IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI
CASE NO. 2007-WC-00231

RICHARD W. LADNER, II (CLAIMANT) — APPELLANT

VERSUS

GRAND CASINO OF MISSISSIPPI (EMPLOYER)
AND GREAT AMERICAN INSURANCE
COMPANY OF NEW YORK (CARRIER) — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

BRIEF OF APPELLEES (EMPLOYER AND CARRIER)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Grand Bear Golf Course / Grand Casino of Mississippi, Employer and Great American Insurance Company of New York, Carrier, certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Richard W. Ladner, II - Claimant

2. James K. Wetzel - Counsel for Claimant

3. Grand Bear Golf Course / Grand Casino of Mississippi - Employer

4. Great American Insurance Company of New York - Carrier

5. Ronald T. Russell of Bryant, Dukes & Blakeslee, P.L.L.C., Of Counsel for Employer and Carrier

6. Honorable Linda A. Thompson - Mississippi Workers' Compensation Commission - Administrative Law Judge

7. Honorable Lisa P. Dodson - Harrison County Circuit Court Judge

BRYANT, DUKES & BLAKESLEE, P.L.L.C.,
Of Counsel

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STATEMENT OF THE ISSUES

Whether the Circuit Court committed error by finding that the ruling of the Mississippi Workers' Compensation Commission is supported by substantial evidence and should be affirmed.

STATEMENT OF THE CASE\

(i) Course Of Proceedings And Disposition In The Tribunal Below

This case involves a claim for medical and disability benefits for injuries that the Claimant, Richard Ladner, sustained as a result of a motor vehicular accident on January 14, 2001. The Claimant was an employee of Grand Casino Biloxi assigned to the Grand Bear Golf Course and Country Club which was owned by Grand Casino. At the time of the accident, the Claimant was not performing any duties associated with his employment as he had not yet arrived at his place of employment. He was on the way to work and his unfortunate accident happened approximately 1.3 to 2 miles from the entrance to the Employer's facilities. Accordingly, the primary issues herein are whether or not the subject accident arose out of and in the course and scope of his employment with Grand Casino, and the application of the "going and coming rule". On appeal, the Circuit Court of Harrison County determined that the Decision of the Mississippi Workers' Compensation Commission is supported by substantial evidence and the Circuit Court Judge affirmed the decision of the Mississippi Workers' Compensation Commission.

As the Claimant was neither at his place of employment nor performing duties associated with his employment at the time of the subject accident, the argument thus arises that the Claimant has not met his burden of proving that his accident arose out of and in the course and scope of his employment as required by law. His burden therefore was to prove that the facts warrant a finding that an exception exists to the general rule that accidents that occur while going and coming from work are not compensable. Based upon the documentary and photographic evidence as well as the testimony of numerous expert witnesses the Administrative Judge concluded that the Claimant's injury was not the result of any special hazard any more

exceptional than any other winding rural county road through a forest upon which a recommended 25 mile per hour speed limit exists. (P.V.65-86)[1]. On this basis, the Administrative Judge denied the claim and it was appealed to the Full Commission which affirmed the ruling of the Administrative Judge. (P.V. 91) On further appeal the Circuit Court of Harrison County in a thorough and well reasoned decision concluded that the decision of the Full Commission is supported by substantial evidence and thus should be affirmed. See Appellees Record Excerpts, Exhibit No. 1, pages 1-10.

The matter is now before this Court on the issue of whether or not the Decision of the Circuit Court affirming the findings of the Mississippi Workers' Compensation Commission contains reversible error.

(ii) Relevant Facts And Testimony

The Claimant herein at the time of the accident was a 26 year old male who was employed by Grand Casino Biloxi at their Grand Bear Golf Course and Country Club which is located in Harrison County off of Highway 49 outside the city limits of Gulfport, Mississippi. The entrance to the Grand Bear Golf Course and Country Club is located at the end of a county road known as Grand Way Boulevard, approximately six miles east of Highway 49.

The Claimant's duties at Grand Bear Golf Course and Country Club required him to perform maintenance on lawnmowers and to keep the greens mowed. All of his work was done on premises.

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References to hearing transcript are designated as "TR" followed by the page number or numbers. References to exhibits are identified as "EX" followed by the page number or the date of the report. References to the pleading volume are identified as "P.V." followed by the page number.

Grand Way Boulevard is a county road, maintained by the County, that runs east and west for approximately six miles from the eastern boundary of Highway 49 to the entrance of the Grand Bear Golf Course and Country Club. Grand Way Boulevard was originally a dirt road known as Forest Road No. 424. It is part of the DeSoto National Forest, and as such, then and now, the road is utilized by the public in general to access public and private lands for hunting, fishing, camping, hiking and other uses that the National Forest affords the public. All of the land on the north and south side of Grand Way Boulevard is owned by the National Forest from the eastern boundary of Highway 49 all the way to the entrance of the Grand Bear Golf Course and Country Club. (TR.147, 149, 150, 151, 152)

In 1999 Robert J. Knesal, P. E., as County Engineer, obtained the easement for the subject road from the U. S. Forestry Service. He explained that private individuals and companies cannot obtain such easements and the Forestry Service can only grant an easement to state and county governments. He also testified that the road is a designated county road for which the County has provided all maintenance since the road was paved in 1999. He stated that it was of benefit to the County to take over the road as the road provides access for residents of Harrison County and the public in general to all the recreational facilities of the DeSoto National Forest and also the Grand Bear Golf Course and Country Club. As a county road, the County is responsible for posting all the safety signage and for determining and posting the appropriate safe legal speed limits. The Grand has no authority to post any signage anywhere on this road except on the very end of the road which is the on premises entrance to the Grand Bear property. Furthermore, he stated that the Grand Casino and the Grand Bear Golf Course and Country Club have no right to restrict usage of this road by anyone as the road and the land on both sides of this road is the property of the U. S. Government. (TR. 149-152.)

Mr. Knesal testified that the subject road is like most of the roads throughout the County. They start out as trails or dirt roads and then evolve into modern paved roads. He stated that ideally you would want to design all of the county roads to be straight 50 mile an hour highways, but usually land access or lack thereof prevent this from occurring. Consequently, what the County tries to do in such circumstances, and in the present situation, is make the county road as safe as possible with lower speed limits. In this particular situation, the County had no say so in the specific layout of the road as the federal government dictated the path to be utilized. As they were unable to make it a straight highway, they then sought to make the road as safe as possible by using the proper equipment to determine the safe driving speeds and legal speed limit. They also utilized other methods such as center line striping and striping of the road edges. In this particular case they took the extra precaution of striping down the entire length of both edges of the road whereas most county roads would only have striping in the center of the road. (TR. 98, 132, 137, 148, 157, 158, 160-163.)

A stipulation by and between the U. S. Forestry Service and the Board of Supervisors of Harrison County was entered into evidence as Exhibit No. 12. This agreement stipulates that the County and the U. S. Forestry Service desired to cooperate in the **development and construction of a highway that would protect adequately and afford adequate utilization of the land of the United States traversed by the highway for the purposes for which the lands are being administered which is access for all who desire to utilize the National Forest for all the usual recreational activities**. The stipulation also specifies that the County is to design, construct and maintain this road to meet the actual load and gross vehicle weight limits of Mississippi state highways designed for 80,000 pound gross weight. (EX. 12)

(a) The General Rule

The Claimant Appellant relies solely on the testimony of Louis Rash, a civil engineer, in his effort to circumvent the general rule that accidents occurring off premises while coming to and going from work are not compensable. An Affidavit bearing the signature of Mr. Rash was introduced into evidence by Claimant's attorney as Exhibit No. 5. This document contains numerous legal conclusions and opinions which are clearly beyond the expertise of this particular witness. In fact, in a deposition that was admitted into evidence as Exhibit No. 10, Mr. Rash admitted that he has no legal training or experience and is not qualified to render legal opinions. Furthermore, he admitted in the deposition and at trial that the affidavit and the legal conclusions contained therein were not drafted by him. In fact, he stated that he does not even talk like the language that is contained in the affidavit. The affidavit was prepared by Claimant's counsel and presented to him for his signature and adoption. (EX. 10, pages 24-25) (TR. 48)

Procedural Rule 9 of the Mississippi Workers' Compensation Commission provides that affidavits shall not contain opinions or other matters composed by attorneys for the signature of the physicians (experts). This Rule states it is intended for affidavits to pertain to narrative notes and reports composed and generated by the expert in the ordinary course of their practice. As this particular affidavit is not in compliance with Procedural Rule 9 and based upon Mr. Rash's admissions at trial and in his deposition, the Administrative Judge and the Commission accorded no weight to this document. (P.V. 65-86)

(b) Exceptions To The Rule

Mississippi case law and case law from other jurisdictions suggest that there are certain recognized exceptions to the general rule that accidents that occur off premises while traveling to or from one's place of employment are not compensable. These recognized exceptions to the general rule involve accidents on the way between home and work that are caused by some "extra

hazard" to which the general public is not exposed or to some "special hazard" that is peculiar to the particular route being traveled. The "special hazard" exception appears when an injury results from some **abnormally** defective or dangerous condition along the designated route such as a protruding manhole cover, an abnormally heavy traffic count, dangerous railroad crossings or recognized dangerous intersections. The accident in question must be caused by the specific hazard and not some general hazard that would apply to all routes of motor vehicle travel. (See. ***Dunn, Mississippi Worker's Compensation*, 3d Edition, 1990 Supplement § 175.1.**)

Mr. Rash, in his affidavit and also in his deposition and trial testimony, suggested that the Grand Way Road had various curves and vegetation near the roadbed that in his opinion caused hazardous situations. On cross examination he admitted that even if this were true, this would be a general hazard, not a special or specific hazard that was peculiar to the site of the accident and that would have been the cause of the accident. (TR. 65)

Mr. Rash suggested that while the roadbed itself is in reasonably good, physical condition, it, in his opinion, did not meet the general accepted minimum criteria for site distance for curves and conditions of curvature for the posted speed limit which is in effect on this road. He based this erroneous conclusion on Harrison County subdivision regulations which require new roads to be constructed with wider traffic lanes and wider cleared shoulders.

On cross examination Mr. Rash was forced to admit that the subject road was a rural county road and not part of a residential subdivision. Accordingly, the Harrison County subdivision regulations would have no applicability. This not only was admitted by Mr. Rash, (TR. 53, 54, 60) (EX. 10, pages 43-44) but also the three experts who testified in behalf of the Employer and Carrier testified that the regulations involving Harrison County subdivisions have no application to a rural county road. Furthermore, former County Engineer Bobby Knesal, and

Robert Weaver, Director of Harrison County Sand Beach Authority Parkway Commission and Assistant Road Manager for Bridge and Traffic, and Danny Hodges, the Traffic Safety Foreman for Harrison County all testified that the subject road was in compliance with any regulations concerning design and maintenance for rural county roads. (TR 97-106, 128, 153-154) Mr. Rash in his deposition admitted that he could not find any regulations for rural county roads in Harrison County. (EX. 10, page 44)

With regard to Mr. Rash's comments that the road does not meet general accepted minimum criteria for site distance for curves and conditions of curvature for the posted speed limit which is in effect on this road, Mr. Rash admitted that he found no posted data for Harrison County in support of that allegation concerning rural county roads. He admitted that once again he was applying an inappropriate standard for Harrison County subdivisions and regulations involving subdivisions rather than rural county roads. (EX.10, page 65.) (TR 53-54) He also admitted that **he was unaware of any testing that had been done by the County to determine the appropriate safe legal speed limit for the subject road and the curvature of the road. He admitted that he had not done any specific testing to support that allegation in his affidavit, and he further agreed that if the County had performed testing with appropriate equipment to make the determination of the appropriate legal speed limit, the County officials who had done so would be in a better position to evaluate this situation than he.** He further agreed that if someone is actually traveling at speeds that are approaching, if not exceeding, twice the legal speed limit, regardless of any road that he is on, he is in a greater danger than someone who would be obeying the legal speed limits. Also, by traveling at speeds in excess of the posted speed limit he is also endangering the lives of other people who might be utilizing the road for other purposes. (See EX. 10, pages 66 and 67.) (TR. 67-68)

Danny Hodges and Robert Weaver testified at trial that they utilized the generally recognized equipment, a ball bank indicator, to determine the appropriate safe legal speed limit for conditions and curvature of the subject road. Mr. Weaver demonstrated how this indicator is used, and he had one of these pieces of equipment in the court room to explain to the court how it works. Both Mr. Weaver and Mr. Hodges testified that they took extra measures to insure the travel safety for this particular road by utilization of appropriate legal speed limit signs and also various advisory signs as well as safety striping on the center and sides of the road all the way down the road. (TR 93-99, 124-130, and 142-144) Clearly, they would be in a better position to determine the appropriate safe speed limits and determine the safety factor of the road than Mr. Rash who had done absolutely no testing, and the Administrative Judge, Full Commission and Circuit Judge appropriately accorded the greater weight to the testimony of the experts who did actual testing.

Mr. Rash also boldly asserted that the general curvature and the S-curves and the back and forth of the whole road system is not a "safe road". He admitted on cross examination that there are many roads in the County with similar curvature that many people in the County utilize to travel to work. He also was completely unable to explain why there had only been one accident on this road at the subject location the entire time the road had been in existence if it was "unsafe". Mr. Rash admitted that even if this assessment was correct, that would be a general hazard and not a "special hazard". (EX 10, pages 54, 62-65) (TR. 60, 66-67)

Robert Weaver and Danny Hodges testified that in their usual course of business they receive data showing various accident locations throughout the County road system. They monitor these situations to see if some additional safety factors need to be utilized to correct any problem at those locations. In regard to this specific road, each of them and Mr. Knesal testified

that the fact that one accident had occurred during the life of the road at this location did not support an allegation that this road or the specific site of the accident were "unsafe". Each of them were of the opinion that this road was safe for its intended purpose, (TR. 103, 107, 129-135, 137, and 153-154) and also the officer who investigated the subject accident, Sheriff's Deputy Charles Morrison, testified in response to a question by Claimant's attorney that this road was safe for travel so long as those utilizing the road travel within the legal speed limits. Officer Morrison also testified that that appeared to be the problem with this particular accident because the Claimant was traveling the road at twice the posted legal speed limit. (See EX. 3, pages 8 and 21.)

(c) Necessity For True Special Hazard

According to *Larson's*, a well recognized authoritative source on Worker's Compensation, for the "special hazards" exception to the general off premise rule to be applicable, two specific components are required. The first component involves the presence of a **true special hazard at the particular off premises point where the accident occurred**. The second is the close association of the access route with the premises so far as going and coming are concerned. The text points out that it was never the intention behind this exception to mark out an off premises area merely because it is a normal access route, and then invest it with all the characteristics of premises for course of employment purposes. *Larson's* cautions that the issue of a special hazard cannot be ignored and an award should not be made solely on the showing that an injury took place in an area which was the sole or usual route to the plant. The treatise further points out that the extended course of employment based upon a special hazard in the access route is valid **only for that hazard.** (Arthur Larson and Lex Larson, *Larson's Worker's Compensation*, Desk Edition, Vol. I, Section 13.01(3)(b) (2004).

With regard to the present claim, Mr. Rash admitted that he had been to the specific site of the accident and drove the subject road on at least four occasions. He admitted that he was able to negotiate the road without any collisions or accidents. He agreed with the investigating officer that at the time of the accident there were no defects in the road, and with regard to special hazards he admitted that there was no intersection anywhere along the road nor was there any railroad crossing. He also agreed that being blinded by oncoming headlights is a problem on all roads and happens even on straight highways. (EX 10, pages 38, 40-41, and 46)

When asked to identify exactly what he was suggesting might be a special hazard at the specific accident site where this accident occurred, it was his weak suggestion that the only "special hazard" at the scene of the accident would be lack of horizontal site distance as Claimant was unable to see around the curve. According to Rash it was this lack of horizontal site distance that caught him by surprise after he came around the curve and he was blinded by the headlights from the oncoming vehicle which caused him to run off the road after leaving the curve. (EX 10, pages 48 and 54) (TR 62)

This opinion was contradicted by several photographs that Rash had taken of the scene and these photographs were attached to his deposition (EX. 10) as Exhibits 2 through 6. These photographs were also made a general exhibit at the hearing (Exhibit 7, pages 1-5). When confronted with these photographs, Mr. Rash was forced to admit that the investigating officer's accident report that he had relied upon was **not accurate**. He agreed that the photographs that he personally took himself showed that the Claimant actually ran off the road and hit the tree before he even entered the curve. These photographs clearly establish that the Claimant had not rounded the curve and would not have been looking directly into the headlights of the oncoming

vehicle when he left the road thus supporting the decision of the Administrative Judge, Full Commission, and Circuit Court (TR 56-59). (See EX. 10, pages 48 through 54.)

Mr. Rash's theories regarding a lack of horizontal site distance were also refuted by the photographs that he took that were attached to his deposition and numbered Exhibits No. 4 and 5 to his deposition (EX. 10). (See EX 7, page 2) These photographs were taken from the area where Mr. Rash determined that the oncoming vehicle that was operated by the deer hunter would have been located and looking in the direction from which the Claimant was coming. These photographs show Mr. Rash's vehicle parked on the side of the road at least fifty feet west of the subject tree that had an orange flag taped around it. When shown these two photographs, Mr. Rash could not explain why he was suggesting that the Claimant could not have seen the oncoming vehicle being operated by the deer hunter when these photographs clearly show that to be the case. (See EX. 10, pages 49 through 52.) (TR 59)

When pressed for an explanation why Mr. Rash insisted that the Claimant could not see the other vehicle when clearly the photographs showed that the deer hunter could have seen the Claimant, Mr. Rash did not answer the question but responded, "If he is going as fast as he said he was going, it was not necessarily what blinded him, or according to his deposition - - or the accident report is what caused him to run off the road." Rash finally admitted that horizontal site distance around that curve was not even relevant. (See Exhibit No. 10, page 53.) (TR 62-65)

Mr. Rash agreed that the Claimant would have been in violation of the legal speed limit at the time that he had the accident and by violating the legal speed limit he was endangering the lives of the other members of the general public who were using the road for recreational and other purposes. He finally agreed at trial that if the Claimant was more familiar with the road in question than some member of the general public who may be using this road for the first time to

take advantage of the recreational aspects of the National Forest, to play golf, or whatever, he could not say that the Claimant was at greater risk of having an accident than the member of the general public. Mr. Rash also **agreed** that if the Claimant had **actually seen the oncoming headlights of the approaching vehicle, this should have alerted him to the fact that someone was coming from the other direction**, and the **headlights would not have been a surprise**. However, he qualified that statement by stating that that was not what he understood the facts to be. He **agreed** that the **only "special hazard"** that he could state was present at the scene of the accident was the **"lack of horizontal site distance"** which he agreed was not relevant. (EX. 10, pages 48 and 54.) (TR. 62, 63, 67, and 69)

The Claimant, Ladner, testified in his deposition, and then again at trial, that at the time of the accident he had not yet arrived at work and was not on the clock. He was not paid mileage for travel and was not actually performing his work activities as he had not yet reached the work site. He neither alleged, nor was any evidence presented to establish he was on any special mission for his employer at the time of the accident.

The Claimant totally negated the special hazard opinion of Mr. Rash by testifying that **he had seen the headlights of the other vehicle through a clear cut before he even reached the site where the accident occurred**. He stated that he had seen the other car's headlights through a clear cut and had dimmed his own lights before approaching the curve. He was well aware that the other vehicle was coming toward him from the other direction, and he further testified that he kept waiting and **waiting for the car to appear but it never did**. (TR 86-88) This **testimony** alone **renders** Mr. Rash's **theories of a special hazard totally irrelevant**, and the Administrative Judge was fully justified in according little or no weight to Rash's unsupported

opinions which were based upon inaccurate factual assumptions. This was the conclusion reached by the Circuit Judge in a thorough explanation of why the Administrative Judge and Full Commission were justified in their decision to accord greater weight to the testimony of the other experts and witnesses than that of Rash whose opinions were based upon inaccurate information and assumptions contrary to the facts. See Appellees Record Excerpts, Exhibit No. 1, pages 4-5.

The Claimant also testified that he knew everything about the road and knew it like the back of his hand. He stated that he traveled it six or seven times a day and even went there when he was not working. He also stated that he knew that the deer hunters were in the area just beyond where he had his accident. He explained that they were there every day during hunting season from daylight to dark and he knew to look for them. He stated that the hunters were not employees of the Grand Casino and were just members of the general public who utilized the National Forest for recreational purposes. He stated that there were only eight employees who would have been working at the Grand on this particular Sunday morning and at the time of the subject accident he would have been the only employee of the Grand Bear Golf Course and Country Club that was using the subject road. (TR. 78-89) There were more **members of the general public using the road for purposes other than employment than there were employees of the Grand traveling to work.**

Mr. Rash, in his deposition, testified that he was unaware of the actual number of employees of Grand Bear Golf Course and Country Club that would have been on the subject road at the time of the accident, and he did not know the number of other members of the general public who would have been using the road for other purposes at the time. Consequently, on this particular occasion he agreed that he could not say that the Claimant was at any greater risk than the general public. He only knew of the subject accident happening at the place where this

accident occurred and he was **unable to explain how this could be classified as such a "hazardous road" by him when the number of accidents did not bear this out.** (See EX. 10, pages 63 through 65.)

Witnesses Bobby Weaver and Danny Hodges testified that based upon their experience and training in road and traffic safety, and based upon their knowledge of the subject road and upon the photographs that they were shown of the location of the subject accident, it was their opinion that there were no unusual or special hazards at the site of this subject accident nor was this accident caused by any special or unusual hazard peculiar to this particular road. (TR. 104-105, 131-133) It was their further opinion that the lay out of the road was in conformance with recognized standards for rural county roads, (TR 98-99, 102, and 128) and in response to comments made by Mr. Rash, it was their opinion that driver impaired vision caused by oncoming headlights at night is a common factor of all state, county and municipal roads. (TR. 105-106, and 134) It was their conclusion that accidents caused by drivers exceeding the legal speed limit is a problem on all roads and not specifically inherent to the subject road. It was their opinion, as well as that of the former County Engineer, Bobby Knesal, that **site distance** around the curve at the site of the accident is **not an important factor if there is not a blind intersection and one stays within his lane.** Mr. Weaver and Mr. Hodges were of the opinion that site distance was not the cause of this specific accident and Claimant's alleged inability to see around the curve is irrelevant concerning the cause of the accident as the tree with which the Claimant collided was located at a place which precedes the curve. (TR. 102-108, 131-135) Mr. Knesal, Danny Hodges, Bobby Weaver, and the investigating officer, Charles Morrison, were all of the opinion that the road is safe for its intended purpose so long as one abides by the legal

speed limit. (TR. 103, 129, 153-155) Their testimony clearly supports the decision of the Judge and Commission which was affirmed by the decision of the Circuit Court.

Mr. Weaver and Mr. Hodges testified that it was part of their job to monitor frequency of accidents at specific locations involving county roads, and if a high incident of accident occurs, to do some study to determine if additional safety measures should be taken. With regard to the subject road, the fact that only one accident had happened at this specific location during the entire time that the road had been paved up to the time of hearing in this matter does not meet the criteria for declaring this road to be a dangerous and hazardous road. (TR 103, 129-130) Mr. Knesal was also in agreement with this conclusion. (TR. 154) It was their further testimony that there are a number of other roads in the county that have much higher traffic accident counts. Also, Claimant's expert, Louis Rash, agreed that there were many other roads in the city of Biloxi which people are required to use to go to work that had higher traffic accident counts than Grand Bear. (EX. 10, PAGE 62)

Mr. Weaver testified that he was familiar with the access road that leads to Ingalls Shipbuilding which is the subject of the case of *Stepney v. Ingalls*. He stated that he used to work at Ingalls Shipyard and was quite familiar with the traffic problems along the subject road in that case. He stated that there is a vastly different traffic count and accident occurrence number on that road when compared to the road that is the subject of the present claim. (TR. 136-137)

It should also be pointed out that the Claimant testified at trial that the deer hunters who use the road for recreational purposes to access the hunting lands of the National Forest were there every day during hunting season. There were more of them there at the time of the accident than there were employees of the Grand utilizing the road at the same time. Accordingly, the

members of the general public were subject to the same road conditions as the Claimant except for the fact that the Claimant was traveling at a rate of speed that was in excess of the legal speed limit thereby endangering not only his own life but the lives of other members of the general public who were exercising their right to use the road for other purposes. The Claimant also acknowledged in his testimony that he had a prior history of speeding violations and had received as many as four tickets in a one month period for speeding. (TR 78)

(iii) Legal Argument

PROPOSITION I

Standard of Review

The Workmen's Compensation Commission is a trier of facts as well as the Judge of the credibility of the witnesses. *Roberts v. Junior Food Mart*, 308 So.2d 232 (1975). When the decision of the Commission is before the Circuit Court on immediate appeal, the Circuit Court may not tamper with the findings of fact, where the findings are supported by a sufficient weight of the evidence. *University of Southern Mississippi v. Gillis*, 872 So.2d 60 (Miss.App. 2003 cert. denied) 873 So.2d 1032 (2004); *Natchez Equipment Company v. Gibbs*, 623 So.2d 270, (Miss. 1993). Even if the Court had been sitting as trier of fact might have found differently based upon the record as a whole, this is not the test. On review, the test is whether the Order of the Commission is supported by substantial evidence and where so supported, it is error for the Circuit Court to reverse the Commission. *Penrod Drilling Company and Granite State Insurance Company v. Etheridge*, 487 So.2d 1330 (Miss. 1986) and *Babcock & Wilcox Company v. McClain*, 149 So.2d 523 (Miss. 1963).

In worker's compensation cases negative testimony concerning the cause of the injury constitutes substantial evidence from which a claim can be denied where the Claimant's

uncorroborated testimony is contradicted by other statements made by the Claimant that are inconsistent with the claim. *Penrod Drilling Company and Granite State Insurance Company v. Etheridge*, 487 So.2d 1331 (Miss. 1986); and see also *Dunn, Mississippi Workmen's Compensation,* (3d Ed.1982) § 264.

In the present claim, the issue is clearly whether or not substantial evidence exists in the record in support of the decision of the Administrative Judge denying and rejecting the claim for benefits which was later affirmed by the Commission.

PROPOSITION II

The Order Of The Administrative Judge Rejecting This Claim For Worker's Compensation Benefits Which Was Affirmed By The Full Commission and the Circuit of Harrison County Is Supported By Substantial Evidence

The Claimant has the burden of proving his claim beyond speculation and conjecture and he must prove that his injury is one which arises out of, and is sustained in, the course of employment. *Flintkote v. Jackson*, 192 So.2d 395 (Miss. 1966); *Johnson v. Gulfport Laundry & Cleaning Co.*, 249 Miss. 11, 162 So.2d 859 (1964). The burden further involves establishing every essential element of the claim, and it is not sufficient to leave anything to surmise or conjecture. *Narkeeta, Inc. v. McCoy*, 247 Miss. 65, 153 So.2d 798 (1963).

In the present claim, the Claimant was neither at his place of employment nor performing duties associated with his employment at the time of the subject accident. Therefore, he is attempting to establish that his claim falls within an exception to the general rule that precludes a finding of compensability. His burden thus involves a specific factual issue of whether or not his injuries were caused by a special hazard (a factual issue) which the Commission as the trier of facts rejected.

In Mississippi, the general rule is that 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. The underlying basis for this theory is that the activity going to and from work is personal for the employee, is beyond the control of the employer, and is not a risk of employment, although the trip is necessary to employment and is in some respects relative thereto. If an exception to the general rule is claimed, it is the Claimant's burden of proof to prove that the exception applies in the particular circumstances of the case. Some of the possible exceptions to the general rule include: (1) that the employer furnishes the transportation; or (2) that the employee perform some duty at home in connection with his employment; or (3) that the employee is injured by some "special hazard" for abnormally defective or dangerous condition along the designated route; or (4) that the injury results from a hazardous parking lot furnished by the employer; or (5) that the place of injury, although owned by one other than the employer, is in such close proximity to the premises owned by the employer as to be, in effect, a part of such premises. *Dunn, Mississippi Workmen's Compensation*, (3d Ed.), § 175, and Supplement § 175.1.

With regard to these recognized exceptions, the Claimant in our present claim was in his own private vehicle and was not being paid mileage for going to or coming from work, nor was he required to perform work at home, nor was he injured in a hazardous parking lot furnished by the Employer. Furthermore, the place of injury, according to Mr. Rash, was approximately 1.3 to 2 miles away from the Employer's facilities. Therefore, none of these exceptions would be applicable. Claimant's counsel suggests that this is a "threshold" case, but any accident that occurs this far away from the employer's premises can hardly be considered a threshold injury claim when the property along the roadway on both sides is owned by third parties and not Grand

Casino. The Administrative Judge, Full Commission, and Circuit Court properly rejected this argument involving a question of fact.

As discussed herein above, where the subject route is the only route for the employee to utilize to gain access to his place of employment, *Larson's* emphasizes that the "special hazard" part of this exception must also be present. *Larson's* cautions that the issue of special hazard cannot be ignored and award should not be made solely on the showing that an injury took place in an area which was the sole or usual route to the plant. 1 *Larson's, Supra* § 13.01(3)(b). In support of this proposition, *Larson's* cites the case of *Warner v. Industrial Commission*, 82 Ill. 2d, 188, 412 NE 2d, 490 (1980). In that particular case, the Court concluded that the Claimant was not entitled to compensation merely because his injury occurred on the public road that was the sole access to the construction site. In that case, as in the present case, the factual situation failed to demonstrate that there was any unreasonable, unnecessary increased risk of injury greater than that of the general public.

In addressing the issue of distance of a particular hazard from employer's premises, *Larson's, Supra*, suggests that some states have applied the "proximity" or "threshold" rule and in these jurisdictions, the specific distance of a special hazard from the employer's premises becomes an important factor in blocking the application of the rule. An Oregon case has cited an example of this issue, and in that case the Claimant traveled home for lunch every day and was injured while crossing a railroad track approximately one-third of a mile from his employer's plant. The Court in that particular case rejected the "special risk" argument since the particular railroad crossing was substantially removed from the employer's facility, there was no employer control over the subject route, and the tracks did not serve the employer's plant. 1 *A. Larson, Supra*, § 13.01(3)(f).

Some of the cases from other jurisdictions suggest that the issue should be whether or not the employer controls the actual road and whether or not the employer has the right to close off the road at will such as where there is a gate at the very entrance to the road that is manned by agents over the employer to screen access to the road. One of the cases cited in *Larson's* in support of the rule that all off premises accidents are not compensable is a 1989 New Jersey case. In that particular case the Claimant was denied benefits for injuries that he sustained in an automobile accident **two miles** from the employer's plant on a private access road leading to the plant. Unlike Grand Bear Way, that particular access road was owned by the employer, and it was the only means of access to the employer's plant. The Court found that the claimant was not injured within the course of employment because he encountered no special hazard as a result of driving along this access road. That road, as is the road that is the subject of the present claim, was maintained and policed by third parties and not specifically under the employer's control. One of the factors considered in that case was that the access intersects with a township road and may be used by the general public. The employer had a gate at a bridge along the road that they could close in the event of an emergency, but the accident occurred on the road prior to this gate and approximately two miles from the plant itself. *New Jersey Manufacturers Ins. Co. v. Public Service Electric & Gas Co.*, 234 N.J.Sup. 116, 560 A2d 117 (1989), cert. denied. This case is analogous to the present claim and furnishes support for the Employer and Carrier's position that merely because this is the only road to and from the Employer's premises this does not make the claim compensable.

Claimant's counsel suggests that the case of *Stepney v. Ingalls*, 416 So.2d 963 (1982) is analogous and should be applied to the present claim. To the contrary, the *Stepney* case is clearly distinguishable from the present factual situation and has no application as was explained in the

Order of Administrative Judge (P.V. 82-84) and the Order of the Circuit Court. See Appellees Record Excerpts, Exhibit No. 1, pages 5-7.

Larson's distinguishes between cases involving accidents that occur either on the way to work in the morning or on the way home in the afternoon from those that occur after the Claimant has already arrived at work and is allowed to go off premises for lunch provided he returns back within the specific time frame. In the *Stepney* case, the Claimant had already reported to work and was granted a special exception by Ingalls management to leave work to go to his house every day for lunch so long as it did not take more than thirty minutes to do so. This is in direct contrast to the factual scenario in our present claim where the employee had not yet arrived at the Employer's premises to report for work and was not under employer's control.

Another major distinction between the present claim and the *Stepney* case is that Ingalls Shipbuilding is a large industrialized complex that employs literally thousands of shipyard workers as opposed to the Grand Bear Golf Course and Country Club that only would have had eight employees working on the date of the subject accident. A major portion of the inherent danger that was found to exist with the access road at Ingalls Shipbuilding was the fact that thousands of employees are all trying to access the same exit road at the same time whenever the whistle blows for the lunch hour. With thousands of blue collar shipyard workers all trying to get out of the gate at the same time, a highly dangerous environment is created on the access road that has been established by many documented traffic accidents and injuries. In addition, Ingalls owns all of the land on both sides of the Ingalls access road which the Court determined to be creative of an atmosphere of actually being on Ingalls premises anywhere on the access road and particularly at the site where that accident happened.

This scenario is vastly different than the one at Grand Bear Road where on the Sunday morning at 6:00 a.m. the Claimant was the only employee of the Grand Bear Golf Course and Country Club utilizing the road for vehicular travel. In fact, contrary to the situation at Ingalls in the *Stepney* case, there were more members of the general public using Grand Bear Road for purposes other than going to work than there were employees of Grand Bear Golf Course and Country Club utilizing it.

The *Stepney* case actually turned on two critical elements that were not present in the present claim. The first element has already been mentioned as the fact that Ingalls owned all the land on both sides of the subject road all the way up and down the road. The scene of the accident in that case was at a recognized highly dangerous intersection where Ingalls employees would be attempting to exit from the Ingalls personnel office to cross lanes of traffic that were being occupied by thousands of Ingalls employees trying to exit from the Ingalls facilities on to the main highway as fast as they could. The Court determined that because of the **unique** situation where Ingalls owned all of the land surrounding the access road on both sides that this was tantamount to actually being on the Ingalls premises. This theory was then fortified by the most critical second element. The second element is a well documented recognized highly dangerous intersection (**special hazard**). In fact, the intersection there was so dangerous that Ingalls confirmed the recognized special hazard by posting a sign that read:

"Dangerous Intersection STOP
Look Both Ways Before Entering Road"

As found by the Judge and affirmed by the Full Commission and the Circuit Court, neither one of these two critical elements are present in the current controversy. The subject accident happened approximately a mile away from the land that is owned by the Grand Bear,

and all of the land on each side of the road from the entrance to the Grand Bear property all the way down the Grand Bear Road is owned by the National Forestry Service. The Grand Bear Golf Course and Country Club has absolutely no right to post any signs anywhere along the right-of-way of the Grand Bear Road nor were any such signs posted. More importantly, there has been absolutely no established history of serious automotive accidents at the site where the present accident occurred, and the overwhelming weight of the evidence in the present claim fails to establish that any known "special hazard" or unusually or abnormally hazardous condition exists. Even the Claimant's expert, when called upon to do so, was unable to cite any specific hazard at the site of the accident to which he could attribute the cause of the accident. He, at first, suggested that site distance around the curve was a special hazard, but this testimony was negated by the experts that testified on behalf of the Employer and Carrier. Also, Mr. Rash's theories that the headlights of the other vehicle came as a complete surprise to the Claimant were totally negated by the Claimant's testimony who verified that he was well aware that the other vehicle was there and he kept waiting for it to show up but it never did. Also, even the Claimant's expert admitted that the danger of being temporarily blinded by headlights from an oncoming vehicle is a general road hazard that would be applicable to all roads and not a special inherent danger unique to the Grand Bear Road.

It is well established in the record that there is no recognized special hazard along the Grand Bear Road or the specific accident site such defective road beds, dangerous intersections, dangerous railroad crossings, or anything over and above the general hazards of county roads that one normally is exposed by virtue of vehicular travel by the public in general. The proof in this matter conclusively establishes that as the only employee of the Grand who was utilizing the road at the time of the accident he would not have been exposed to any hazard greater than the general

public experiences, such as those who were using the road every day for access to the National Forest for recreational purposes such as hunting. The Claimant testified that the hunters were there every day during hunting season and they were using the road just as much if not more than he was.

In a case more relevant to the factual scenario of the present claim, the Mississippi Court of Appeals affirmed the decision of the Mississippi Worker's Compensation Commission denying benefits to a Claimant who was injured in a motor vehicle accident after pulling out onto Highway 304 in Tunica, Mississippi while exiting the parking lot of Sam's Town Hotel & Gambling Hall on the way home from work. That case, *Mooneyhan v. Boyd Tunica, Inc. d/b/a Sam's Town Hotel & Gambling Hall*, 850 So.2d 119 (2002) also involved an employee who was an employee of a casino who was injured off premises. In that case, the accident was even closer to the employer's premises as it happened just outside the exit to the employer's parking lot.

Mooneyhan argued that the facts in her case fell within the "special hazards" exception to the going and coming rule, and she further contended, as in the present claim, that the highway was the sole access road to her place of employment. It was the Claimant's contention that she was exposed to hazards greater than the general public because Highway 304 is the sole access road to her place of employment and it is particularly dangerous because of the high volume of traffic going to and from the casino. She further argued that the danger was increased due to the fact that there was higher traffic than usual due to the holiday season. The Court rejected each of these arguments and determined that Highway 304 is owned by the County and utilized not only by employees of Sam's Town Hotel but also by patrons of three casinos located on that road and the general public at large. More importantly, the Court in denying the claim found that although Highway 304 was in close proximity to Sam's Town Hotel premises, the Claimant introduced ***no***

evidence showing that entering or driving on Highway 304 was inherently dangerous or hazardous nor was any evidence introduced showing a repetitive history of auto accidents, serious or minor. This decision clearly establishes that if the Claimant is alleging a special hazard, he has to actually prove it with strict documentation. That same rationale is applicable to the present claim. This was the ruling of the Judge and the Commission in our present claim, and the Circuit Court affirmed their decision. Similarly, in the present claim no evidence was introduced showing that using the subject road was inherently dangerous or hazardous or a special hazard at the accident site caused the accident. Nor was any evidence introduced showing a repetitive history of automotive accidents. To the contrary, there was only one known accident at the site of the accident in the entire history of the road since being paved up to the date of the hearing in this matter. Furthermore, neither the employer herein or anyone else had documented a special hazard by posting a sign as had been posted by the employer in the *Stepney* case.

There was also no evidence to support the Claimant's allegations that he was at a greater risk of being injured by using the subject road on a regular basis to get to work than the members of the general public who utilized the road on a regular basis to access the recreational aspects of the National Forest land. Even Claimant's expert was forced to admit that the Claimant who was vastly familiar with the subject road was in no greater danger using the road on a regular basis than someone who was not familiar with the road using it for the first time or one who used it infrequently for recreational purposes. As found by the Judge and Commission, the fact finders, Mr. Ladner's injury did not result from a risk to which his employment exposed him, his injury resulted from his own wanton and willful disregard for and the violation of the posted legal speed

limit. In doing so he not only jeopardized his own well being but the well being of all the other members of the general public who were utilizing the road for recreational purposes.

While it is indeed sad and unfortunate that the accident happened and Mr. Ladner suffered severe injuries, the injuries did not arise out of and in the course and scope of his employment with Grand Bear Golf Course and Country Club. The accident occurred at a time and place when the Claimant was not yet within the course of his employment. He was on the way to work and at a physical location beyond his employer's control in any relevant sense.

Appellant's entire claim rests on the testimony of Louis Rash and as was demonstrated herein above and during cross examination in Mr. Rash's deposition and also cross examination at trial, his opinions were flawed and based upon inaccurate information and facts thus rendering it unreliable and untrustworthy. The Administrative Judge and the Full Commission rejected his opinions which was well within their authority as the triers of fact. Instead, the Judge and the Full Commission based their decision to deny the claim on the expert testimony of Robert Knesal, a professional Civil Engineer who designs roads, subdivisions, and parking lots. Their opinion was also supported by the testimony of the Traffic and Safety Superintendent for Harrison County and the Supervisor of the County's Bridge and Traffic department all of whom testified to the safety factor of the subject county road. The opinion of the Administrative Judge and Full Commission was further supported by photographic and video evidence as well as declarations against interest by the Claimant all of which contradicted the testimony of Claimant's expert. Clearly, the decision of the Administrative Judge and the Full Commission are supported by substantial evidence as found by the Order of the Circuit Court and must be affirmed.

Appellant also argues that the case of *Duke v. Parker Hannifin Corp.*, 925 So.2d 893 (Miss. 2006) was decided after the decision in the present claim and should have some bearing on the present claim. To the contrary, there is absolutely no proof whatsoever in the record that Ladner was on any special mission or errand for his employer when the subject accident occurred and all of the other potential exceptions to the General Rule relied upon by Appellant have already been addressed as not applicable.

Counsel for Appellant also suggests that the Courts have previously stated that doubtful cases must be resolved in favor of compensation so as to fulfill a beneficent purpose of the statute. Actually, there is no statutory presumption of compensability as suggested by counsel for Appellant. The statutory provisions of the Mississippi Workers' Compensation Act state that the Act shall be **fairly construed** according to the law and the evidence, and makes no mention of favoring one party as opposed to the other. (*Miss. Code Ann.* § 71-3-1.) Furthermore, the suggestion of liberal application obviously does not mean all claims are to be decided in favor of the Claimant as the case law including those cases cited by opposing counsel all adhere to the legal concept that the Claimant has the burden of proof by preponderance of the evidence of the elements of the claim which are contested arguably and in good faith. Those cases cited by the Claimant for this proposition all confirm that the Commission is the finder of fact and when supported by substantial evidence, it is the duty of the Court to affirm the Commission's findings. (See for example *Dunn, Mississippi Workmen's Compensation*, Third Edition, Section 31-32 and see also *Mississippi Practice Series, Mississippi Workers' Compensation* § 1:6).

CONCLUSION

The Decision of the Commission, the finders of fact, is supported by substantial evidence. The Order of the Circuit Court addresses each and every issue raised by Appellant on appeal and

addresses each issue based upon sound logic. The Order of the Circuit Court contains no significant errors of law or fact and therefore must be affirmed.

RESPECTFULLY SUBMITTED, on this the 18th day of July, 2007.

GRAND BEAR GOLF COURSE / GRAND CASINO OF MISSISSIPPI,

and

GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Appellees

BRYANT, DUKES & BLAKESLEE, P.L.L.C.,
Their Attorneys

BY: RONALD P. RUSSELL

CERTIFICATE OF SERVICE

I, RONALD T. RUSSELL, of the law firm of Bryant, Dukes & Blakeslee, P.L.L.C., do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing **Brief of Appellees (Employer and Carrier)** to:

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Honorable Lisa P. Dodson
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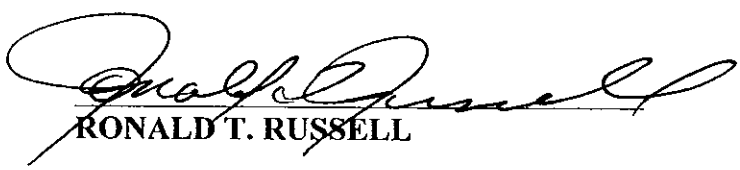
SO CERTIFIED, this the 18th day of July, 2007.



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