**IN THE SUPREME COURT OF MISSISSIPPI**

**HOWARD LANE** — **CLAIMANT / APPELLANT**

**VS.** — **CAUSE NO.: 2006-TS-02137**

**HARTSON-KENNEDY CABINET**
**TOP COMPANY, INC. and**
**ROYAL INDEMNITY COMPANY** — **EMPLOYER & CARRIER / APPELLEES**

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# BRIEF OF EMPLOYER AND CARRIER / APPELLEES

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## CERTIFICATE OF INTERESTED PERSONS

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The undersigned counsel of record for the Employer and Carrier / Appellees certify that the following listed persons and/or business entities 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 disqualification or recusal.

1. Howard Lane
2. James K. Wetzel
3. Matt G. Lyons
4. Stephanie A. Taylor
5. Linda A. Thompson, Administrative Judge
6. Hartson-Kennedy Cabinet Top Company, Inc.
7. Royal Insurance Company

**STEPHANIE A. TAYLOR**
Attorney for Appellees, Hartson-Kennedy Cabinet Top Company, Inc. and Royal Insurance Company

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## I. STATEMENT OF ISSUE

Whether the injuries sustained by Howard Lane on November 18, 2003, while he was driving his personal vehicle five to six miles from this employer's premises, and while he was admittedly off-duty and receiving no reimbursement for his travel or vehicle expenses, arose out of and in the course of Mr. Lane's employment with Hartson-Kennedy Cabinet Top Company, and were therefore compensable under the Mississippi Workers' Compensation Act.

## II. STATEMENT OF THE CASE

Claimant/Appellant, Howard Lane, filed a Petition to Controvert on January 14, 2004, alleging that on November 18, 2003, he suffered a work related motor vehicle accident resulting in injuries to his nose, jaw, wrist, collarbone, neck, ankle, legs and back.

Employer and Carrier / Appellees denied the compensability of the injury and accident contending that the accident and resulting injuries did not arise out of and in the course of Mr. Lane's employment with Hartson-Kennedy Cabinet Company.

On January 12, 2005, a hearing was conducted by Mississippi Workers' Compensation Commission Administrative Law Judge Linda Thompson, resulting in the *Order of Administrative Judge* dated March 17, 2005. The Honorable Linda Thompson found that Mr. Lane had reached his home base, the Hartson-Kennedy plant, had left for a personal mission at his residence and thus was not in the course of his employment when the motor vehicle accident occurred, thereby denying Mr. Lane's claims for workers' compensation benefits.

Claimant / Appellant feeling aggrieved by the Administrative law decision appealed the matter to the Full Commission. The Commission affirmed the *Order of Administrative Judge* on October 27, 2005, after having heard oral arguments offered on behalf of the parties.

Claimant / Appellant feeling further aggrieved by the decision of the Commission appealed the matter to the Circuit Court of the First Judicial District of Harrison County. After hearing oral argument on behalf of both parties, the circuit court judge affirmed the *Full Commission Order* of the Mississippi Workers' Compensation Commission on November 30, 2006.

The following is a statement of the facts relevant to the issues presented for review:

Howard Lane was employed as a truck driver with Hartson-Kennedy Cabinet Top Company

Inc., (hereinafter "Hartson-Kennedy") at the time he was injured. (MWCC Hearing Transcript p.17) However, at the time he was injured, he was not in the course and scope of his employment. Mr. Lane delivered cabinet tops for Hartson-Kennedy using the company's 18-wheeler type truck, and he used Hartson-Kennedy's plant as his "home-base," *H. T.* p. 37 in that he parked his personal vehicle there while he was delivering the cabinet tops for Hartson-Kennedy *H. T.* p.18. and had a set routine for doing so. When he returned from a delivery, he turned in his paperwork and was then "off-duty." *H. T.* p. 39. After such, he would then get into his personal vehicle and go about his own personal business. *H. T.* p. 41.

Mr. Lane had done just that when the accident in question occurred. He had returned from a delivery route with an empty trailer. He had parked the 18-wheeler and turned in his paperwork. *H. T.* p 21-22. And he had been told by his boss to go off-duty in order to go home, take a shower, or do whatever he needed to do until several hours later when his trailer would be re-loaded and ready for another round of deliveries to adjacent states. *H. T.* p 22. At this time, as on all occasions, upon returning to his "home-base," Mr. Lane was free to run personal errands or go to a casino or anything else he wanted to do. *H. T.* p 41. Mr. Lane then got into his personal vehicle, a Chevy Silverado pick-up truck, for which he was receiving no reimbursement or travel expenses from Hartson-Kennedy whatsoever, and proceeded to drive toward his house. *H. T.* p 53. Some five to six miles away from Hartson-Kennedy's premises he was struck by a drunk driver.

Mr. Lane's accident was tragic and his injuries were severe; however, the accident did not occur while Mr. Lane was in the course and scope of his employment. Thus, his injuries are not compensable under the Mississippi Workers' Compensation Act, and the rulings of Administrative Judge, the Full Commission, and the Circuit Court of Harrison County should be affirmed.

## III. SUMMARY OF THE ARGUMENT

The injuries sustained by Howard Lane on November 18, 2003, while he was driving his personal vehicle five to six miles from this employer's premises, and while he was admittedly off-duty and receiving no reimbursement for his travel or vehicle expenses from his employer, are not compensable under the Mississippi Worker's Compensation Act.

Mr. Lane was not a "traveling employee" at the time of the subject accident but rather was subject to the "going and coming" rule, recognized by the Mississippi Supreme Court and the Mississippi Workers' Compensation Commission.

Furthermore, Mr. Lane was not acting within any of the recognized exceptions to the "going and coming" rule thereby prohibiting him from receiving benefits under the Mississippi Workers' Compensation Act.

Therefore, the findings of the Administrative Law Judge and the Commission must not be disturbed and the Supreme Court must affirm the circuit court since these findings were in no way arbitrary and capricious.

## IV. ARGUMENT

**THE INJURIES IN QUESTION ARE NOT COMPENSABLE UNDER THE MISSISSIPPI WORKERS' COMPENSATION ACT.**

*1. Claimant / Appellant was not a "traveling employee" as defined by Mississippi Workers Compensation Case Law at the time of the subject accident.*

At the time of the subject accident, Howard Lane was not considered a "traveling employee" as defined under Mississippi Workers' Compensation case law. "A traveling employee is one who goes on a trip to further the business interests of their employer such as a traveling salesman or a person attending a business conference for the benefit of his employer." *King v. Norrell Services, Inc.* 820 So.2d 692, 694 (Miss. App. 2000) (citing *Bryan Bros. Packing Co. v. Dependents of Murrah,* 106 So.2d 675, 677 (1958)).

Although, Mr. Lane's employment duties do consist mainly of traveling and delivering goods, his travels begin and end at a fixed location or home base, the Hartson-Kennedy plant in Gulfport. There is a long-standing rule in the law of Workers' Compensation that, in the case of an employee having a fixed place of employment, the employee and not the employer generally assumes the hazards associated with going to and from the place of employment. *King* 820 So.2d at 694 (citing *Hurdle and Son v. Holloway*, 749 So.2d 342 (Miss. App. 1999)).

Mr. Lane's duties begin when he arrives at the Hartson-Kennedy plant in Gulfport. Mr. Lane had left his home base, Hartson-Kennedy plant, on Sunday for a work mission and returned to the home base on Tuesday afternoon. At the time of the accident, Mr. Lane had left the company 18-wheeler at the Hartson-Kennedy plant, gone off duty, got into his personal vehicle and left the plant. He was free to do whatever he wanted to do for approximately two or three hours. He was on his own time and off duty when the accident occurred and not a "traveling employee." A "traveling

employee" remains in the course of his employment only during the time between leaving home base on the work mission and returning to home base at the end of the work mission. *Dependents of Roberts v. Holiday Parks, Inc.*, 260 So.2d 476, 478 (Miss. 1972). As previously stated, Howard Lane had already reached his home base and left for a personal mission at his residence or elsewhere at the time of the accident and was not in the course of his employment when the motor vehicle accident occurred. He was, therefore, subject to the "going and coming" rule as outlined in the case of *Wallace v. Copiah Lumber Co.*, 77 So.2d 316 (Miss. 1955).

2. *The General "Going and Coming" Rule Applies, and the Exceptions to that Rule do not.*

"[T]he general rule [is] that the hazards encountered by employees while going to or returning from their regular place of work and off the employer's premises are not incident to employment and accidents arising therefrom are not compensable." *Stepney v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 416 So.2d 963, 964 (Miss. 1982) (quoting *Miller Transporters, Inc. v. Seay's Dependents*, 350 So.2d 689 (Miss. 1977)). The Administrative Judge in the subject case noted this to be the law in Mississippi, and she cited the case in which the rule has its genesis, *Wallace v. Copiah Lumber Co.*, 77 So.2d 316 (Miss. 1955). Indeed, the "going and coming rule" has been the law since 1955, and it continues to be the law today. See *Mooneyhan v. Boyd Tunica, Inc.*, 850 So.2d 119 (Miss. App. 2002).

One exception to this general rule is "where the employer furnishes the means of transportation, or remunerates the employee [for them]." *Mooneyhan*, 850 So.2d at 121 (quoting *Wallace*, 77 So.2d at 318). In the present case, Mr. Lane admits that he was in his personal vehicle at the time of the accident, and that he was not paid or remunerated in any way for the use of that vehicle. *H.T.* at 53. Thus, that exception does not apply in Mr. Lane's case. In fact, none of the

exceptions to this time honored rule apply to Mr. Lane's case, as the Administrative Judge took great efforts to explain in her Order. *See Order of Administrative Judge* at p. 14-17.

The exceptions to the general "going and coming" rule are set out in Claimant / Appellant's cited case, *Duke v. Parker Hannifin,* as follows:

> (1) where the employer furnishes the means of transportation, or remunerates the employee; or (2) where the employee performs some duty in connection with his employment at home; (3) where the employee is injured by some hazard or danger which is inherent in the conditions along the route necessarily used by the employee; or (4) where the employer furnishes a hazardous routes; or (5) where the injury results from a hazardous parking lot furnished by the employer; or (6) where the place of injury, although owned by one other then the employer, is in such close proximity to the premises owned by the employer as to be, in effect, a part of such premises; or (7) when the employee is on a special mission or errand for his employer, or where the employee is accommodating his employer in an emergency situation.

925 So.2d 963, 964 (Miss. App. 2005)(quoting *Wallace v. Copiah County Lumber Co.,* 77, So.2d 316, 318 (1955)). Again, the facts of Mr. Lane's case do not justify the application of any of these exceptions.

None of the conditions necessary to support an exception are present here, and no evidence of any such conditions was presented at the hearing on the merits. This is fatal to this appeal. "An employee who claims an exception to the general rule must prove that he comes within one of the exceptions." *Aetna Fin. Co. v. Bourgoin,* 252 Miss. 852, 858, 174 So.2d 495, 497 (1965).

Mr. Lane has the burden on this issue, and has offered no proof in order to carry that burden. And the exceptions can be eliminated by a review of the record. The first exception was dealt with above. With regard to the second exception, the Administrative Judge found that Mr. Lane did not perform any duties at home for Hartson-Kennedy "from the time he left their plaint on Tuesday until he returned to pick up another load." *Order of Administrative Judge* at p. 15. Likewise, Mr. Lane

himself testified that he did not do any substantive work at home for Hartson-Kennedy. *H.T.* p 37. Claimant / Appellant's reliance in *Duke vs. Parker-Hannifin* is therefore misplaced.

With regard to exception number three, Mr. Lane was not injured "by some hazard or danger which is inherent in the conditions along the route necessarily used by the employee." He was struck by a drunk driver on a public road. This is a hazard faced by all of us at any time we use a public road. It is simply a very unfortunate fact of modern life. In *Wallace*, the Court said:

> We do not see any peculiar or unusual circumstances here to invoke any of the exceptions we have set out above. There were a number of approaches to and from the plant used by the employees. They could select there own route; the employer furnished no special route; certainly the highway, under the facts here, do not, from a legal standpoint, become a part of the employer's premises. There was no greater danger to Claimant in using the public highway than to any other pedestrian thereon.

77 So.2d at 318 (internal citations omitted). *See also Stepney v. Ingalls Shipbuilding Division, Litton Systems, Inc.* 416 So.2d 963, 964 (Miss. 1982)(citing *Wallace,* 77 So.2d at 318). The same is true here. There was no greater danger posed to Mr. Lane along his route home than the danger posed to any other member of the public using that highway. The fact that he was employed by Hartson-Kennedy did not heighten that danger and was irrelevant and of no consequence to his accident.

The *Stepney* case illustrates this point even more effectively. In *Stepney*, the Claimant was employed by Ingalls where he worked on the 7:00 a.m. to 3:00 p.m. shift as a first-class pipefitter. He had a thirty-minute lunch break each day, and was permitted by Ingalls to drive home for lunch, so long as he returned to work by 12:00 p.m. At approximately 11:50 a.m., while driving along the *sole* access road leading into the shipyard and its parking lot, he was involved in a two-car accident, and was seriously injured. The accident occurred on the access road *in front of* the Ingalls Employment Office. At the time of the accident, and during the lunch break, the Claimant was

driving his own personal car, was not being reimbursed for transportation expenses and was not paid any remuneration. He had not been instructed to perform any duty or task for Ingalls during his lunch period. *See Stepney,* 416 So.2d at 964 (general facts of the case).

The *Stepney* court found that the injury in question was compensable, but only because, "[c]laimant has been subjected to a particular risk because of his employment." *Id.* At 966-967. In Mr. Lane's case, the particular risk at issue is a drunk driver. Unlike the risk in *Stepney,* Mr. Lane's drunk driver has no connection to Mr. Lane's employment whatsoever. In *Stepney*, the risk was encountered on the sole access road to the plant. There was no other way to get back to work. The accident happened so close to Stepney's place of employment that it was right in front of the Ingalls' Employment Office. None of those facts are present in Mr. Lane's case. To the contrary, Mr. Lane was driving his personal vehicle some five to six miles from Hartson-Kennedy when the accident in question occurred.

Mr. Lane simply cannot reasonably argue that encountering a drunk driver five to six miles away from his employer's premises and while on a public highway was a particular risk to which he was subjected because of his employment. If that argument can carry the day here, then any risk encountered at any time by any employee while they are driving on a public road would lead to a compensable injury. Thus, the third exception to the "going and coming" rule does not apply.

Exceptions four, five and six, also clearly do not apply here due to the facts of this case. Exception four does not apply because Hartson-Kennedy did not supply Mr. Lane's route to and from work. Mr. Lane testified that he was given a reasonable amount of time to go home and take a shower, and that this trip would be about 17 miles long, one way, if he took the "three rivers route and Highway 67." *H. T.* p 27. He also testified that he was "free to do anything he wanted" during

this time. *H. T.* p 41. There is no evidence in the record that Hartson-Kennedy gave Mr. Lane any *suggestion* about what route he should take to get home, much less that anyone at Hartson-Kennedy mandated a particular route. In fact, the opposite is clear from the record. Once Mr. Lane had turned in his paperwork, he was off-duty and free to do what he wanted including choose his route of travel. He testified that he was even free to run personal errands, or go to a casino, until it was time to pick up his next load several hours later. *H. T.* p 41.

Exceptions five and six are hardly worthy of mention. This accident did not occur in Hartson-Kennedy's parking lot (exception five), nor was it "in such close proximity to the premises owned by the employer as to be, in effect, a part of such premises," as required by exception six. Thus, neither exception applies. Again, if the definition of close proximity, under exception six, is going to be extended to accidents involving drunken drivers six miles away from the employer's parking lot, then the exception will have "swallowed the rule".

Mr. Lane offered no evidence that the route he traveled was inherently dangerous or hazardous, nor was any evidence introduced showing a repetitive history of any serious or minor auto accident in this area. And that makes sense because this accident was caused by an unpredictable variable - i.e. a drunk driver. This is not an "inherently dangerous" route. This accident was caused by an inherently dangerous person, and it was a person completely unrelated to Hartson-Kennedy, and over whom Hartson-Kennedy had absolutely no control.

The well-settled law in this state gives us a general rule, and seven exceptions. The general rule applies here, and the exceptions do not. For that reason, this hazard, a drunken driver, encountered by Mr. Lane while off-duty and returning from his regular place of work away from and off his employer's premises was not incident to employment, and this accident, which arises solely from that hazard, is not compensable.

**THIS COURT SHOULD AFFIRM THE ORDERS OF THE ADMINISTRATIVE LAW JUDGE, FULL MISSISSIPPI WORKERS' COMPENSATION COMMISSION AND CIRCUIT COURT OF HARRISON COUNTY.**

Claimant/Appellant argues that fact findings and application of law below are erroneous. However, it is well settled law in Mississippi that the Mississippi Workers' Compensation Commission is the ultimate fact-finder and may accept or reject an administrative judge's finding, and if the Commission's fact findings are supported by substantial evidence they must remain undisturbed by the reviewing court even though the evidence would not convince the reviewing court were it the fact finder. *Hardin's Bakeries and Liberty Mutual Ins. Co. v. Harrell*, 566 So.2d 1261 (Miss. 1990) (citations omitted). Further, [a]bsent an error of law, where substantial credible evidence supports the Commission's decision, ... the circuit court, may not interfere." *Smith v. Jackson Constr. Co.*, 607 So.2d 1119 (Miss. 1992) (citing *Walker Manufacturing Co. v. Cantrell*, 577 So.2d 1243 (Miss. 1991). This Court has previously spoken to the very issues raised in Appellant's argument that are presented in this appeal and has stated: "[t]his highly deferential standard of review essentially means that [the Supreme] Court will not overturn the Commission unless [it] finds that the Commission's decision was arbitrary and capricious.." *Walker*, 577 So.2d at 1247.

The Circuit Court followed this well settled law when applying law to fact in the instant case. The findings of the Commission, under *Hardin's Bakeries*, must not be disturbed here as the arguments set out *supra* are clearly supported by substantial evidence that Mr. Lane was not in the scope of his employment at the time of his unfortunate accident. Further, unquestionably credible evidence, as set forth *supra* supports the Commission's findings, and as such the circuit court, abiding by *Smith*, did not interfere with those findings. Accordingly, under *Walker*, it is incumbent

on this Honorable Court to affirm the decisions of the Commission and Circuit Court as neither were arbitrary nor capricious. Simply stated, Mississippi law, when applied to the facts of this case, simply do not allow for compensation of Mr. Lane's injuries.

## V. CONCLUSION

The facts of Mr. Lane's accident are such that the general going and coming rule applies. Prior to the subject accident, Mr. Lane had already reached his home base and departed on a personal mission completely unrelated to this employment duties. The hazard encountered by the employee in this case was a drunk driver, and that hazard was encountered while Mr. Lane was leaving his regular place of work and off his employer's premises. Thus, the hazard was not incident to employment, and the accident which arose therefrom is not compensable. None of the exceptions which have been carved out of this rule fit Mr. Lane's particular accident. Thus, the injuries Mr. Lane sustained are simply not compensable under the Mississippi Workers' Compensation Act, and the *Order of the Administrative Judge*, the *Full Commission Order* of the Workers' Compensation Commission, and the *Opinion and Order* of the Circuit Court of the First Judicial District of Harrison County should be affirmed.

Respectfully submitted this the 25th day of June, 2007.

**STEPHANIE A. TAYLOR**

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## CERTIFICATE OF SERVICE

I, Stephanie A. Taylor, one of the counsel of record for **EMPLOYER AND CARRIER / APPELLEES, HARTSON-KENNEDY CABINET TOP COMPANY, INC. AND ROYAL INSURANCE COMPANY,** do hereby certify that I have this date caused to be delivered, **via United States Mail, postage prepaid**, a true and correct copy of the above and foregoing document to:

***Matt G. Lyons, Esq.***
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THIS the 25th day of June, 2007.

**STEPHANIE A. TAYLOR**