IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO.: 2006-WC-02137

HOWARD LANE — **CLAIMANT/APPELLANT**

VERSUS

HARTSON-KENNEDY CABINET TOP CO., INC. — **EMPLOYER / APPELLEE**

And

ROYAL INDEMNITY COMPANY — **CARRIER / APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I. REPLY TO APPELLEES' "STATEMENT OF ISSUE"

___ 1. Nothing in the Record supports Appellees' contentions Howard Lane was injured "five or six miles from this employer's premises. . . ." To the contrary, the Record shows Howard was within 2 miles of completing this employee's errand for his employer when inured. [*MWCC Transcript* R. 3, et seq.]

___ 2. Nothing in the Record supports Appellees' contentions Howard was "off-duty" when injured - - "admittedly" or otherwise. To the contrary, the Record shows Howard Lane was "**on the job**" Tuesday afternoon, November 18, 2003 at **3:45 p.m.** when he was injured while timely ***traveling*** back to the plant to be ready for the next trip out that day, in violation of FMCSA -- as directed by **Mr. Curtis**, Lane's supervisor.

_____ ***First***, *see* the Record at *MWCC Transcript R.* 60 - 71 **"Cross-Examination of Employer / Carrier,"** to-wit:

"Q. I want to understand your testimony that you gave in direct, **Mr. Curtis**. You said that on the afternoon of the November the 18th, they wouldn't pay for the shower at home because he is considered at his home base or terminal; is that correct, sir?
A. Correct.
Q. Had he gone -- you tell him to go get a shower. Had he gone to The Flying J, they would have paid him for the time he was taking the shower at the Flying J?
A. Yes.
Q. But **you wanted him to go home so he could save the money to the company**; is that correct, sir?
A. **Correct.**
Q. So in this case on this afternoon, you said you mentioned something about him going to Flying J. He had asked you do you want me to go to Flying J and get a shower, and **you said no, go home and get a shower?**
A. Correct.

Q. So **you gave him a directive in order to save money for the company**. Instead of going to Flying J, go home and get your shower?
A. If that's what he wanted to do during that time.
Q. Well, that's what you told him. That's what you testified earlier you told him to do, **correct, sir?**
A. **Yes.**" [*MWCC Transcript* R. 69]
"**Q. Don't go to Flying J. Go home to take it; is that correct?**
A. Yes.
Q. You're his supervisor?
A. Yes.
Q. You gave him that directive?
A. Yes.
Q. Would he have been given a standard hour for the shower time? How long would he have normally been given had you instructed him to go ahead and get it at The Flying J? How long would he have been given in terms of payment time? Would it have been 45 minutes, an hour, 30 minutes?
A. I think they normally take a half hour to eat and a half hour to shower.
Q. So you would have given one hour then; is that correct, sir?
Q. Well, **would you have paid him one hour for that shower time had you told him to go the Flying J instead of going home?**
A. It would have been an hour. Whatever he put on his log.
Q. And that hour, what would he had been paid? Time and a half?
A. Yes.
Q. Why was it time and a half as opposed to straight time?
A. **They normally work over 50 hours a week**. [Record, p. 70]
Q. And **he had already worked eight hours that day**; did he not?
A. **He should have, yes.** [*MWCC Transcript* R. 71]

_____ ***Second,*** *see* the Record at *MWCC Transcript R.* 25 - 28 "**Direct Examination of Employee, Howard Lane,**" to-wit:
"Q. So had you not gone -- had he not directed you to get a shower that afternoon, you would have stayed right there at the plant waiting on your truck to be loaded?
A. Right.
Q. You would have still been on the clock? Yes or no?
A. Yes.
Q. Did the supervisor direct you to go get a shower?
A. He told me that I could go home and get a shower and be back by six where my truck would be ready to go.
Q. All right, did he give you an option of either going to -- you told us he gave you three different options. Get a shower there at the plant, get a shower at The Flying J, or get a shower at home? . . .
A. He said that **I would have time to go home** and get a shower." [*MWCC Transcript* R. 25- 26]. " * * *

Q. Similar to that afternoon at home, at the site of Hartson-Kennedy, **his directive was go get a shower and report back?**
A. Right.
Q. Did he know approximately how long it would take you to get home and come back from getting that shower?
A. I guess he had an idea. He knew that by that time I left, my truck should be ready by the time I got back, you know. Being an hour and a half, two hours.
Q. Did you have any other plans other than going home to get that shower . . . .
A. No.
Q. Tell the Judge what happened. Approximately what time did you leave?
A. I must have left approximately 3:30 because the accident was reported at about 3:45. [*MWCC Transcript* R. *27*]
Q. . . . **how long were you away** from the Hartson-Kennedy plant?
A. . . . **ten minutes**." [*MWCC Transcript* R. *28*]

Confusion and error below re: Lane's "**on duty**" status stems from *Employer's attorney*'s jumping back-and-forth on the Record **between** [1] **a** *hypothetical day* or **"typical week"** or **"normally"** [MWCC Trans. R. 37, lines 9-14; *aka* Appellees' "H.T. p. 38" lines 9-14 and "H.T. p. 39"] **and** [2]**"the particular Tuesday when the accident occurred** [MWCC Trans. R. 41, lines 21-24]. Rather than rebut each of Appellees contentions, Lane refers to the Record capsuled here and in the *Appellant's Brief, Appellant's Statement of Issues, Case and Statement of Facts.*

_____***Third***, ***Employer's attorney*** inadvertently **admitted** that Howard Lane was "***on duty***" - in this exchange between Lane and Employer's attorney, to-wit:

[Employer's counsel] " Q. But **they told you** that **you had to be clean before** - -
[Howard Lane] A. But **they required you to be clean** and ready to do your job.
[Employer's counsel] Q. Okay, let's talk about the particular Tuesday when the accident occurred. As I understand it, that's November the 18th, 2003."
Id. [MWCC Trans. R. 41, lines 21-24].

Beyond the above said admission that Lane was injured doing as required on his Employer-directed **trip** - - Reversal is due here, and payment of medicals and compensation are further due Lane here, under **three [3] simple truths** here, to-wit: [1] Appellees **admission** that Lane was a "**travelling employee**,"[MWCC T. R.13], [2] Lane was injured on a ***"dual purpose"* trip** [E & M Motel v. Knight] returning, without detouring, in 10 minutes, as *directed* by Mr. Curtis. [MWCC R. 60 - 71], and [3] Lane, an admitted "travelling employee," was injured while performing duties or functions at least ***incidental to*** Lane's ***employment***. See *Jefferson v. T.L. James & Co.*, 420 F.2d 322 (Miss. 1969) covered in *Appellant's Brief.*

II. REPLY TO APPELLEES' STATEMENT OF CASE [and 'statement of the facts']

Appellees' '*Statement of the Case*' and alleged *'facts'* **are** but erred, self-serving **contentions**, without basis in specific fact or testimony. Howard Lane stands by *Appellant's Statement of the Case* and *Statement of the Facts,* rather than redundant rebuttal of Employer's *claims* one-by-one. See the Record and *Appellant's Brief.*

III. REPLY TO APPELLEES' SUMMARY OF THE ARGUMENT

Appellees' "*Summary of the Argument*" are just erred contentions - - contrary to *Appellees' fatal* **admission**, on the Record, overlooked by the MWCC below, that: "We...**admit** that he is a ***travelling employee*** and spends much of his time on the road." [MWCC Trans. **R. 13,** lines 1- 5]. Note: The general "going and coming " rule does **not apply to** Lane, **a traveling employee**. Dunn, Miss. Wk Comp. [3rd Ed.], §175, at p. 215, citing many cases at FN 25 hereof. See the Record and *Appellant's Brief.*

IV. REPLY TO APPELLEES' "ARGUMENT"

1. ***Appellees Admitted that Howard Lane Was a 'Travelling Employee'***

The Record is closed. It is too late to withdraw *Employer's* record **admission** that: "We . . . **admit** that he is a ***travelling employee*** and spends much of his time on the road." [MWCC Trans. **R. 13,** lines 1- 5; aka *App'ees'* "H.T. p. 12"]. As the Good Book says:

"Out of thine own mouth shall thee be judged." **Luke 19:22.**

Appellees' *arguments* are not *'facts'* --- but mere erred, self-serving **contentions** of an *unfaithful Employer*, without basis in [or specific reference to] specific fact or testimony. Appellees' recited cases are factually dissimilar to the facts *sub judice.*

Appellees' *Argument* is baseless contentions fatally-premised on ***hypothetical*** ["What did you **normally?**"MWCC Trans. R. 37, lines 9-14] ***vis-a-vis*** the **"particular Tuesday when the accident occurred**, [Trans. **R. 41,** lines 21-24].

Appellees' *Argument* and contentions are without specific reference to facts in the Record of occurrences *on November 18, 2003* - - such as those painstakingly delineated by Lane here that his accident and injuries *arose out of and in the course of* Employee's dutiful adherence to his Employer's directives *on November 18, 2003.*

Appellees' *Argument* not only is factless - - Appellees' *Argument* also skews and misstates "The Law" with erred "summary assertions" - - rather than correct statements of "The Law" via accurate, verbatim recitals of precedential case *Law.* The weight of Law places the emphasis on the Employee's "home." A ***"traveling employee"*** is generally *in the course of his employment* "from the time he leaves his

home until he returns to his ***home***." See Dunn, [3rd Ed.] § 171 "*Temporary Deviation*" at FN13, citing *Roberts' Dependents v. Holiday Parks, Inc.*, 260 So. 2d 476 (Miss. 1972). See Dunn, [3rd Ed.] § 175 at FN 25, citing Mississippi cases, i.e., *Thrash v. Jackson Auto Sales*, 100 So. 2d 574 (Miss. 1958).

Appellees' *Argument* loses sight of [a] the true facts [vis-a-vis hypotheticals], [b] the true language and [c] true purpose of our Workers Compensation Act. The various facts in cases cited by Appellees are wholly unlike Mr. Lane's facts & circumstances.

Appellees' *Argument*, as the Orders and Findings below, ignore the "***dual purpose doctrine***" of **E & M Motel v. Knight**, 231 So. 2d 179 (Miss. 1970) that is conclusive on all issues here, to-wit:

> "All of these widely-assorted (*dual purpose*) problems can best be solved by the application of a lucid formula stated by **Judge Cardozo** in *Marks [Deps.] v. Gray*, [252 NY 90, 167 NE 181] - - a formula which, when rightly understood and applied, has never been improved upon.
>
> Judge Cardozo said: **"** A servant in New York informs his master that he is going to spend a holiday in Philadelphia, or perhaps at a distant place, at San Francisco or Paris. **The master asks him while he is there to** visit a delinquent debtor and demand payment of a debt. The trip to Philadelphia, the journey to San Francisco or to Paris is not a part of the employment. . . .
>
> **We do *not* say that service to the employer must be the sole cause of the journey**, but at least it must be **a concurrent cause**. . . .
>
> **The test** in brief is this: If the work of the employee creates a necessity for travel, he is in the course of his employment**, though he is serving at the same time some purpose of his own.*** ***"**

Id. **E & M Motel, et al. v. Knight**, 231 So. 2d 179, **at 182** (Miss. 1970).

Wisely, in **E & M Motel**, P. Justice Gillespie and This Court went further and underscored the method and purpose of the ***dual purpose doctrine*:**

> "In applying the foregoing authority [***dual purpose doctrine***] to the present case **the solution must be ascertained by considering *the entire trip*** from Tupelo to Memphis and the return, **not by considering the fractional part of the trip** from Holly Springs to Corinth."

Id. **E & M Motel, et al. v. Knight**, 231 So. 2d 179, **at 183** (Miss. 1970).

Likewise, here, we must consider ***in toto the entire trip*** of [a] Lane's lengthy ***travels*** from Gulfport to Tennessee, and [b] from Tennessee to Gulfport, on November 18, and [c] from Gulfport to N. Biloxi, on November 18, and [d] from N. Biloxi back to Gulfport, on November 18, when injured **in continuation of** Lane's [e] next-scheduled trip, from Gulfport to Tennessee, merely hours later, on November 18, violating limits of Federal Law - - all for **and** as directed by Mr. Lane's Employer: ["Q. You're his supervisor? A.Yes. Q.You gave him that directive? A.Yes."] MWCC *Transcript* Record, p. 71; *Appellees'* "H. T., p. 70." The myopic view below is error.

Lane's injuries are ***compensable*** on three [3] simple grounds, to-wit:

[1] Appellees **admitted** that Lane was their "**traveling employee**,"[MWCC R.13]; [2] Lane was injured on a ***"dual purpose"*** [**E&M Motel**] trip, returning directly, without detour, in 10 minutes, as *directed* by Mr. Curtis. [MWCC Trans R. 60 - 71]; [3] Lane's injuries occurred while this admitted "travelling employee" was performing duties or functions at least ***incidental to*** Lane's ***employment***. See *Jefferson v. T.L. James & Co.*, 420 F.2d 322 (Miss. 1969).

Jefferson v. T.L. James & Co., 420 F.2d 322 (Miss. 1969) holds:

> "An injury occurs '*in the course of the employment* when it takes place within the *period of the employment, at a place where the employee reasonably may be in the performance of his duties*, and while he is *fulfilling those duties* ***or*** *engaged in doing something* ***incidental thereto***, or, as sometimes stated, where he is *engaged in the furtherance of the employer's business.*"

Jefferson v. T.L. James & Co., 420 F.2d 322 (Miss. 1969). See *Appellant's Brief.*

II. Though the General "*going and coming*" Rule is Inapplicable, In This Case, Lane Proved Miller Exceptions [(2), (3) and (7)] that *Swallow the Rule*:

Appellees' *Argument* of an inapplicable, general "*going and coming*" rule here is *factless*, erred, self-serving **contention** of an *unfaithful Employer*, without basis in, or specific reference to specific fact or testimony here. See The Record.

Appellees' *Argument* of an inapplicable, general "*going and coming*" offer inapplicable, dissimilar cases, while Appellees ignore recent, similar cases [i.e., JESCO, INC. v. Douglas Cain, __ So. 3rd __ (Miss. Court of Appeals, April 24, 2007)].

Appellees' recited cases are factually dissimilar to the case *sub judice*. Appellees wrongly attempt to apply an ***inapplicable*** "going and coming rule" to Lane- -an admitted ***"traveling employee"*** to whom "*going and coming rule*" does **not apply**.See *Dunn,* 3rd Ed §175 . . . **Going to and Returning from Work,"** at page 215, to-wit:

> "But the ["going and coming"] rules above discussed **assume** that the employee works regular hours at **a** regular **fixed** locality. Different considerations apply to ***traveling employees***. In such cases traveling itself is a large part of the job, and the employee remains in the course of employment while going from and returning to his home. . . ."

Dunn [3rd Ed.], §175, at p. 215, citing many cases at FN 25. [Emphasis added].

JESCO, INC., et al. v. Douglas Cain, supra, the most recent decision on the subject, ignored by Appellees, supports ***Appellant's*** Brief, filed 4-21-07, the day before said JESCO Opinion. This Court's reaffirmation in JESCO of Miller's seven (7) ***exceptions*** to the general *"going and coming" rule* strengthens Lane's appeal.

Contrary to Employer's false *contentions* here and below [and the misled ALJ's, MWCC's and Court's *Orders* reliant thereon] - - The Record **proof** in the MWCC *Trans. R.* 25-28 and 60-71 **show** Lane ***satisfied even*** a *misplaced burden of proof* put Employee *here*. Though inapplicable to Lane - - Lane proved ***exceptions (2), (3) and (7)*** to the misplaced *general* "going and coming" rule. *See also MWCC Trans. R.* 25 - 28 **"Direct Examination of Employee,"Howard Lane**."

Miller ***exceptions*** **(2)**, **(3)** and **(7)** to said *general rule* are **applicable here: ". . . (2) where the employee performs some duty in connection with his employment at home,"** [i.e., showers, changes, performs tasks incidental to his job; Q. No one suggests truckers arriving from a 9-hour long-trip not clean up before the next 9-hour trip - -1 to 3 hours away], *Dunn*, 3rd Ed. §172, citing *E. & M. Motel*; ***and***

(3) *3rd exception to deniability*: " . . . (3) where employee is injured by some *hazard* or danger which is inherent in the [employment] conditions . . ." *Dunn*, 3rd Ed. §172, citing *E. & M. Motel*: **"The ultimate question** is whether the injury results from a ***risk*** to which the employee is **exposed by his employment."** Dunn, Id., citing *Cook Const. Co. v. Smith*, 397 So.2d 536 (Miss. 1981)] . . ." **and or**

(7) *7th exception to deniability*: ". . . (7) when the employee is on a special mission or errand for his employer, **or** where the **employee is accommodating his employer."** Id. *Dunn*, [3rd Ed.] §172, citing *E. & M. Motel*, Id.

Appellees' Brief wholly ignores ***exceptions*** **(2)**, **(3)** and **(7)**- - proven by Lane.

Appellees' Brief wastes time on ***exceptions*** **(4)**, **(5)** and **(6)** to the *general* "*going and coming* rule" [not applicable to "traveling employees" *E. & M. Motel*, Id] Lane never cited or relied on ***exceptions*** **(4)**, **(5)** or **(6)**. What Mr. Lane *did do* is loyally follow his disloyal Employer's directives ["timely ***travel*** home, shower, change, timely ***travel*** back"]. Thus, incidentally or otherwise, Lane [a] was *exposed* to "the *risks* or *hazards* of the road" [b] while *doing something* ***incidental to*** the performance of his job [Jefferson v. T.L. James & Co., Id.] which resulted in an accident and compensable injuries *in the course of and arising out of his employment*. See *Dunn* [3rd Ed.] §§ 170 -175.

The *general* "*going and coming*" rule was *misapplied* to Lane below. Error mischaracterized and narrowed Lane's *workplace* and *work duties* to one (1) single, fixed place of work [i.e., Hartson's Gulfport, MS parking lot] vis-a-vis the roads and highways where Lane's duties required him to be as a "*traveling employee.*"

The pre-*Duke v. Parker Hannifin* *Fact-Findings* and *Law-Interpretations* in the ALJ's March 2005-Order are Mistaken in view of *Duke v. Parker Hannifin*, and were otherwise inconsistent with the Spirit and Letter of The Miss. Workers Comp Act. On balance [and **on Employer's testimony**] Lane's Appeal must be sustained.

Inapplicable *Rules of Law* and *Standards of Review* were applied to Lane below. As with the Circuit Court's misapplication of an unlawfully-rigid ***Standard of Review*** above, the ALJ failed to use the lesser ***Standard of Proof*** applicable to employees under the Act here set forth in *Retail Credit Co. v. Coleman*, 86 So.2d

666 (Miss. 1956), to-wit:

> "[W]ith reference to the **burden of proof** in compensation cases of this type, the **following test . . . is an accurate definition:** 'In proving that an accident took place in the course of one's employment a claimant is **not** bound by **the preponderance rule or** the rule of **proof beyond a reasonable doubt** as in criminal cases.He is required to prove or **show a state of facts** from it may be **reasonably inferred [employee] was engaged in the Master's business** when the accident took place.'

Retail Credit Co. v. Coleman, 227 Miss. 791, at 800, 86 So.2d 666 (Miss. 1956).

The finding of compensability in *Retail Credit Co. v. Coleman* is the rule "in a majority of jurisdictions," as stated in *P. A. M. Transportation v. Miller*, 750 S. W. 2d 417 (Ark. App. 1988), granting compensation to another "traveling employee" [trucker] "injured while walking across a street."

Employer failed the *standards of pleading and proof*, and failed to carry their burden of *pleading and proving their* unpled *'affirmatives defenses'* of purported 'deviation' by Lane from employer's orders, and of purported "*intervening cause*" of Lane's injuries while about his Employer's instructions and course of employment. *See Appellant's Brief.* Employer failed to carry their burden of *proving* a *risk* of accident did not arise out of and in the course of Lane's employment. In discerning Lane's status relative to his injury, Lane's many duties and Lane's **many-trips *and*** Lane's many ***on-the-job* hours *that* November 18th *day*** were ignored below - - as well as Employer's violations of Law, i.e., *FLSA* and *FMCSA*. *See Appellant's Brief.*

Howard Lane Carried an employee's *lesser burden of proof* that Lane was injured while he was just "following orders" and "about his master's business." Id.

V. CONCLUSION

THE COURT MUST REVERSE AND RENDER OR REMAND TO THE CIRCUIT COURT

The Honorable ALJ, Linda Thompson, was grossly misled by Appellees' prior counsel [i.e.,"meds paid;Lane ok," when not so, when $450K unpaid; Lane crippled], resulting in MWCC and Circuit Court adopting such lies--and following such mislead. ***"A lie can go half-way around the world before The Truth has its boots on."*** ***Proverb.***

Employer's distortions sourcing *fact mistakes* in the March 17, 2005 ***Order of Administrative Judge*** [*MWCC Pldngs R.*16-33] - - are material **mistakes** injected by employer's prior representative [and the impaired Mr. Lane, from ***errors in beliefs***]- - - - resulting in material **mistakes** of *'fact'* and *'law' findings* in said ***Order*** - - wrongly denying Mr. Lane's benefits due under the MWCAct.

The ***first*** material **mistake** of fact, found on the first page of the March 17, 2005 ***Order***, mistaken declares: "***medical benefits were paid*** by a group health insurance policy furnished by employer." Id.[WC Pleadings R. 16]. The ALJ's ***threshold error*** in "fact" findings occurs despite a *contrary* record [at WC Trans. R. 34] where Lane was asked: **"Q. Are all of your medical bills paid right now?"** To which Lane accurately answered: **"A. No, they are not."** [*MWCC Trans.* R.34, line 5-6]. Lane is still being 'dunned.' See *MWCC Depo.* p.78, lines 1-5, R. Ex.'G - 9.' In fact, of $562,594 resulting bills from Lane's 11/18/03 - 8/26/04 medical providers [Cir. Ct. R. 46- 52], $450,000 of Lane's **medical bills** were still **unpaid** on appeal, resulting in providers' refusal of care from 2004 to date. Lane sought, but was denied needed care.

The ***second*** material **mistake** of fact, is in **conflicting** 'fact' findings at p. 3 of the March 2005 *Order* [MWCC Pleadings R.19], *starts* with the *erroneous* finding that:

> ". . . On **Tuesday** he would go home for four to six hours, but he was **free** to do anything he wanted to do. . . " Id.,

and *ends* with the conflicting, but *true*, *fact finding* that:

> "His **free** days were **Friday and Saturday**, when he had no job duties at all, and would return to work again on Sunday." Id. [*Order*, MWCC Pleadings R. 19].

Clearly, and fatal to the denial of benefits here, the ALJ missed the critical fact that Tuesday was not "his free day" ever-- and surely not "his free day" on the Tuesday, November 18, 2003 never-ending-work-day of Lane's injury.

The ***third*** material **mistake** of fact in the ALJ's **conflicting** 'fact' findings is at p. 3 - 4 of said ***Order*** [MWCC Pleadings R. 19], and starts with the *erroneous* finding that :

> "He was free to run personal errands or go to a casino or anything else he wanted to do,"

and ends with the conflicting, but *true*, *fact finding* that:

> **"but** he testified that he did not think **Hartson-Kennedy** would have **wanted** him to do anything **other than** go home and get himself **clean and ready** for **his next run**. He said he was **required to be clean** while doing his work."

Order [MWCC Pldgs, R. 19].

The ALJ's "findings" are erred and conflicting-- mandating *close scrutiny* of *Orders* below, and a reversal and a remand to the Circuit Court to correct errors. The Orders below must be reversed under a relaxed ***Standard of Review*** applicable here under a humanitarian purpose of our compensation law, described by Dunn 3rd Ed., at §32, to-wit:

> "The humanitarian objects of compensation acts should not be defeated by over - emphasis on technicalities or by putting form over substance. [See cases cited at FN 5]. The Act is to be given broad and liberal construction and **doubtful cases are to be resolved in favor of compensation**. [See cases cited at FN 6]."

Dunn, 3rd Ed, at §32, p, 28-29. On The Record, Lane's case is stronger than 'doubtful' and as strong as Cain,Leslie, Stepney, Roberts, Duke, Seay, Coleman, Thrash and Knight.

The MWCC and Circuit Judge ***forgot*** such guiding ***Standards***, wrongly '**rubber-stamped**' a misled ALJ's factual and Law errors, forgetting:

> "[A}n injury occurs '*in the course of the employment* when it takes place within the *period of the employment, at a place where the employee reasonably may be in the performance of his duties*, and while he is *fulfilling those duties* ***or*** *engaged in doing something* ***incidental thereto***, or, as sometimes stated, where he is *engaged in the furtherance of the employer's business*."

Jefferson v. T.L. James & Co, 420 F.2d 322 (Miss. 1969), citing 58 Am Jur 720 *Wk C.* 212.

Minimally, Howard Lane's '**dual purpose**' trip was at least '**incidental**' **to** Lane's job and his Employer's directions, and not "completely unrelated to his employment duties" - - a distortion *continued here*, in Appellees' Brief, at page 13.

The Law must reward Lane's dutiful attention to his job as a **loyal**, obedient, honest and "*hardworking, miracle employee*" [*MWCC Transcript* R. 60 -71] working straight through on November 18, 2003 to "serve his master's business."

The Law must not reward such disloyal, out-of-state *Employer and Carrier* who abandon their longtime, crippled employee, broken, facing a $ Half Million in past, unpaid medical bills, while continuing to distort the Law, facts and The Record.

As is written: I have fought a good fight, I have kept the faith. II *Timothy*, 4:7.

He that is not with me is against me. *Luke*, 11:23.

United we stand, divided we fall. Ben Franklin, *1776.*

Howard Lane respectfully asks this Court:

I. Reverse the Orders *below* denying relief and render judgment, *inter alia,* awarding to Appellant all benefits due under the MWCAct, **or**

II. Reverse the Orders *below* denying relief and remand this case back to The Circuit Court for proper determination and award of Howard Lane's medical bills,

compensation, rehabilitation, fees and other MWCAct benefits due Mr. Lane.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Appellant's counsel certifies that I have mailed, postage prepaid, via U. S. Mail, a true and correct copy of the foregoing ***Reply Brief of Appellant*** unto: Stephanie Taylor, Esq., James Streetman, Esq., Scott, Sullivan, Streetman & Fox, Appellees' current counsel, P. O. Box 13847, Jackson, MS 39236, and Hon. Kosta N. Vlahos, Circuit Court Judge [*Retired*], P.O. Box 7575, Gulfport, MS 39506.

This the 10th day of August, 2007.

_____
Matt G. Lyons [MSB:[redacted]

It's the Employer and Carrier's contention that at that time he was not within the course and scope of his employment. We will admit that he is a travelling employee and spends much of his time on the road. However, travelling employees are covered from the time they leave their home base until they return to their home base. Mr. Lane had returned to his home base in this case. He was on a personal mission at the time the accident occurred. Therefore, he was not in the course of his employment.

About the secondary issues, we feel that all issues should be determined today as far as temporary disability and permanent disability. Both parties put on their pretrial statements that permanent disability was an issue. You will find that when you look at Mr. Lane's deposition testimony, which has been entered into evidence, that Dr. Jordan has told him he could come back as needed, and he hasn't seen Dr. Jordan since May of 2004. Dr. Smith has also told Mr. Lane that he could come back as needed, and he hasn't seen any specialist since May of 2004, over eight months. The only doctor he is seeing now is Dr. Curtis Broussard, who is a family practice doctor, and the only thing Dr. Broussard is doing is managing his medication. Whenever Mr. Lane runs out of medication, he goes to see Dr. Broussard, who refills his prescriptions.

leading.

BY ADMINISTRATIVE JUDGE THOMPSON: No, that's okay.

BY MR. SKELTON: (Continuing)

Q. Did you have conservation with Mr. Lane that day?

A Yes.

Q. Okay, can you tell me what the content of that conversation was? What was said between you and Mr. Lane?

A He asked me could he wait or did I need him to wait and take a shower on the road and eat. I said no. It's going to be a while before your load is ready. You can go home and take a shower and eat.

Q. Why didn't you want him to wait?

A Because he didn't need to be on the clock, and Hartson-Kennedy didn't need to pay for him to sit there.

Q. What would they have paid him for the amount of time if he had sat there in between the time he turned in his receipt and his next load was ready?

A He would have been paid time and a half for the hours he sat there, and, of course, the shower and his meal.

Q. Okay, and so why did you tell him -- or what did you tell him to do now?

A He needed to go home.

Q. And why did you tell him that?

A Because he didn't need to sit at Hartson- Kennedy on the clock.

Q. Okay, are you familiar with how Mr. Lane's compensated while he's on the road?

A Yes.

Q. When he's on the road, tell me when he is compensated? When is he paid his hourly rate?

A Driving, making his drops, and he is also paid when he takes his showers and eat.

Q. He is paid for the time he is actually taking showers?

A Yes.

Q. And when is he not paid while he is on the road?

A Sleeper berth or off duty.

Q. Okay, what would off duty consist of?

A After he gets to his final destination, he will take a shower and eat, I'm assuming, and then he will go off duty when he gets back in his truck.

Q. Okay, and that time he is either sleeping or just doing whatever he wants to do?

A Yeah.

BY MR. SKELTON: Okay, that's all the questions I have.

CROSS-EXAMINATION

BY MR. WETZEL:

Q. You said he gets paid for when he's showering?

A Yes, sir.

Q. Okay, and so how long would he have been paid for the shower on the afternoon of November 18th of '03?

A He gets paid for the showers on the road.

Q. But you won't pay him for the shower that he had to go home and take?

A Not at the home terminal.

Q. That's just something that Hartson-Kennedy says that

if you have to shower at the home terminal, we won't pay you for that period of time, but we'll pay you while you're on the road?

BY MR. SKELTON: I'm going to object to showering at home terminal --

BY MR. WETZEL: May I ask the question. If you have an objection, point it to the Judge, please?

BY ADMINISTRATIVE JUDGE THOMPSON: Okay. Hold on. All right, would you mind just starting over with that question.

BY MR. WETZEL: I'll be happy to.

BY MR. WETZEL: (Continuing)

Q. Is it Hartson-Kennedy's policy that we will pay you for your shower on the road, but we won't pay you at the home terminal; is that what I understand you to say, Jay?

BY MR. SKELTON: Objection, because there is no shower at the home terminal. He is talking about at home. I assume.

BY ADMINISTRATIVE JUDGE THOMPSON: Can you just elaborate a little bit to make it perfectly clear?

BY MR. WETZEL: Well, I need to know the substance of his objection. If his objection is to the form -- I mean it's not whether he can understand the question. It's whether the witness can understand the question. He has not given any substantive objection.

BY MR. SKELTON: -- a fact that not in evidence if he showered at the terminal.

BY ADMINISTRATIVE JUDGE THOMPSON: Wait. If

you could just rephrase it to be a little more specific about where the truck is and where the shower is.

BY MR. WETZEL: (Continuing)

Q. I want to understand your testimony that you gave in direct, Mr. Curtis. You said that on the afternoon of November the 18th, they wouldn't pay for the shower at home because he is considered at his home base or terminal; is that correct, sir?

A Correct.

Q. Had he gone -- you tell him to go get a shower. Had he gone to The Flying J, they would have paid him for the time he was taking the shower at The Flying J?

A Yes.

Q. But you wanted him to go home so he could save the money to the company; is that correct, sir?

A Correct.

Q. So in this case on this afternoon, you said you mentioned something about him going to Flying J. He had asked you do you want me to go to Flying J and get a shower, and you said no, go home and get a shower?

A Correct.

Q. So you give him a directive in order to save money for the company. Instead of going to Flying J, go home and get your shower?

A If that's what he wanted to do during that time.

Q. Well, that's what you told him. That's what you testified earlier you told him to do, correct, sir?

A Yes.

Q. Don't go to Flying J. Go home to take it; is that correct?

A Yes.

Q. You're his supervisor?

A Yes.

Q. You gave him that directive?

A Yes.

Q. Would he have been given a standard hour for the shower time? How long would he have normally been given had you instructed him to go ahead and get it at The Flying J? How long would he have been given in terms of payment time? Would it have been 45 minutes, an hour, 30 minutes?

A I think they normally take a half hour to eat and a half hour to shower.

Q. So you would have given one hour then; is that correct, sir?

A I don't understand what you're saying. Giving him an hour?

Q. Well, would you have paid him one hour for that shower time had you told him to go to Flying J instead of going home?

A It would have been an hour. Whatever he put on his log.

Q. And that hour, what would he had been paid? Time and a half?

A Yes.

Q. Why was it time and a half as opposed to straight time?

A They normally work over 50 hours a week.

Q. And he had already worked eight hours that day; did he not?

A He should have, yes.

Q. So you would have had to pay him time and a half over eight any way in a one day period of time?

A No, sir.

Q. You don't pay time and a half after eight on a straight day, in a one day period?

A No, sir.

Q. You don't?

A It's overtime after 40.

Q. Okay, how do you have him log that time on his DOT logs for that, let's say, two hour period of time when you told him to come back around, I think you said, 5:00 to 5:30. How would you have had him log in that time on his DOT log?

A He logs off duty.

Q. Off duty as being rest time?

A Off duty as to where he could do whatever he wanted to do.

Q. Well, do you understand what I'm talking about when I am talking about DOT requirements? Or do you understand what I'm talking about as a commercial driver what you are required? He had already driven eight hours. He's only entitled -- he has to have -- he can only drive 10 continuous hours?

A Right.

Q. Then he has to have how many hours of rest?

A Eight.

Q. So if he had had eight hours that he had already

driven that day, he could only drive two more hours?

A Correct.

Q. So the period of time that he had, the two and a half hours that afternoon when you told him to go get a shower, he would have to log that as part of his rest time to meet the DOT requirements; would he not?

A That is logged off duty. He is not on the clock?

Q. Yes, sir, I understand it's off the clock. But it's still rest time under the DOT, so he can use that as part of his what, his eight hours of rest?

A Yes.

Q. That would have been part of his rest time under DOT standards, correct, sir?

A Yes.

BY MR. WETZEL: That's all I have. Thank you, Jay. I appreciate it.

REDIRECT EXAMINATION

BY MR. SKELTON:

Q. If I understood your testimony correctly, you told -- and correct me if I'm wrong -- Mr. Lane to go home and shower in your exact words, if that's what he wanted to do?

BY MR. WETZEL: I'm going to object as redirect on this --

BY ADMINISTRATIVE JUDGE THOMPSON: Overruled.

BY MR. SKELTON: (Continuing)

Q. Is that your testimony?

A Yes, sir.

Q. What would have been the consequences if he had not gone home and showered that day?