing you can do for your back and cause the most pain is reach into a trunk and lift something heavy out.

> Absolute worst thing you can do for a back with a degenerative disk. He was able to do that without much pain, get over, bend underneath the car and change a car tire. That's what I'm saying; I don't think with the surgery I could make him any more functional than that. If he's able to do that now and he wasn't grimacing and he wasn't using his cane then, if he's able to do that now, I don't think there's any way that I could to that to make to make him - I don't think I can make him better than his ability to do that, and in a sense, I feel that he misrepresented himself to me when we were having our discussion because he states that he was not able to do any of these things and in fact he was able.
>
> The worst things you can do for yourself with a back problem is driving a car, which almost the entire video was him driving in a car and getting in and out of a car, which are two of the most difficult things to do with back problems and bending over as you would to get in a trunk, and he was able to do that. So the short answer is I don't think that I can make him any better than he is right now.
>
> Q. You agree that he does have a degenerative disk?
>
> A. I agree that he has a positive diskogram finding. He does not have a degenerative disk based on his MRIs.

T. Exhibit 2, p. 17-18.

Finally in his redirect testimony, Dr. Antinnes was asked regarding Mr. Chestnut's ability to work:

> Q....Based upon your review of the videotape and your medical findings with regard to Mr. Chestnut, could you state within a reasonable degree of medical certainty whether Mr. Chestnut could work right now?
>
> A. Well, what I saw him doing on the videotape I certainly think he can hold down some sort of employment with what he was able to do there. I think that he'd probably be able to do - I don't know if he'd be able to lift - I don't know what his work involved with Dairy Fresh, but I think he'd be able to probably do something with the amount of activities that he was able to perform on the videotape. It's reasonable to think that he'd be able to do some type of work.

T. Exhibit 2, p. 24-25.

It is obvious that Dr. Patterson and Dr. Antinnes based there medical opinions upon subjective complaints provided by the Claimant. Once these medical providers viewed the Claimant's daily activities (videotape, T. Exhibit 3), they felt that the Claimant misrepresented his alleged injuries to them. Thus, Dr. Patterson's initial date of maximum medical improvement of August 18, 2003, was reestablished. The Functional Capacity Evaluation, Dr. Patterson and Dr. Antinnes are all in agreement that the Claimant could work thereafter.

### 3. Videotape

T. Exhibit 3 is a surveillance video of Mr. Chestnut that was made on March 30, April 1, and April 29, 2004. In the video, Mr. Chestnut spent a fair amount of time driving and opening car hoods on all three (3)days. On Mach 30, 2004, he picked up a young child from the floor. The next day on April 1, 2004, he bent over into a car trunk, took out a spare tire, and gave the spare tire to a friend. Mr. Chestnut then reached into the trunk and removed a jack. The friend removed the flat tire from the rim, but Mr. Chestnut placed the spare tire on the rim and tightened the nuts. While changing the tire, Mr. Chestnut did not appear to be in any pain. In fact, he often smiled. On all three (3) days, Mr. Chestnut seemed to have no problems getting around, although he sometimes used a cane. (The Administrative Judge found that Dr. Patterson's and Dr. Antinnes's descriptions of the events shown on the video are accurate.) T. Exhibit 3.

## STANDARD OF REVIEW

The findings and Orders of the Commission are to be upheld if those findings are supported by substantial

evidence. Fought v. Stuart C. Irby Co., 523 So. 2d 314, 317 (Miss. 1998(, cited by Boyd v. MWCC, 919 So. 2d 163, 166 (Miss. 2005). The Court of Appeals in Fought, Boyd and numerous other cases have held that Commission orders can be reversed "only where such order is clearly erroneous and contrary to the overwhelming weight of the evidence. Fought, at 317; Boyd, at 166. In fact, the Court of Appeals opined that "challenges to the findings of the Commission face a very high burden in our standard of review" Fought, at 317; Boyd, at 167.

**SUMMARY OF THE ARGUMENT**

The two (2) essential issues at bar are whether the Claimant reached maximum medical improvement on August 18, 2003, and whether the Claimant is entitled to any permanent partial disability benefits. A clear reading of the medical evidence in this case supports the August 18, 2003, MMI date. Dr. Patterson placed the Claimant at MMI on August 18, 2003, and no substantive treatment was performed thereafter. In fact, the only two (2) medical witnesses in this case agree that no additional treatment is necessary. As far as permanent disability benefits

are concerned, the case law is clear. The Claimant has to prove that the Employer refused to take him back following the injury and that he made reasonable efforts to obtain work with other suitable employers. The Claimant did neither according to his own testimony. Therefore, no permanent benefits are owed.

## ARGUMENT

### 1. Maximum Medical Improvement

In this claim, Mr. Chestnut contends that he has not reached maximum medical improvement because he still wishes to have a fusion. Mr. Chestnut's physicians, however, no longer believe that procedure is advisable. T. Exhibit 1, attached correspondence of Dr. Patterson dated August 12, 2004, and T. Exhibit 2, p. 10. In fact, Dr. Patterson originally placed Mr. Chestnut at maximum medical improvement on August 18, 2003. T. Exhibit 1, attached Medical Records of Dr. Patterson dated August 18, 2003. At that time the discogram had not been approved, and Dr. Patterson considered that test to be essential to his decision whether to recommend the fusion. In other words, Dr. Patterson in effect

concluded that, if the operation was not going to be performed, Mr. Chestnut was at maximum medical improvement on August 18, 2003. After the discogram was done, Dr. Patterson recommended the surgery; however, after he changed his mind concerning the procedure, Dr. Patterson placed Mr. Chestnut at maximum medical improvement on September 1, 2004, with the same work restrictions that he had previously assigned to the Claimant a year earlier. Indeed, a second Functional Capacity Evaluation in the fall of 2004 produced the same results as had the first such evaluation in August 2003, thus indicating that Mr. Chestnut had reached maximum medical improvement on August 18, 2003.

**2. No Loss of Wage Earning Capacity**

The only place to begin a discussion pertaining to disability is Miss. Code Ann. §71-3-3 which defines disability as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." This means that the Claimant must seek, after

any period of temporary disability subsides, employment in another or different trade to earn his wages. Potts v. Lowery, 134 So. 2d 474 (1961). There is no evidence in this record that the Claimant did so. The following paragraphs will discuss the application of this precedent in cases of permanent partial disability in "body as a whole" cases.

In 1992, the Supreme Court of Mississippi handed down their opinion in Jordan v. Hercules and since that time the decision has become one of the most cited cases by the Administrative Judges, Commission, Court of Appeals and by the Supreme Court itself. The following excerpt sets forth the guidelines very clearly:

> When an injury occurs which is related to the body as a whole, scheduled member standards do not apply. Miss. Code Ann. §71-3-17(c)(25). Since Jordan's injury involved not only his arm, but also his upper shoulder and back, it must therefore be treated as an injury to the body as a whole. Russell v. Southeastern Utilities Co., 230 Miss. 272, 92 So. 2d 544 (1957). Where there is a finding of permanent partial disability, the claimant bears the burden of making a prima facie showing that he has sought and has been unable to find work "in the same or other

> employment" pursuant to Miss. Code Ann. § 71-3-3(i). (Emphasis added) Pontotoc Wire Products Co. v. Ferguson, 384 So. 2d 601, 603 (Miss. 1980).

Jordan v. Hercules, 800 So. 2d 179, 183 (Miss. 1992).

In 1999, the Court of Appeals followed Jordan, by reiterating the above excerpt in denying permanent partial disability benefits to Patricia A. Dulaney. National Pizza Company v. Dulaney, 733 So. 2d 301 (Court of Appeals 1999). Patricia Dulaney suffered an admitted work- related injury while employed by National Pizza Company and received a seventeen percent (17%) impairment to the "body as a whole". Id, at 303. However, Dulaney failed to seek any employment after her date of maximum medical improvement. Id, at 304. The Claimant argued that she did not seek any other employment because she was on Social Security disability. Id. The Court of Appeals found no merit in this argument in holding that "regardless of what some other governmental agency concludes," the Claimant's duty is to prove an industrial disability under the Mississippi Workers' Compensation Act. Id. Even though Dulaney received an impairment

rating and restrictions, the Court found that no efforts were made to find other employment and this fact alone prevents an award of permanent partial disability. Id., citing Georgia Pacific v. Taplin, 586 So. 2d 823, 828 (Miss. 1991) and Jordan, at 183.

In 2002, the Court of Appeals made it clear that the Claimant has two (2) separate duties. Wesson v. Fred's, 811 So. 2d 464 (Court of Appeals 2002). At that time, the Court held that not only does the Claimant have to prove that a Claimant with a permanent injury to the "body as a whole" have to prove that the former employer refused to bring them back to work, but the Claimant must also prove that he/she made reasonable efforts to obtain work with other suitable employers. Id, at 470, citing Thompson v. Wells Lamont Corp., 362 So. 2d 638, 640 (Miss. 1978).

As recent as June 7, 2005, the Court of Appeals held firm to the proposition that the Claimant has the burden to prove he/she has sought and has been unable to find work "in the same or other employment". Boyd v. MWCC, 919 So. 2d 163 ( Miss. App. 2005). In Boyd, the Court

opined that an Employer's failure to seek out the Claimant and ask them to return to work does not eliminate the Claimant's duty to attempt to return to her previous employment or seek out other suitable employment. Id.

The Claimant's own hearing testimony that he did not seek to return to his previous employment or seek out other employment is sufficient evidence to support a finding that the Claimant is not entitled to any permanent partial disability. T. 50,51. As set fourth in Dulaney, it is irrelevant that the Claimant is receiving Social Security disability benefits or that he feels that he cannot work. The Employer's testimony merely confirmed that the Claimant never once attempted to return to work nor did he contact his employer to even inquire about his job. T. 63, 69.

Further, all of the cases cited firmly hold that a permanent impairment rating and restrictions, are not sufficient to award permanent partial disability benefits if the Claimant has made no effort to return to his previous employment or sought other suitable employment.

## CONCLUSION

Considering the evidence as a whole including, but not limited to, Claimant's physical condition, medical evidence, videotape surveillance, and pertinent case law as cited by the Appellee, Administrative Judge Mark Henry, and affirmed by the Full Commission and the Circuit Court of Forrest County, the Appellee requests that the Full Commission Order and the Order of the Circuit Court of Forrest County affirming the Opinion of the Administrative Judge be upheld.

Respectfully submitted,

J. ANDREW HUGHES, P.A.,

BY: _____

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**CERTIFICATE OF SERVICE**

I, J. Andrew Hughes, attorney for Appellee, does hereby certify that I have this day served by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the following:

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THIS the 20th day of April, 2007.

J. ANDREW HUGHES