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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify that the following persons have an interest in the outcome of this case. These representations are made in order that The Court may evaluate possible disqualification or recusal.

A. Howard Lane, Appellant, and wife, Linda Rogers Lane;

B. Hartson-Kennedy Cabinet Top, Inc., Marion, Indiana, Appellee;

C. Royal Indemnity Company, Appellee;

D. Counsel for Appellant, Matt G. Lyons, Esq. and James K. Wetzel, Esq.;

E. Counsel for Appellee, Robt. W. Coleman, Jr., Esq. and Scott, Sullivan, Streetman & Fox, P.C.,

F. Lane's unpaid treating Physicians, Hospitals and Medical Providers, i.e.,

1. American Medical Response South, Gulfport, MS
2. Garden Park Medical Center, Gulfport, MS
3. Gulf Coast Medical Center, Biloxi, MS
4. Coastal ENT Associates, (Dr. Vincent Pisciotta), Gulfport, MS
5. Dr. Theodore F. Jordan, Orthopedics, Gulfport, MS

6. Cardiovascular Consultants, PLLC, Biloxi, MS

7. Turner Drugs, D'Iberville, MS

8. Gulf South Radiology, P.A., Biloxi, MS

9. Dr. Robert T. Watts, Jr., Biloxi, MS

10. Dr. Terry Smith, (Spinal & Neurosurgery) Biloxi, MS

11. Open MRI, LLC [Compass Site], Gulfport, MS

12. SouthCoast Pathology Services Group, Gulfport, MS

13. SMB Radiology, Gulfport, MS

14. Dr. Curtis Broussard, Gulfport, MS

15. Dr. Amy Rose, Surgeon, Biloxi, MS

16. Dr. Jack Q. Causey, Gulfport, MS

17. T-D Pharmacy, Gulfport, MS.

18. Ameripath Mississippi, Inc., Jackson, MS

19. Southern Physical Medicine, Jackson, MS [James Williams, II MD.]

20. Dr. Michael Winkelmann, MD., PA., Jackson, MS

21. Dr. Stuart Yablon, MD, Jackson, MS

22. Dr. Rahul Vohra, MD., PA, Jackson, MS

23. University Radiology Associates, PLLC, Jackson, MS

24. Mobility Medical, Inc., Jackson, MS

25. Anesthesia Solutions of Biloxi, MS

26. MS Methodist Rehabilitation Center, Jackson, MS

This the 21st day of April, 2007.

Matt G. Lyons, Of Counsel For Appellant

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Statement of the Issues

I. Whether Howard Lane was *acting in the course and scope of his employment* when he was injured in a truck collision on November 18, 2003, such as Mrs. Duke in *Duke v. Parker Hannifin Corp.*, 925 So. 2d 893, (Miss. App. Nov. 22, 2005), and/or whether the "*going and coming*" rule is applicable in this case?

II. Whether 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/or otherwise Inconsistent with the Spirit and Letter of The MWCAct?

III. Whether the *general* "*going and coming*" rule was *misapplied* here, and/or whether error mis-characterized 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*"?

IV. Whether Inapplicable *Rules of Law* and *Standards of Review* were applied?

V. Whether 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?

VI. Whether Employer Failed to Carry their Burden of *Proving* that the *Risk* of Accident and Injuries Did Not Arise out of and in the Course of Lane's Employment?

VII. Whether Applicable, Correlating Federal Laws [*FLSA* and *FMCSA*] were Ignored In Determining this Employee's Work Time and Work Status Relative to His Injury?

VIII. Whether Mr. Lane Carried an Employee's *Lesser Burden of Proof* That Mr. Lane Was Injured while he was "Following Orders" or "About His Master's Business"?

Statement of the Case

Howard Lane, a truck-driver/employee for Hartson-Kennedy Cabinet Top, Inc., appeals a final order ["Opinion and Order" dated November 30, 2006] of the Circuit Court of Harrison County, First Judicial District, Mississippi. This Court has jurisdiction pursuant to Mississippi Code Annotated § 71-3-51. An Administrative Judge denied Mr. Lane's claim for medical, compensation and other benefits under the Mississippi Workers' Compensation Act by March 17, 2005 *Order.* The Mississippi Workers' Compensation commission affirmed the decision of the Administrative Judge by October 27, 2005 *Order.* Said Circuit Court affirmed the MWCC.

Statement of the Facts

On November 18, 2003, at about 3:45 p.m., Howard Lane, a "hardworking" eight [8] year+ truck-driver employee of Hartson-Kennedy Cabinet Top, Inc., innocently suffered permanent, total, debilitating injuries and resulting loss of wage earning capacity and consequential, unpaid, medical bills totaling about $ 565,000.00 since 11/18/03 when his westbound truck was struck head-on by a speeding, eastbound truck operated by a drunk, uninsured motorist, who died on impact with Lane's truck.

"The parties have stipulated that Mr. Lane did indeed suffer a motor vehicle accident on November 18th of 2003 and that he suffered serious injuries as a result. The parties have also stipulated that Mr. Lane's average weekly wage on November 18th of 2003 was $935.20." [MWCC Transcript Record, page 4, lines 20 - 25.]

2. Appellant timely submitted all claims to the Appellees, to no avail, and then timely filed the same before the MWCC, as did Appellant's treating physicians, hospitals and other medical providers in Harrison County, Hinds County and other Mississippi locales, all without success, leaving about $450,000 in unpaid medicals to now. Thus, timely, Mr. Lane filed a *Petition to Controvert* on January 14th of 2004 alleging that on November 18th of 2003 he suffered a work-related motor vehicle accident and resulting injuries to his nose, jaw, wrist, collar bone, neck, ankle, legs and back." [MWCC Transcript Record, page 4, lines 10 - 15]. As a result, part of Appellant's feet were amputated. Id.

3. "The Employer and Carrier [Appellees herein] erroneously denied the compensability of Mr. Lane's injury and accident and contends, without having pled the

'affirmative defense' that Mr. Lane 'deviated' from his work, and 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." [MWCC Transcript Record, page 4, lines 15 - 19].

4. On January 12, 2005, a Hearing was conducted by MWCC Administrative Law Judge Linda Thompson, resulting in the *MWCC's Official Record Transcript* herein.

5. On March 17, 2005, the ***Order of Administrative Judge*** was filed, finding erroneously, among others, that Lane's "medical bills were paid by Hartson-Kennedy's group carrier," when Lane's medical bills [MWCC Pleadings Record, p. 47 - 52] were, in fact, not paid. [See dunnings by Lane's health providers --MWCC Depo. Transcript p. 78, line 1 - 5, Ex. "G - 9," MWCC Exhibits filed herein]. Further fatally-erred was the ALJ's conflicting finding, on a key issue, "that Mr. Lane was injured on his [purported] **"free day"** [Tuesday] when in fact Mr. Lane only had Saturday and Sunday "off work," and had already worked all day that Tuesday driving loads for Hartson-Kennedy from Tupelo to Gulfport, while making stops for his employer along the way, returned to Gulfport at about 3:00, only to then ordered to travel home, clean up and back for 4 or 6, to wait on and take out on the road to Tenn., another load for Hartson. Mr. Lane was injured traveling back "about his Master's business, less than 3 miles from his next load. The following ***record*** defeats the ALJ's erred Order denying Mr. Lane all benefits, to-wit: See *MWCC Transcript Record*, pgs. 60 - 71,**"Cross-Examination of Employer/ Carrier" (Mr. Curtis)** 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 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." [*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. [*MWCC Transcript* Record, p. 71]
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]

6. On October 27, 2005 the MWCC affirmed the ***Order of Administrative Judge***.

7. On November 8, 2005, Appellant timely filed his **Notice of Appeal** to the Harrison County Circuit Court, First Judicial District, in Gulfport.

8. On November 22, 2005, ***The Mississippi Court of Appeals*** rendered Duke v. Parker Hannifin Corp., 925 So. 2d 893 (Miss. App. Ct. 2005), a decision contrary to the findings and ***Order of Administrative Judge*** affirmed by the MWCC.

9. On October 9, 2006 Oral Argument was had before Harrison County Circuit Court J. Kosta N. Vlahos [now officially retired[.

10. On November 30, 2006 an "***Opinion and Order***" "prepared by" Appellees' counsel, was unilaterally sent to the Circuit Judge, *without* Appellee or Clerk mailing copies to Appellant's counsel, in violation of MRCP 5 (a) and Unif. Circ. Ct. R. 11.05, and same summarily signed as unilaterally submitted, verbatim, *without* changes by the Circuit Court, *without* opportunity for review and correction by Appellant's counsel.

11. From *errors of fact and law* in the record, the ***Order of Administrative Judge*** affirmed by the MWCC, and Circuit Court's said ***Opinion and Order***" Mr. Lane ***Appeals***.

Summary of the Argument

Howard Lane is clearly and cleanly covered by the Mississippi Workers' Compensation Act. First, whether he now or ever fully realized it, Mr. Lane was not truly 'released' from all of his employment duties and obligations on *Tuesday*, November 18, 2003. Mr. Lane was "on the job" ***Tuesday*** morning, November 18, 2003, when he left Tupelo, Mississippi. Mr. Lane was "on the job" ***Tuesday*** afternoon, November 18, 2003, as he arrived at Hartson's Gulfport plant from North Mississippi, at **3:00 p.m.** and when Lane was instructed by **Mr. Curtis**, his employer-supervisor, to *travel* home and clean up and ***travel*** back and to be clean and ready to wait and take the next truck load out again.

Mr. Lane was "on the job" ***Tuesday*** afternoon, November 18, 2003, at **3:45 p.m.** when Mr. Lane was injured while *traveling* in obedience to the employer's instructions and directions. See *MWCC Transcript Record*, pgs. 60 - 71,**"Cross-Examination of Employer/ Carrier" (Mr. Curtis)** 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 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." [*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. [*MWCC Transcript* Record, p. 71]

Mr. Curtis' testimony above in no way meant that Howard Lane was "off work" or "released from work" or "excused from his employment duties." In the trucking vernacular, Howard Lane was "**under dispatch**" and **under his employer's control** and directives to "***travel*** home, clean up and ***travel*** back and be clean, ready, waiting for the next trip out.

Here, Hartson not only failed to comply with State Law [MWCAct] Hartson also did not comply with *Federal Law*, namely, the *Federal Motor Carrier Safety Act* of 1935, 49 CFR §§ 390 - 396, particularly § 395 Use of Fatigued Drivers, and the *Fair Labor Standards Act* [FLSA], 29 USC §§ 201, et seq. See scope of FLSA's coverage, to-wit:

"Fair Labor Standards Act (FLSA)**: 'Covered employees must be paid for all hours worked in a work week.** In general, **compensable hours worked include** all time an employee is on duty **or** at a prescribed place of work **and any time that an employee is suffered or permitted to work.** This would generally **include** work performed at **home, travel time, waiting time,** and probationary periods.' "

FLSA, 29 USC §§ 201, et seq. *See MRAP 28 (f) Addendum Reproduction of Laws herein.*

Yet, the fact Hartson unlawfully failed to pay Howard Lane for his time is not the *primary* issue here, but only an underlying point illustrating that Mr. Lane was not "off the clock" under *State Law*, The MWCAct, or *Federal Law*, namely, *Fair Labor Standards Acts* and *Federal Motor Carrier Safety Act*, and that Mr. Lane never realized he was not "off the clock" under State and Federal Laws germane to Lane's Appeal here.

The fact Mr. Lane never realized the true meaning of "off the clock" or "off duty" is clear on the Record here [MWCC Transcript *Record*, pgs. 25-28 and 60-71] is immaterial. As in Dragnet, only the facts, the material facts, count here. Second, Mr. Lane was empowered and directed by **Mr. Curtis** to perform his job in his own way [to ***travel*** home to clean up and ***travel*** back and be ready to take the next truck load out again ***or*** clean up while *traveling* on the road]. **Mr. Curtis**, Mr. Lane and employer's counsel testified that Mr. Lane had the authority and duty to ***travel*** home, get clean and ***travel*** back - - clean and ready by a certain time for the next load out. Mr. Lane unwittingly attempted to save his employer time and money by *traveling* home and back in less than 30 minutes on Tuesday, 11-8-2003.

Lane was, as Hartson's "long-haul trucker," subject to said Federal Laws and was

a ***traveling employee*** under the MWCAct. All testified that Mr. Lane was required by his employer to clean up after his Tuesday morning trip to Gulfport, and he was directed to ***travel*** home and back to clean up to be ready to take the next truck load out again, ***or*** clean up while ***traveling*** on the highway, Tuesday afternoon. All testified that the purpose of timely and frugally cleaning up and standing ready not only served his employer's interests, but was required by his work. Mr. Lane followed orders and made a decision to use his time, and his company's time and money, wisely, and to ***save time and money*** *while the truck was being loaded by timely* ***traveling*** to-and-from Lane's home to serve his employer, Hartson, and to accomplish his employer's assigned work-related tasks of timely and frugally cleaning up, and timely and frugally ***traveling back***, to wait and be ready to take the next truck load out. Mr. Lane was undeniably within the coverage provided by the Mississippi Workers' Compensation Act as defined in *Duke v. Parker-Hannifin* and *Jefferson v. T.L. James*. ***Order*** was within the period of his employment, at a place where Mr. Lane was ordered to be and would reasonably be in the performance of Mr. Lane's company's duties and interests, while fulfilling Mr. Lane's company's duties and interests, and undoubtably, dutifully and frugally furthering the business of Mr. Lane's employer.

Third, *even if* it is found that Howard Lane was "going and coming" within the meaning of *Miller*, then Lane clearly and cleanly met ***multiple exceptions*** set out in *Miller*. Mr. Lane was injured at the instant he was returning to Hartson's plant as Ms. Duke in *Duke v. Parker-Hannifin*. Every minute, nickel and dime saved by employees like Howard is vital to the profitable operations of Hartson, *Parker Hannifin* and every company. Hartson's ability to please its customers with clean, timely deliveries, is vital in their competitive world. Hartson had an interest in the safe, clean and timely travel of Mr. Lane.

This Court has repeatedly held that extensive injuries, medical bills and impairments sustained by ***traveling employees*** acting 'on orders' as Mr. Lane arises out of and in the course of Mr. Lane's employment.

Mr. Lane's claim and extensive, unpaid medical bills should be paid under the beneficent purposes, spirit and letter of MWCC Act.

Argument

I. Howard Lane Was Never Relieved From Employment Duties and Assignments at Any Time During Tuesday, November 18, 2003 and Was Performing His Assigned Job Duties at the Time of Lane's Injury. Therefore, Mr. Lane's Injuries are Compensable and Medical Bills Payable Under the Mississippi Workers' Compensation Act.

Howard Lane was never, at any time during that Tuesday, November 18, 2003, truly and fully "released" from his work assignments and employment duties ["go on and travel home, clean up, travel on back here this afternoon and be ready for the next load out"]. "Compensation shall be payable for disability or death of an employee from injury . . . arising out of and in the course of employment, without regard to fault as to the cause of the injury." Miss. Code Ann. § 71-3-7.

The Court of Appeals for the Fifth Circuit in the Mississippi case of *Jefferson v. T.L. James & Co.*, stated that "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), citing 58 Am.Jur. 720-21, *Workmen's Compensation*, §§ 212.

Howard Lane was "on the job" all Tuesday morning, November 18, 2003, when he left Tupelo, Mississippi. Howard Lane was "on the job" all Tuesday afternoon, November 18, 2003. Howard Lane was "on the job" Tuesday afternoon, November 18, 2003, at **3:00 p.m.** when Howard arrived at Hartson's Gulfport plant from North Mississippi, and when Howard was instructed by **Mr. Curtis**, his employer-supervisor, to ***save time and money***, *while the truck was being loaded,* by timely ***traveling*** home, to accomplish Mr. Lane's

employer's assigned work-related tasks of ***timely and frugally cleaning up***, and timely ***traveling back*** to the plant in order, to serve the further end purpose of being ready *to* timely ***travel*** out at **6:00** p.m. with the next load to Mr. Lane's employer's customers. See *MWCC Transcript R.* 60 - 71, **"Cross- Examination of Employer/Carrier"** hereinafter. 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 stand ready for the next load out-- as instructed by **Mr. Curtis**, his employer-supervisor. See *MWCC Transcript R.* 60 - 71 **"Cross- Examinationof 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?
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Q. Well, that's what you told him. That's what you testified earlier you told him to do, **correct, sir?**
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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]

The general rule is that dangers encountered by employees while traveling to work in the morning and returning to their home in the afternoon, off employer's premises, are not covered by the Mississippi Workers' Compensation Act. *Miller Transporters, Inc. v. Dependants of Seay*, 350 So. 2d 689, 691 (Miss. 1977).

In this case, Mr. Lane's job, orders and tasks were not a normal "9 to 5" workday's activities, when injured. Lane's Tuesday 11-18-03 workday was an non-stop workday.

As **Mr. Curtis** testified for employer in *above* record, *MWCC Transcript R.* 60 -71, **Howard Lane** was ***still* working under the directives and control of his employer** when **Mr. Lane** was directed to ***travel*** home, clean up, ***travel*** back, be ready for the next load,

As **Mr. Curtis** testified *above*, Mr. Lane was ***still* working under the directives and control of his employer** when Mr. Lane attempted to fulfill his employer's directives to ***travel*** home, clean up, ***travel*** back and be ready for the next load - - right up to the moment of Mr. Lane's injury ***traveling back*** to Mr. Lane's employer's plant.

Mr. Lane's case falls within the well-settled rule that employees are within the course of his employment, **from the time he leaves his home base until the time he returns** to his home base, when he is ***traveling*** on the instructions or business of his Employer. See *Dependants of Roberts v. Holiday Parks, Inc.*, 260 So.2d 476, 478 (Miss. 1972).

Further, when the "business or work of an employee necessitates ***travel***, then the employee will be covered from the time that he leaves home until such time as he returns home." *Financial Inst. Ins. Serv. v. Hoy*, 770 So.2d 994, 998 (Miss. Ct. App. 2000).

Mr. Lane's work, as an ***over-the-road trucker***, by its nature was not a standard "*going* to work in the morning *and coming* home in the afternoon "9 to 5" type job."

Mr. Lane's work, as an ***over-the-road trucker***, by its nature ***necessitated*** the ***travel*** risks or street risks that led to his injury. The Court of Appeals explained further in *Hoy* that "as long as the injury 'results from a risk which is inherent in the nature of the employment, **or** which is reasonably incidental thereto . . . ,' the employee will be covered." *Id.*

Mr. Lane was 'within the course of his employment' and his ***travel*** to and from home to clean up and ***travel*** back to the plant to wait on the next load 'was on the business of his employer.' In *Retail Credit Co. v. Coleman*, Mr. Coleman was a field investigator for Retail Credit Company. *Retail Credit Co. v. Coleman*, 86 So.2d 666 (Miss. 1956). Coleman was ***traveling*** while investigating insurance claims. At about 9:30 or 10 p.m. the night of his death, Coleman stopped into 51 Grill to eat a sandwich. He ate his sandwich while talking to a waitress he knew there. He then visited at a table with two former college classmates. He drank two cans of beer and didn't leave Grille 51 until midnight. While driving back towards his home, Coleman was killed in a one-vehicle accident. The Court found that, as a *traveling employee*, it was necessary to stop and eat. They also found that the **two-hour** personal visit with college buddies was simply a "temporary deviation from the business purpose of his trip to Durant." *Id.* at 670. "'A business destination remaining to be reached, you have the clearest kind of coverage' of the employee on the trip back to his headquarters in Kosciusko." *Id.* Lane was within the coverage provided by the Act. See

MWCC Transcript R. 25- 28 **"Direct Examination of Employee,"[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]

As in *Duke v. Parker Hannifin Corp.*, 925 So. 2d 893, (Miss. App. Nov. 22, 2005), Howard Lane was *acting in the course and scope of his employment* when injured *traveling* back to the plant at 3:45 p.m., on his never-ending-workday, Tuesday, November 18, 2003.

As *Jefferson v. T.L. James*, Lane was within the period of his employment, at a place where he would reasonably be in the performance of his duties, while fulfilling his instructed duties, undoubtably *accommodating or furthering the business of his employer.*

Howard Lane's compensation, medical bills and other benefits should be paid here.

II. If it be Found that Howard Lane was "Going and Coming" within the *General Rule* of *Miller* - - Mr. Lane Still Meets Multiple *Miller Exceptions*.

The general "going and coming" rule was *misapplied* here in denying Mr. Lane benefits under the Act. See March 17, 2005 ***Order of Administrative Judge*** [MWCC Pleadings R. 27 - 32]. Lane was a ***"traveling employee"*** to whom such "going and coming rules" do not apply in this case. See Dunn, *Mississippi Workmen's Compensation*, [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 base.*"* Dunn [3rd Ed.], §175, at p. 215, citing cases at FN 25. [Emphasis added].

Like Ms. Duke in *Duke v. Parker Hannifin Corp.*, 925 So. 2d 893 (Miss. Nov. 22, 2005) and *many* other similar, Mississippi cases - - Mr. Lane was injured while acting [" ***traveling***"] within the course of his employer's instructions. See *Dunn* [3rd Ed.], §175.

Mr. Lane's risks and resulting injuries and medical care arose out of and in the course of his employment status as a "***traveling*** employee" [trucker] for his Employer - - while obeying his employer's directions [go travel home, clean up, travel back, to be ready for the next load out at 4 or 6 p.m.]. See Dunn, §§170-176, and *Duke v. Parker Hannifin.*

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).

Mr. Lane's *workplace* and *work duties* were mis-characterized and ***erroneously narrowed*** to a single, fixed place, Hartson's Gulfport, MS-plant, *vis-a-vis* the roads where Lane's ***traveling* orders, duties and activities** required him to be as a "*traveling employee*" on Tuesday, November 18, 2003, *from-dawn-through-dusk. Miller Transporters, Inc, v. Dependants of Seay*, 350 So.2d 689, 691 (Miss. 1977) held that, ***in general***, "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 . .." Id.

However, also in *Miller,* The Court also observed that there are ***multiple exceptions*** to the ***general rule*** of *Miller.* There and in other like cases, This Court explained the ***multiple exceptions*** to the general "going and coming rule," *inter alia*, the following *specific,* ***applicable exceptions*** here - each satisfied by Lane's proof-in-the-record, to-wit:

A. **". . . (2) where the employee performs some duty in connection with his employment at home,"** i.e., showers, changes, performs tasks in preparation for a trip;

B. **"or . . . (3) where employee is injured by some *hazard* or danger which is inherent in the [employment] conditions [traveling]. . . ."** See *Dunn*, [3rd Ed.] §172, citing *E. & M. Motel, et al. v. Knight*, 231 So. 2d 179 (Miss. 1970)**: "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. Inc. v. Smith*, 397 So.2d 536 (Miss. 1981);

C. ."**or . . . (7)** when the employee is on a special mission or errand for his employer, **or where the employee is accommodating his employer."** *Cook*, Id.

Mr. Lane obeyed employer's orders [*travel* home and back 'to **save** us **money**'- [MWCC *Transcript* R. 60 -71], and was *exposed* to "*risks* or *hazards* of the road," resulting in injuries *in the course of and arising out of his employment. Dunn*, §§170 -175.

Mr. Lane satisfied an inapplicable *burden of proof misplaced* on employee here. Mr. Lane proved *"exceptions (2), (3) and (7)"* to an inapplicable, misplaced "going and coming" rule, as is conclusively shown by the record [*MWCC Transcript R.* 60-71, "Cross-Examination of Employer/Carrier" and *MWCC Transcript R.* 25- 28 "Direct Examination of Employee - Howard Lane"] and the applicable Mississippi cases cited here.

Mississippi's highways, roads and alleys are ***traveling employees'*** [truckers'- - like Lane was that **Tuesday**] "workplace." Dunn, Id. Mr. Lane, as a ***traveling employee*** was "generally *in the course of his employment 'from the time he leaves his home until he returns to his home.*" Dunn, Id. More so than *Duke* at the instant of *Duke*'s death, Howard Lane was a ***traveling employee***, accommodating his employer, ***obeying orders*** and job duties when Mr. Lane was injured. [*MWCC Transcript* R. 60 -71].

The essential facts on **Tuesday**, November 18, 2003, of

[a] the job activities Mr. Lane was ordered to do on **Tuesday**, November 18, 2003,

[b] the job activities Mr. Lane had to do on **Tuesday**, November 18, 2003, and

[c] the job activities Mr. Lane attempted on **Tuesday**, November 18, 2003, - - - -

are the critical, material, determining facts here. [*MWCC Transcript* R. 60 -71].

Fact is that Mr. Lane's **Tuesday**, November 18, 2003 job duties and activities are ***different from*** and ***more than*** his "normal" job duties and activities [and others' job duties] attempted to be shown as the "norm." See all that testimony in the record spent on "what one normally would do, what he used to" - - as opposed to what Mr. Lane [a] was directed to do, and [b] what he had to do, and [c] what he did, on **Tuesday**, November 18, 2003. [*MWCC Transcript* R. 60 -71].

The simple fact (in the record) is Mr. Lane traveled ***as directed*** and was injured while *traveling* as ordered by Lane's supervisor, **Mr. Curtis**. [*MWCC Transcript* R. 60 -71].

The simple fact (in the record) is that the stated purpose for **Mr. Curtis** giving Mr. Lane those instructions was not strictly "*personal*" - - but "***to save the company time and money.***" [*MWCC Transcript* R. 69].

What Lane did was common sense; as directed; something that benefited Mr. Lane's employer; something that a good employee does; especially a *"good, hardworking, miracle employee*" like Mr. Lane was directed to do. [*MWCC Transcript* R. 60 -71].

Even if **Mr. Curtis** had not given Mr. Lane these express instructions, Mr. Lane's injuries would still be covered by the Act*'s exceptions* to "the going and coming rule" set out in *Duke v. Parker-Hannafin, supra,* and *Deps. of Ingram v. Hyster*, 231 So.2d 500 (Miss. 1970), citing Larson, *Workmen's Compensation Law*, Vol. 1, § 28.11, at pages 427.

Even if it is found that Lane was "going and coming" within the meaning of *Miller*, then Lane clearly meets at least three exceptions ["(2), (3) and (7)" outlined in Dunn, Id.], if not even *more exceptions* to deniability of benefits under the "going and coming" rule.

As the ***Accident Report*** shows, Lane was not injured "six miles" from the plant, as believed, but 2-miles from the plant. [See *MWCC Pldgs R. 3* and Ex. "A" hereto]. Lane was injured at the instant he ***traveled*** back on the narrow, ***dangerous***, winding, two-lane road leading to the plant - like *Stepney*, the employee compensated ***traveling*** from lunch in a personal auto, in *Stepney v. Ingalls Shipbuilding,* 416 So. 2d 963 (Miss. 1982). See *Dunn*, [3rd Ed.] §§ 170 -175, at 175.1, FN 25.3. Lane was "subject to call ***or*** the supervision or control of his employer" as in *Leslie v. City of Biloxi*, 758 So. 2d 430 (Miss. Ct. App. 2000). Compare ***Accident Report*** and map, *MWCC Pls R. 3* and Ex. "A," to map addressed by

Justice Gillespie in *E. & M. Motel Mgmt. v. Knight*, 231 So. 2d at 181 (Miss. 1970). Also, compare *Stepney* and *Leslie* to the *MWCC Transcript R.* 60-71, "Cross-Examination of Employer/ Carrier" and to the *MWCC Transcript R.* 25 - 28, "Direct Examination of Employee." One has to 'bend over backwards' to deny Lane's compensation here. One has to ignore the spirit and letter of the Act to deny Lane's compensation here. One has to ignore that Mr. Lane's case is stronger than *Stepney's* and *Leslie*'s cases. One has to ignore record facts and controlling principles of the Act to deny compensation to Mr. Lane.

Compare *MWCC Transcript* R. 60 -71 and *R.* 25- 28 to *Ingram* and *Duke,* which held that injuries sustained by an employee in the employee's attempt to save the employer's property arises out of and in the course of employment. Surely an employee's [Lane's] attempt to save the employer's ***time and money*** is no different from an employee's [Lane's] attempt to save the employer's ***property***. They are one and the same.

Mr. Lane's claim, medical bills and benefits should be paid.

III. Fact-Findings and Law-Interpretations Below are Mistaken, Fatally-Erred, Wholly Inconsistent with The Spirit and Letter of The MWCAct, and Unjustly Survived Erred, Unlawfully - Rigid ***Standards of Review*** applied Below.

The ***Standard of Review*** before Mississippi Courts of an employee's claims under the Mississippi Workers' Compensation Act is different from that for common law claims.

The ***Standard of Review*** is less technical, less rigid, more flexible, less strict, more relaxed, in keeping with the original, less-legalistic *spirit and letter* of the Mississippi Workers' Compensation Act, which like many well-intended 'humane' Acts [i.e., ERISA], did not contemplate the necessity of lawyers and lawyering, as here. *Dunn*, Id. *Larson*, Id.

This unique, less technical, less strict ***Standard of Review*** before Mississippi Courts of an employee's claims under the MWCAct is fully defined and described in Dunn, *Mississippi Workmen's Compensation* [3rd Ed.], § 289, to-wit:

"**[E]ach case** involves the problem of interpretation in the light of its own **peculiar facts** and **circumstances**, and the substantial evidence rule is not inflexible and is **not to**

be viewed in the same strict technical sense as applied in the review of the decisions of trial Courts at common law, especially when awards have been denied by the [Mississippi Workers' Compensation] Commission, and the courts are called upon to consider the problem in relation to the beneficent purposes of the [Mississippi Workers' Compensation] Act. * * *

Findings may be determined to be "clearly erroneous," although there is some slight evidence to support them, if, on the entire evidence, the reviewing court is left with a definite and firm conviction that **a mistake** has been made by the commission in its findings of fact and in its application of the Act. [See cases cited at FN 67].

The substantial evidence rule does not require that the court act as a mere **rubber stamp**, but judges are required to act in a meaningful but responsible fashion and in so doing, may reverse the commission when the result [of the reviewing court's review] is found to be in accord with ***the spirit and letter of the Act***." [citing *Bechtel Const. Co. v. Bartlett*, 371 So. 2d 398 (Miss. 1979) at Dunn, FN 67.1].

Dunn, *Mississippi Workmen's Compensation* [3rd Ed.], § 289, pages 377 - 378.

The relaxed ***Standard of Review*** applicable here is in keeping with the humanitarian objects of compensation laws, 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, pages 28 - 29.

The MWCC and Circuit Court forgot these and other guiding ***Standards*** - - and wrongly '**rubber-stamped**' the ALJ's factual and legal mistakes below.

The source of *fact mistakes* in the March 17, 2005 ***Order of Administrative Judge*** [*MWCC Pldngs R.*16-33] are material **mistakes** injected by employer's representatives, 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 Act.

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." [*MWWC 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 **true** conflicting **fact** 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 conflicting-- mandating *close scrutiny* of all Orders below, and a reversal and a remand to the Circuit Court to correct all errors. The true, material fact is that *not only* ***did Mr. Lane testify*** truthfully that he was ordered to *travel* home, to **clean** up and *travel* back and be ready for the next trip that day. Further, ***Employer's own attorney*** also, inadvertently, but truly, corroborated that **key fact** here:

See the admission of fact in the exchange betwenn Lane and **Employer's attorney**, to-wit:

"

[Employer's counsel] Q. But **they told you that you had to be clean** before - -
[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..."

Id. [MWCC Transcript R. 41, lines 21 - 24]. If that is not a tacit *admission* of the **key fact**;

Then see *MWCC Transcript R.* 25 - 28, **"Direct Examination of Employee,"** *supra*, and See *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 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." [Record, p. 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. [*MWCC Transcript R. 60* - 71].

Given the record of Lane's ***orders*** at *R. 60*-71 and *R.* 25 - 28, it is clear that the *ALJ's pre-Duke v. Parker Hannifin* 'fact' and *'law' findings* in her March 25, 2005 ***Order*** denying benefits are patently fatal, reversible mistakes. Likewise, The MWCC's and Circuit Court's *'rubber-stamp' Orders* affirming the ALJ's erred 'fact' and 'law' findings denying benefits are fatally flawed, and, wholly ***inconsistent with the spirit and letter*** of the MWCAct.

All ***Orders*** denying benefits *below* are fatally based on clear mistakes of 'fact' ['beliefs'] and clear mistakes of law. Among other wrongs, they wrongly applied ***inapplicable*** "going and coming rules" to Howard Lane - - a ***"traveling employee"*** to whom such "going and coming rules" do not apply in this case. 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 base."

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

Like Ms. Duke in *Duke v. Parker Hannifin Corp.*, 925 So. 2d 893 (Miss. Nov. 22, 2005) and *many* other similar, Mississippi cases - - Mr. Lane was injured while acting within the course of his employer's instructions. See *Dunn* [3rd Ed.], §175.

Mr. Lane's risks and resulting injuries, losses and medical care arose out of and in the course of his employment status as a "traveling employee" for his Employer - - while obeying his employer's directions. See *Dunn*, §§170-176, and *Duke v. Parker Hannifin*. Id.

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 *Dependents of Roberts v. Holiday Parks, Inc.*, 260 So. 2d 476 (Miss. 1972). See also Dunn, [3rd Ed.] § 175 at FN 25, citing numerous cases, i.e., *Thrash v. Jackson Auto Sales*, 100 So. 2d 574 (Miss. 1958).

Scrutiny of the ALJ's Order is no attempt to demean such dedicated public servant's labors, but to correct mistakes [i.e., 'medicals paid' - when not paid] that colored misconceptions [i.e., 'meds paid; Lane will be ok' - when not so] and an erred Decision.

The "findings" and decisions of the *Orders* below are fatally erred, requiring reversal of the *Orders or reversal* and remand to the Circuit court - - to correct all errors.

IV. Employer Failed to Carry Their Burden of *Pleading and Proving their* Unpled *'Affirmative Defense'* of Purported 'Deviation' by Mr. Lane from Employer's Orders; And Employer Failed to Carry Their Burden of *Proving* that the *Risk* of Accident and Resulting Injuries Did Not Arise out of and in the Course of Mr. Lane's Employment; And Mr. Lane Carried The Employee's Lesser Burden of Proof That Lane Was "About His Master's Business" When He Was Injured.

An employer must plead and carry employer's **burden of proving** each ***affirmative defense*** ["deviation"] - - particularly as to a ***"traveling employee"*** like Lane. See *Dunn*,

§171 "*Temporary Deviation"* at FN13. See *Duke*. Id. Hartson did not do so. Still, Mr. Lane satisfied a *burden of proof misplaced* on employee. Lane proved *"exceptions (2), (3) and (7)"* to an inapplicable, misplaced "going and coming" rule, as shown above and below.

Mississippi's highways, roads and alleys are ***"traveling employees'"*** [truckers'] "workplace." Dunn, Id. Lane, as a ***"traveling employee"*** was "generally *in the course of his employment 'from the time he leaves his home until he returns to his home."* *Dunn*, Id.

Since the employer *contends* such purported *'affirmative defenses'* as "*deviation from employment instructions and duties"* and 'intervening cause' - employer must a) plead all such *'affirmative defenses'* in their *Answer* [*MWCC Pleadings* R. 5] and b) must carry Employer's burden of proving each *'affirmative defenses,* particularly as to such a "*traveling employee"* as Mr. Lane. See Dunn, [3rd Ed.] § 171 "*Temporary Deviation"* at FN13, citing *Roberts' Dependents v. Holiday Parks, Inc. See M. & W. Const. Co. v. Dependents of Bugg.* Employer did not a) plead 'affirmative defenses' *of* ***'deviation'*** and ***'intervening cause'*** [*see Answer, MWCC Pleadings* R. 5] *or* b) prove such 'affirmative defenses.'

Here, Employer waived all *'affirmative defenses'* contended by Employer not plead, specifically Employer's unproven contentions of "deviation" and "intervening cause." *Dunn.*

All of Employer's *contentions* fail, pled or unpled, in view of the Record facts, i.e.:

[1] employer admitted Mr. Lane was a dedicated, "***hardworking***" employee, who always ***obeyed*** the employer's directions and ***instructions***, and

[2] employer instructed Lane to timely ***travel*** home, shower, ***travel*** back, be ready;

[3] Mr. Lane ***traveled*** right home, showered, and was injured '***traveling*** back' as instructed. *See MWCC Transcript Record R.* 25 - 28. See *Dunn*, [3rd Ed.] §175, **"Going to and Returning from Work,"** at page 215, *Duke v. Parker Hannifin*, Id., *Roberts' Deps.*

v. Holiday Parks, Inc., 260 So. 2d 476 (Miss. 1972), *Dunn*, [3rd Ed.] § 175, FN 25. See *Thrash v. Jackson Auto Sales*, 100 So. 2d 574 (Miss. 1958).

The employer/carrier, the ALJ, MWCC and Circuit Court made fatal ***mistakes-of-fact*** and resulting ***Law-Interpretation-errors***, i.e.:

[a] Lane's ***workplace*** and duties were mis-characterized and wrongly-narrowed to a fixed place, i.e., Hartson's Gulfport-lot, contrary to Dunn, Id., even after employer admitted Lane was instructed "to timely ***travel*** home and bathe and change clothes"- orders not inconsistent with his duties, i.e., "to be presentable to out-of-state customers."

[b] **"Going and coming"** rules were wrongly applied here, where ***inapplicable***, since the ALJ erroneously assumed a **fixed place** of employment of this trucker. Dunn, Id.

[c] Lane's **medical bills** were not paid. More than $450,000.00 medical bills are still not paid to this **"miracle"** employee's providers.

Third, ***even if*** this Court *applies* the *"going and coming" rule* here, the ***Record*** below shows Lane met and carried any *burden of proof* placed on him thereasto. The *"going and coming"* ***general rule*** is often defined as *"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. . . ." *Dunn*, Id. *However*, our Court created many *specific exceptions* to the general "going and coming rule," *inter alia*, *the following specific exceptions - each met* and satisfied by Lane's proof-in-the-record-here, *to-wit*: **". . . (2) where the employee performs some duty in connection with his employment at home,"** i.e., showers, changes, performs tasks in preparation for the next road-trip. **[**Q. No one suggests truckers who have come off of a 9-hour long-haul not clean up or prepare for the next trip 1 to 3 hours away.**]** ***or [the 3rd exception to deniability]***,

. . . (3) where employee is injured by some *hazard* or danger which is inherent in the [employment] conditions . . . ." See *Dunn*, [3rd Ed.] §172, citing *E. & M. Motel, et al. v. Knight*, 231 So. 2d 179 (Miss. 1970): **"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. Inc. v. Smith*, 397 So.2d 536 (Miss. 1981)] . . .**"or [*the 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.

Here, Mr. Lane followed his employer's instruction ["timely ***travel*** home, shower, change, timely ***travel*** back"] and, thus, was *exposed* to "the *risks* or *hazards* of the road" which resulted in an accident and injuries in the course of and arising out of his employment. See *Dunn* [3rd Ed.] §§ 170 -175.

Since employer wrongly argues that Lane "deviated" from his employment instructions and duties, This Court must examine and determine **these critical issues:**

[1] *Did employer **plead** such affirmative defense* of purported "deviation" by Employee?
[2] *Did employer carry employer's burden of proof* of purported "deviation" by Employee?
[3] *Did Employer* prove Lane '**deviated**' from orders to timely ***"travel*** home***and*** back?"

The answer to all is 'no.' Employer did not plead or prove the *contended* "*affirmative defenses*" of "*deviation*," "*intervening cause*" or any other '*avoidances*' in their ***Answer***. *See* ['*Answer,' MWCC Pleadings* R. 5] and compare same to employer's *contentions* and ALJ's ***Order*** *below* adopting Hartson's **unpled** and **unproven** *contentions* that are refuted by the Record at *MWCC Transcript R.* 25 - 28 and 60 - 71. Contrary to employer's *contentions* and AlJ's and MWCC's *Orders*, the **proof** in the MWCC *Transcript R.* 25 - 28 and 60 - 71 show Lane ***satisfied even*** a *misplaced burden of proof* put Employee *here.* Lane proved "exceptions (2), (3) and (7)" to a misunderstood and misplaced *general* "going

and coming" rule that is inapplicable to Mr. Lane. **See** *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*]

See also *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 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." [*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**. [*MWCC Transcript* R. 70]
Q. And **he had already worked eight hours** that day; did he not?
A. He should have, **yes**. [*MWCC Transcript* R. 71].

On balance and on **employer's testimony above**, **Mr. Lane's Appeal must be granted.**

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 not an anomaly, but 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." Mr. Lane, like the trucker in *P. A. M. Transp.*, at the time of his injury,**"had not completed his assigned duties for that day's long-distance haul**." *P. A. M. Transp.*, Id. Here, the record shows Mr. Lane "was not **free**" of his employer's **orders**, and that **Tuesday** was not Lane's "**free day**."" [*Order*, MWCC Pldgs R. 19] and that Mr. Lane "had not completed his **assigned duties for that day's [multiple]** long-distance **haul[s]**". P.A.M., Id. Also, Lane's case is **stronger than** *Stepney*'s. At 3:00 p.m. Hartson **ordered** Lane to *travel* home, clean up, *travel* back to go out on ***another trip*** between 4 and 6 p.m., since 4 p.m. was 'when the next load was ready' on **Tuesday** . Id. Hartson's 3 p.m *order* to go back out was ***without*** 8 hours ***rest***, right ***after*** Lane drove from Tupelo to Gulfport, with stops, violating safety and labor laws, i.e., violating *FLSA*, 29 USC §§ 201. The scope of *FLSA* is as follows, to-wit:

["employees must be paid for all hours worked in a work week. . .**all time** an employee is on duty **or** at a prescribed place of work and **any time** that an **employee is suffered or permitted to work**... **include** work performed at **home, travel time, waiting time**. . . . **"**

Fair Labor Standards Act, 29 USC §§ 201, et seq.

In reviewing the record below, it is clear that the scope of *FLSA* is greater than the employee [Lane] realized - - and the scope of *FLSA* is certainly greater than that which the employer [Hartson] recognized on Lane's [and other Hartson-employees'] pay day.

Further, Hartson *not only* violated *FLSA* and *The MWCAct* for not paying as required, Hartson *also* violated *The Federal Motor Carrier Safety Act*, Title 49 CFR §390-396, i.e., §395 [*for* Use of Fatigued Drivers] and §395.8 [*for* limiting pay to "rig time only" -

- unlawfully *excluding* "non-rig" incidental work], since Hartson *ordered* Mr. Lane to work more hours than lawful on that Tuesday, and Hartson failed to *compensate* "on-duty driving time" ***and*** "on-duty non-driving time" -- including Lane's *time* traveling back upon Hartson's *orders* when Mr. Lane was injured "traveling about his Master's business." *See FLSA, FMCSA,* and see *Truck Accident Litigation and Insurance*, American Bar Association (1994), p. 18-19, *Appellant's R. 28 (f) Addendum for Reproduction of Authorities* herein.

Mr. Lane's case is *stronger* than *Stepney*'s and *Coleman*'s cases for many reasons: [A] Mr. Lane "*was an employee* ***exposed to a greater hazard*** *than the general public*," and [B] Mr. Lane "*was* ***exposed to a greater hazard"*** *than* all truckers should be exposed to, under the *FMCS Act's* [§ 395's] ban against truckers driving without their 8 hours rest, and [C] Mr. Lane worked 50 hours+/week [and ***all day that*** Tuesday,] and undoubtably worked "off the clock" **without compensation** in violation of *FLSA*, *FMCSA,* and MWCAct, and [D] Mr. Lane was required by Hartson's *orders* to *travel* fatigued, without 8 hours' rest, *across dangerous roads*, *with more frequency than the public, Stepney* and *Coleman*, and [E] Mr. Lane was subjected to a "*particular risk because of his employment.*" *Id.*

Howard Lane is entitled to benefits of the MWCAct -- more so than Mr. Coleman in *Retail Credit Co. v. Coleman*, the trucker in *P.A.M. Transp. v. Miller*, and *Stepney*, Id.

Last, but not least, consider what is truly lawful, ***moral*** and **just** under the MWCAct. Mr. Lane is entitled to benefits ***more so*** than *Coleman* and the *truckers* in *P.A.M. Transp. v. Miller* and *Total Transportation v. Shores*, #2005-WC-01951-CO (Miss.2006) because, ***unlike*** *Coleman*, and ***unlike*** truckers in *P.A. M. Transp.* and *Total Transp. v. Shores*, when injured, Mr. Lane ***was*** **not drunk**, and Mr. Lane *was* **not** '**hanging out at bars**,' *muchless* "deviating" such as *Coleman* and truckers in *P.A. M. Transp.* and *Total Transp.*. Id.

Howard Lane was and is an honest, lifelong Mississippi Baptist; a "***hardworking***," "***miracle***" **employee** of Hartson for nearly 9 years; husband of Linda Rogers Lane for 25 years, father and grandfather; brother-in-law of City Clerk Hank Rogers; quiet friend to all.

Howard Lane **did not drink**, and **does not drink - *not even after suffering severe fractures*** of *more than* **25 bones** [WC Plds R. 46] and ***more than* $450,000.00 in *unpaid* medical bills** [MWCC Pldgs R. 47-52] *still* 'dunning' Mr. Lane [Depo. p. 78, line 1-5, Ex.'G-9'] - - - - since Howard Lane's obedient and near-fatal *attempt* "to serve his Master."

If there are those who *still* harbor ***doubts*** as to Mr. Lane's compensability under the Act, from "wolf-cries" of "you will open the floodgates," etc., consider "***the bargain***" made in our 1949 MWCAct where ***common law rights were relinquished*** by both *employees* (tort claims) and *employers* ('fault-based' defenses) and must consider the humanitarian ***history*** *and* ***purpose*** of the Mississippi Workers' Compensation Act, and consider the role the *history* and *purpose* of the Mississippi Workers' Compensation Act *must* play in a just administration of the Mississippi Workers' Compensation Act, *to-wit*:

> "In the administration of the Act for the purpose expressed, the Commission is to give the Act a *liberal construction* **resolving doubtful claims in favor of compensation**. See e.g., *Barham v. Klumb Forest Products Center*, 453 so. 2d 1300 (Miss. 1984). The **humanitarian** objects of the Act should **not be stymied by hypertechnical construction**. See e.g., *Lindsey v. Ingalls Shipbuilding Corporation*, 68 So. 2d 872 (Miss. 1954). . . ."

See Alben N. Hopkins, *Mississippi Workers' Comp: Beyond The Basics, I. Introduction and Procedure, Workers' Compensation In Mississippi, Issues and Answers*, by Wm. D. Blakeslee; Michael D. Greer, Alben N. Hopkins, Gregory D. Keenum and Matt G. Lyons, (National Business Institute, 1991), pgs. 1 - 5 of 227.

Conclusion

Howard Lane asks this Court to reverse the the Orders *below* denying relief and render judgment awarding to Appellant all benefits due under the MWCAct, *inter alia*, medical benefits, compensation, rehabilitation, interest, fees and costs, **or** to reverse the Orders *below* denying relief and remand this case back to the Circuit Court for award of Mr. Lane's medical bills, compensation, rehabilitation, fees and other due MWCA benefits.

Respectfully submitted,

Howard Lane, Claimant/Appellant

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CERTIFICATE OF SERVICE

I, Appellant's counsel, do hereby certify that I have this day mailed, postage prepaid, by U. S. Mail, a true and correct copy of the above and foregoing Brief of Appellant, unto: Robt. W. Coleman, Jr., Esq., Scott, Sullivan, Streetman & Fox, P. C., P. O. Box 13847 Jackson, MS 39536-480, and Hon. Kosta N. Vlahos, Harrison County Circuit Court Judge [*Retired*], P. O. Box 7575, Gulfport, MS 39506-7575.

This the 21st day of April, 2007.

_____
Matt G. Lyons [MSB[redacted]