IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI

CASE NO. 2007-WC-00231

RICHARD W. LADNER, II — APPELLANT

VERSUS

GRAND BEAR GOLF COURSE/GRAND CASINO OF MISSISSIPPI and GREAT AMERICAN INSURANCE COMPANY — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT RICHARD W. LADNER, II (Claimant)

(Oral Argument Requested)

JAMES K. WETZEL, ESQUIRE (MS Bar No [redacted]
JAMES K. WETZEL, P.A.
1701 24th Avenue
Post Office Box I
Gulfport, MS 39502
(228) 864-6400 (ofc); (228) 863-1793 (fax)
ATTORNEY FOR APPELLANT

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

RICHARD W. LADNER, II — **APPELLANT**

VERSUS

GRAND BEAR GOLF COURSE/GRAND CASINO OF MISSISSIPPI and GREAT AMERICAN INSURANCE COMPANY — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

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

Richard W. Ladner, II (Claimant)	Appellant
James K. Wetzel with the law firm of James K. Wetzel & Associates	Counsel for Appellant
Grand Bear Golf Course/Grand Casino of Mississippi (Employer and Great American Insurance Company (Insurer)	Appellees
Ronald W. Russell, Esquire with the law firm of Bryant, Dukes & Blakeslee	Counsel for Appellees
Honorable Linda A. Thompson, Mississippi Workers' Compensation Commission	Administrative Law Judge
Honorable Lisa P. Dodson, Harrison County Circuit Court	Circuit Judge

JAMES K. WETZEL, Counsel for
Richard W. Ladner, II, Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CASES CONT'D:

Other:

STATEMENT OF THE ISSUES

I. **THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION IN FINDING THAT THE CLAIMANT'S VEHICULAR COLLISION OF JANUARY 14, 2001, WHILE DRIVING TO WORK WAS NOT AN INJURY WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT; AND FURTHER HOLDING THAT THE VEHICULAR COLLISION FELL WITHIN THE "GOING AND COMING RULE", THEREFORE, NOT A "COMPENSABLE ACCIDENT."**

INTRODUCTION

This is an appeal by Richard W. Ladner, II, who filed a workers' compensation claim against his employer, Grand Casino of Mississippi, d/b/a as Grand Bear Golf Course, and its workers' compensation carrier. For convenience hereinafter in this brief, the Appellant, Richard Ladner, will be referred to as Mr. Ladner, and the Appellee, Grand Casino of MS, will be referred to as Employer.

Mr. Ladner is appealing the decision of the Circuit Court of Harrison County, First Judicial District, dated January 19, 2007. (R.E.8). Said decision affirmed the order of the Mississippi Workers' Compensation Commission dated February 8, 2006. (R.E.7). Said order affirmed the decision of the administrative law judge dated June 9, 2005. (R.E.6). Mr. Ladner contends errors of law and fact were made by the Circuit Court judge affirming the decision of the Full Commission and its fact finder, the administrative law judge.

The most significant of said errors by the Circuit Court judge was in affirming the Full Workers' Compensation Commission holding that Mr. Ladner's vehicular collision on January 14, 2001, while driving to work was not an injury while in the course and scope of his employment; that the vehicular accident in which he was involved fell within the "going and coming rule"; therefore, not compensable. The Workers' Compensation Commission also erred as a matter of law in failing to apply certain statutory principles in its decision making process: (1) the Workers' Compensation law should be construed liberally in favor of the claimant in order to carry out the purpose of this remedial legislation; and (2) that doubtful questions should be resolved in favor of the claimant.

The Claimant would submit to this Honorable Court that the Workers' Compensation Commission as well as the administrative law judge failed to apply these legal standards on the issue of whether or not this vehicular collision was "incident to his employment" which gives rise to a compensable injury under the Workers' Compensation laws.

The Claimant would submit to this Honorable Court that after the record is reviewed in its entirety, this Court will be left with the clear and firm conviction that a mistake has been made by the Circuit Court and the Full Workers' Compensation Commission in its application of the Act to the findings of fact made by the administrative law judge as it relates to compensability.

FACTS OF THE CASE

At the time this matter was heard before the administrative law judge, Mr. Ladner was 27 years old and had a high school education. Prior to Mr. Ladner's accident on January 14, 2001, he had been working for the Employer as an assistant mechanic at the Grand Bear Golf Course and Country Club. He worked six days a week at the golf course approximately 8 to 12 hours a day. All of his work was performed at the golf course and country club which was located at the end of a rural county road that runs southeasterly from Highway 49 to the Grand Bear Golf Course known as Grand Way Blvd. The entrance to the golf course and country club is approximately six miles from Highway 49. Grand Way Blvd. is the only road leading to the Grand Bear Golf Course. The only physical structure on Grand Way Blvd. is the Grand Bear Golf Course and Country Club at the end of this roadway. There were no other homes or other physical structures on this six mile road.

On January 14, 2001, there were about 13 to 15 employees in the maintenance department at the golf course. Approximately 8 or 10 of these individuals worked on the weekend, including Mr. Ladner. There were other workers at the club house and pro shop and they usually arrived at 8:00 o'clock a.m. Mr. Ladner assisted the main mechanic in the maintenance of all vehicles, golf carts, and lawnmowers.

Grand Way Blvd., prior to being paved as a two-lane road, was paid for by the Grand Bear Golf Course, according to the testimony of Robert Kneasal, the Harrison County engineer. When Grand Way Blvd. was taken over by Harrison County, it was a dirt road and designated as Road 424. This particular road was an old logging trail and it was never designed originally from the beginning as a formal road or roadway. Robert Kneasal testified that when it was taken over by the County, they went out and surveyed and compiled a set of drawings to show the alignment of the six-mile

road and improvements the County wished to have performed. The Grand Casino entered into a public/private agreement in 1999 or 2000 wherein Grand Casino would pay for the expenses of the improvements, but the County would oversee the layout of the road. The National Forestry Commission was the owner of the road and was very adamant about not allowing the County to get off the path of the road. (T.145-146).

Mr. Kneasal testified there were several areas of curves that had "big dog legs" the County wanted to take out in order to shorten up the road in some places and the Forestry Commission would not allow the County to do same. (T. 147). Mr. Kneasal testified the Forestry Commission made the County stick to the existing right of way of the road as it was laid out. He did testify that in some places the County smoothed out some curves but basically stayed with the layout of the road as it existed when a dirt road. (T.147). Kneasal advised that when the County designed a road from scratch, it would determine what speed limits it wanted on the road and then it would design the curves and road based upon the speed to be designated for that particular roadway. He advised that in this particular case, the Grand Bay Blvd., the curves were already in place and the County just basically smoothed out some of the curves and made sure it had adequate room for pavement and some ditching for drainage along the right of way. (T.147-148).

Mr. Kneasal testified that he was in charge of the survey crew and that he had the survey crew go out and survey the road for right of way because the National Forestry Commission required a deed to be drawn up with the legal description and they would in turn grant an easement for the use of the road to the County. (T.148). Mr. Kneasal advised they prepared construction drawings for the road which was planned and profile sheets that showed the horizontal alignment and the vertical alignment of the road and determined if any culverts were required in the lowest spots and basically

laid it out on paper so the survey crew could continue laying it out in the field for construction workers. (T.148). He advised that the primary purpose for this particular roadway being improved was because it was the only access road to the golf course and country club and it was being paid for by Grand Casino for their use. The hunters and people using the national forest property would be the only other persons that would be using this road from time to time. Mr. Kneasal testified Grand Casino hired a paving contactor and that the County only oversaw the alignment and the surveying of the road in question. (T.149).

Mr. Kneasal also testified that the federal government, the Department of Interior and National Forest Service, limited the County from clearing more of the right of way and using more of the road for shoulders. They would not allow for wider shoulders. He further testified Grand Bay Blvd. is still owned by the federal government and the County only has an easement for the use of the road. (T.150). He further testified that the land on the north side and south side of the road which basically runs east and west was all owned by the National Forestry Service up to the gate where the Grand Casino property begins. Kneseal further testified that the vehicle accident involving Mr. Ladner that occurred on January 14, 2001, was on land that was owned by the federal government or right of way, and that the only signs along this area of the road were the ones that other employees of the County testified to with a reference to regulatory speed limit signs. (T.151).

On cross-examination of Mr. Kneasal by claimant's attorney, Mr. Kneasal testified that Grand Casino bought the piece of property at the end of Grand Bay Blvd. because it wanted to develop a golf course as an amenity to its casino; that the only ingress and egress to the golf course property was the old logging and hunting trail known as Road No. 424, which was basically a fire lane (T.155). It was also considered a logging road that was owned and maintained by the National

Forestry Service. Mr. Kneasal also testified Grand Casino paid for all the improvements to Grand Bay Blvd. A public/private agreement was entered into with Harrison County and it did not cost the County a nickel in terms of improvement costs. (T.156).

Mr. Kneasal also testified the only ingress and egress to this golf course was by way of this logging road and that the National Forestry Service would not allow them to vary from the existing logging trail in terms of the layout of the road. He further testified that if he were going to design a road from Highway 49 to the Grand Casino property, he would not have designed this road in the fashion in which it was laid out. He testified that because of all the curves and natural obstacles in that road it would not be good and that you would want to design it for a higher speed which you couldn't do with the curves that were in it. This was the reason they had a maximum speed limit of 25 mph along the 6.2 mile stretch. They would normally design a road for travel of 40-50 mph. Further, in designing the shoulders for the road, they would normally have 5-8 foot shoulders and then ditches. There would be clearing beyond the 5-8 foot right of way so if people ran off the road, they would not hit trees that were adjacent to the road. (T.157-158).

Mr. Ladner testified that he used his personal truck to drive to work, that he was not paid for mileage to and from work and that he lived about 30 minutes from the golf course. Mr. Ladner testified he normally took Wortham Road, which is on the west side of Highway 49, crossed Highway 49 over to Grand Way Blvd. runs southeasterly from Highway 49 to the golf course. The entrance to the golf course and country club is approximately 6.2 miles from Highway 49 and Grand Bay Blvd. is the only road leading into or out of the Grand Bear Golf Course. (T.76).

On Sunday morning, January 14, 2001, Mr. Ladner testified he left for work in his red Chevrolet pick-up truck, planning to report to work at the golf course promptly at 6:30 a.m. He

testified he crossed Highway 49, entered Grand Way Blvd. going southeasterly to the golf course, and it was about 6:15 a.m. and listening to the radio in his truck. According to Mr. Ladner, as he approached one of the major curves on this roadway, he saw an oncoming vehicle with its lights on through a clear cut in the trees, and he dimmed his lights. (T.72). He then advised that he lost control of his vehicle and ran into a tree on the south side of the roadway. At the time of the accident, Mr. Ladner did not see any other Grand Bear employees on the Grand Way Blvd. He testified he only saw the vehicle that was coming from the other direction away from the golf course and assumed it was a deer hunter. (T.81). Mr. Ladner testified that from the time deer season began in November, the Grand Bear employees and golfers had to look out for deer hunters because the hunters hunted the road every day, starting about 6:30 a.m. He said they always started near the golf course where there was a good deer crossing. According to Mr. Ladner, he had just gotten to the deer stand area before his wreck when he saw the headlights through the clear cut in the trees and he dimmed his lights because he knew a car was coming. The car was right there with its lights on bright and Mr. Ladner testified he missed the curve which he could not see because of the lights on the other car and he hit a tree and his vehicle was totaled. (T.86-87).

Among the many injuries suffered in the wreck, Mr. Ladner's primary injury was a broken neck at the C6-7 level which left him as a "quadriplegic" with some limited use of his upper extremities that he described as "his right hand doesn't work at all and his left hand has about as much strength as a baby would have." (T.73). He further testified he could not feel from his chest down. Mr. Ladner testified the collision, based upon his best estimate, was approximately 1.3 to 2 miles from the entrance of the Grand Casino property and the only medication he had taken that day prior to the accident was his Dalprax which is for depression. (T.78-79).

A Mississippi Uniform Accident report was prepared by Harrison County Sheriff Deputy Charles Morrison which indicated Ladner collided with a tree at about 6:06 a.m. on Sunday, January 14, 2001. (R.E.9). The deputy arrived at the scene at 6:12 a.m. He reported that Mr. Ladner stated he was eastbound on Grand Bear when he saw an oncoming vehicle. He stated the vehicle lights blinded him and he ran off the road striking a pine tree. Witness Barnett stated he was westbound on Grand Bear doing about 5 mph when he saw a vehicle come out of nowhere and strike the tree. Deputy Morrison testified he arrived at the scene at 6:12 a.m. and found Mr. Ladner's vehicle on the south side of the road where it struck a large pine tree. Deputy Morrison testified he did not smell alcohol on Mr. Ladner and the emergency technician told Deputy Morrison that he had seen no signs of alcohol. Deputy Morrison described the road as "extremely curvy" . He also said the road was relatively new and paved with asphalt and that there was a double yellow line down the middle of the road. Deputy Morrison testified that the accident took place in the 25 mph zone. (R.E.11).

Louis Rash, a certified civil engineer from Biloxi, Mississippi, testified for the claimant as an expert in civil engineering and road design. Mr. Rash received his B.S. and M.S. in civil engineering from the University of Mississippi and had been a practicing civil engineer since 1968. In addition to other past work, he was employed by the City of Biloxi as a city engineer for 10 years. In 1993, he went into private practice and his company, Louis D. Rash & Associates, provided expert consulting work in civil engineering and road design providing their expertise to municipal as well as county entities for public work projects and shopping center development. Mr. Rash further testified he had been a licensed professional engineer in the state of Mississippi since 1968 and also held licenses in

the past in the state of Louisiana. Mr. Rash was accepted as an expert in the field of civil engineering with an expertise in road design and engineering. (T.21-22).

Mr. Rash testified he was engaged by Mr. Ladner, claimant, through his attorney, James K. Wetzel, to undertake an evaluation as to the safety, design and hazards involved with the use of the road currently known as the Grand Way Blvd. His evaluation took place subsequent to Mr. Ladner's accident. (R.E.10). Mr. Rash testified in addition to driving the road, he had a field crew do a global positioning system alignment of the road to verify the road was the one that showed up on the County maps and the geological survey maps that he used. (T.23-24). Mr. Rash also testified that in all of his contacts with the engineering department for Harrison County, he was told by the employees in question that the only specifications they had for county roads within Harrison County were "subdivision regulation requirements" for the design and construction of county roads. (T.24). He further testified there was no formal "county road design ordinance" and was told by the engineering department that the only one they had in use was a county subdivision regulation which Mr. Rash obtained a copy (T.25). Mr. Rash further reviewed all the documents from Bobby Kneasal's office, who was the county engineer, and he reviewed the plan and documents entered into between the Harrison County Board of Supervisors and the Grand Casino.

Mr. Rash testified that the Grand Bear Road, also know as Grand Way Blvd., as far as the County was concerned, generally goes in an easterly direction from Highway 49, then in a southeasterly direction 6.2 miles to the gate of the Grand Bear Course. Mr. Rash testified that the shoulders on each side of the roadway are only 2-3 foot; and they are not very distinct for slopes or back slopes along this area. In fact, some of the surface drainage ditches were almost completely vertical. (T.29-30). Mr. Rash testified the significance of this is that it is a "confining thing" and

there is no safe way to get off the road if you have to get off the road. He further testified this two-lane road was the same all the way from the exit off Highway 49 to the entrance at the Grand Bear property. He testified that once you get to the Grand Bear property, the side slopes are then designed properly from 3 to 1 and maybe 4 to 1 slopes away from the road where the ditches are involved. In reference to the trees in this particular 6.2 miles of roadway, Mr. Rash testified in his review of it as well, the trees were almost on top of the road and then when you get to the entrance way of the casino property it looks like there is a total change where you have approximately 20 feet of cleared area off the leading edge of the road. (T.30-31).

Mr. Rash testified that he personally accompanied Officer Charles Morrison with the Harrison County Sheriff's Department to physically locate the tree impacted by Mr. Ladner when he left the road. (T.28;31). He further testified there was no other ingress or egress to the Grand property other than this particular 6.2 mile stretch of road. From a civil engineering standpoint, Mr. Rash testified he was of the opinion this was a hazardous road based upon the curvature of the road, the length of the curves and the radius of the curves and that all speed limits which were set along this whole 6.2 mile length at 25 mph was based strictly upon the hazardous conditions of the road. Mr. Rash further testified that the site distance was negligible primarily because the vegetation is right up against the edge of the road or within five feet of the edge of the road and there are very sharp turns at numerous locations along the 6.2 miles. (T.31-21). In fact, there are some places the speed limit is 15 mph and the turns are very dangerous because there is no visibility of what you are going to see when you make the turn. In reference to the specific area where the collision occurred, Mr. Rash testified the curve was actually a little bit more of a degree of curvature in that particular point and that it was slightly going uphill as well. There was a slight incline as you go around the

corner and the vegetation blocked your view. Mr. Rash pointed out the tree that was actually struck and demarcated it with an orange ribbon in photos introduced into evidence. He testified that where Mr. Ladner went off the road, there was no back slope whatsoever on the ditch itself and that it was his opinion the subject accident which occurred on January 14, 2001, by Mr. Ladner on the Grand Bear Golf Course road was caused by special hazards and dangers which are inherent in the conditions along the route to the golf course. (T.35-36). Mr. Rash testified his opinions were based primarily on the closeness of the vegetation to the road and the fact there are not any shoulders to the road necessarily, and that there is a 6-8 inch drop from the edge of the pavement to the so-called shoulder and then the embankment or back slope of the ditch is essentially vertical and is that way along the whole section through the 6.2 miles. (T.36). Mr. Rash also testified that for all practical purposes this road is a part of the employer's premises in that it is the only route that you can get to the premises and there was no other route to travel to get to the Grand Bear Golf Course. Mr. Rash also testified that Mr. Ladner, in his opinion, was subjected to a degree of exposure greater than the general public who generally used the road and that Richard Ladner was in a different position because he had to go to work to and from each day, seven days a week, where these special hazards existed. Mr. Rash testified that in his opinion the site distance with curves that are blocked with trees and other roadside vegetation creates a very hazardous condition along the roadway and the road bed itself in his opinion, did not meet the generally accepted minimum criteria for site distance for curves and conditions of curvature for the posted speed limit on that road. (T.37-38).

Mr. Rash further testified that Mr. Ladner was exposed on a daily basis to significant hazards each day associated with this particular road that he had to travel to and from his work. (T.40). He further testified that looking at the road way or undeveloped road as it existed prior to the paving of

the road in approximately 1998 or 1999, he did not see any appreciable difference in the actual layout of the road and it did not appear that they took out any major curves whatsoever. Specifically, there were absolutely no changes in the road way prior to the paving and after the paving where the incident took place by Richard Ladner. (T.42-43). Mr. Rash further testified that the curve that Richard Ladner was approaching was not demarcated or designated as approaching a curve at that particular area and there were no signs warning Richard Ladner or the general motorists approaching the curve to reduce their speed. Finally, it was the opinion of Mr. Rash, that based upon general civil engineering principles, the 6.2 miles of roadway constituted a special hazard that Mr. Ladner approached on the morning of January 14, 2001. (T.40).

In light of the facts cited above, the administrative law judge, affirmed by the Workers' Compensation Commission, stated and found as follows:

> 4. The question is whether the motor vehicle accident arose out of and in the course of his employment with the Grand Casino. In support for his claim for workers' compensation benefits, Mr. Ladner has relied on the "special hazards" exception of the "threshold doctrine" or the "going and coming rule." The rule is that "for an employee having fixed hours and a place of work, going to and from work, is covered only on the employer's premises." *Larson's Workers Compensation Law,* Section 13.01(1), "The Basic Going and Coming Rule." Thus an accident that occurs off the employer's premises while a worker is traveling to and from his place of his employment is not compensable.
>
> An employee who claims an exception to the general rule must prove that his situation comes within one of the generally accepted exceptions. The Mississippi Supreme Court has stated the following exceptions:
>
> (1) Where the employer furnishes the means of transportation or remunerates the employee; or (2) where the employee performs some duty in connection with his employment at home; or (3) where the employee is injured by some hazard or danger which is inherent in the condition along the route necessarily used by the employee; or (4) where the employer furnishes a hazardous route; or (5) where the injury results from a hazardous parking lot furnished by the employer; or (6) where the place of injury, although owned by one other 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. *Wallace v. Copiah County Lumber Co.*, 77 So. 2d 316, 319 (Miss. 1955).

Mr. Ladner looks to the third exception: "where the employee is injured by some hazard or danger which is inherent in the condition along the route necessarily used by the employee." The Employer did not furnish him transportation or pay him mileage. He did not perform any duty connected to his employment at home. He was not injured in a parking lot, and the place of injury was more than a mile from the premises owned by the Employer.

According to *Larson's*, the special hazard exception to the general premises rule must involve "a true special hazard." An access route must be closely associated with the premises. *Larson's*, Section 13.01(3)(b). Apparently, the early cases on the subject involved accidents occurring on railroad crossings or rights of way adjacent to factories.

Mr. Ladner has referred particularly to the opinion of the Mississippi Supreme Court in *Stepney v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 416 So. 2d 963 (Miss. 1982). In that case, the claimant was seriously injured while driving along the sole access road leading into Ingalls Shipbuilding and its parking lot, right in front of Ingalls Employment Office. The access road was a six-lane highway with two-way traffic. Another driver pulled out in front of the claimant and the two cars collided. Claimant was on his lunch break and in his personal vehicle. He was not on an errand for the employer and he was not reimbursed for his transportation. The Supreme Court determined that the injury was compensable, reporting the following as significant facts:

> (1) The six-lane road or street was the only access and exit to Ingalls Westbank shipyard and the site of claimant's employment.
>
> (2) Although the street was either maintained or owned by the county or state, it was used principally by employees of Ingalls and those persons who had business with Ingalls.
>
> (3) During changes of shifts and lunch breaks, thousands of Ingalls' employees left and entered the plant by that sole access route, the six-lane street.
>
> (4) The premises on each side of the access road were owned and used by Ingalls. In addition to the regulation red stop sign at the point where the collision occurred Ingalls had erected another stop sign with the following words thereon: "Dangerous Intersection. Stop. Look Both Ways Before Entering Road."

(5) Ingalls knew and recognized that the intersection of the access road and the road leading from the employment office constituted a hazard

and the placement of the aforementioned sign at that point is an admission by it thereof.

(6) The appellant was exposed to a greater danger than the general public for the reasons he worked regularly every week and was required to cross the dangerous intersection on his way to and from work each day. *Stepney,* 416 So. 2d, at 966.

In the *Stepney* case, it is clear that the employer admitted there was a special hazard at the intersection of the access road and the road leading to the employment office, and the special hazard was right in front of the employment office, that is very closely associated to the employer's premises. As a matter of fact, Ingalls owned all the land on both sides of the subject road all the way up and down the road. Thousands of Ingalls' employees had to cross roads of traffic entering or exiting from Ingalls' facility. The Supreme Court determined that because of the unique situation where Ingalls owned all of the land surrounding the access road on both sides that it was tantamount to actually being on the Ingalls' premises. Additionally, the intersection was documented by the employer as a highly dangerous intersection.

In Mr. Ladner's case, however, the action occurred more than a mile from the Employer's gate and from the land owned by the Employer, and the property of both sides of Grand Way Blvd. is part of the DeSoto National Forest, not the Grand Casino. The Casino has no posted no signs about dangerous conditions of Grand Way Blvd. There is no history of motor vehicle accidents along Grand Way Blvd. until Mr. Ladner's accident. There are no road intersections or railroad crossings along the six miles of the road. Additionally, Grand Way Blvd. is not principally used by employees or patrons of Grand Bear Golf Course and Country Club. It is a road with a long history of hunters, hikers and others out in the woods to enjoy recreation and national forests. It is not a heavily traveled road in the sense of the road in the *Stepney* case where thousands of Ingalls' employees traveled several times a day.

There is no dispute that Grand Way Blvd. is full of curves, that there is limited shoulder area along many sections of the road, and that trees grow closer than one car's width to the road. The speed limit is posted at either 25 or 15 mph and double lines advise there no passing on the road – the County's recommendation for safe driving along the road. The roadway is in very good condition, and the sides of the road are striped. Grand Bay Blvd. resembles many other old country roads in Mississippi (for example, Old Agency Road in Madison County, Mississippi).

In January 14, 2001, Mr. Ladner drove to work at 6:15 a.m. when it would have been dark along the Grand Way Blvd. He testified he was blinded by the lights of a vehicle of a hunter coming in a direction away from the Grand Bear Golf Course and because of that, he ran into a pine tree on the south side of Grand Way Blvd. The video tape of the drive he made does not bear out that testimony, however. The pine tree into which he drove was in a place that would indicate he had not made the turn into the curve of the road. It is hard to imagine that he could have been blinded by the lights of an oncoming vehicle because there was a thick growth of trees between him and the other vehicle and because of the curves of the road. If he had been driving at 15-25 mph, he should have been able to stop rather easily if he had actually been blinded by the lights of an approaching vehicle. And, considering how often he drove the road, he should have known it quite well – at least well enough to know the curvy nature of the road and the closeness of the trees to the road bed.

Mr. Ladner admitted to the deputy sheriff at the scene of the accident that he was going at least 45 mph when he ran into the tree. Deputy Morrison testified he thought Mr. Ladner may have been going faster than 45 mph. Even Mr. Rash, the claimant's expert, admitted that any road becomes hazardous when one exceeds the speed limit.

Mr. Ladner also testified that he saw the headlights on the approaching hunter and dimmed his lights and waited for the car to proceed on up the road. This is consistent with his testimony about being blinded by the light of an oncoming vehicle.

In conclusion, this most unfortunate motor vehicle accident occurred before the claimant reached his employer's premises on a road that does not present hazards any more exceptional than of any other winding rural road through a forest upon which it is recommended a 25 or 15 mph speed limit. This accident falls within the "going and coming rule" and is not compensable. It is therefore, ordered that Richard Ladner's claim for workers' compensation benefits is hereby denied and dismissed. (R.E.6).

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE WORKERS' COMPENSATION COMMISSION IN FINDING THAT THE CLAIMANT'S VEHICULAR COLLISION OF JANUARY 14, 2001, WHILE DRIVING TO WORK WAS NOT AN INJURY WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT; AND FURTHER HOLDING THAT THE VEHICULAR COLLISION FELL WITHIN THE "GOING AND COMING RULE", THEREFORE, NOT A "COMPENSABLE ACCIDENT."

The Honorable Court has stated on numerous occasions, that the Workers' Compensation Act should be given liberal interpretation and where there is doubt, the cases should be resolved in favor of compensation. *See, Walton v. McClendon,* 342 So. 2d 732 (Miss. 1977). In *Deemer Lumber Co. v. Hamilton,* 52 So. 2d 634 (1951), this Supreme Court stated, "We have repeatedly held that the Workers' Compensation Act is to be liberally construed. All courts agree that there should be, according to the Workers' Compensation Act, a broad and liberal construction that doubtful cases should be resolved in favor of compensation, and the main purpose which this Act seeks to serve leaves no room for narrow or technical construction." This Court stated in *Marshall Durbin Co. v. Warren,* 633 So. 2d 1006 (Miss. 1994), "It has been the long standing rule of this Court that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purpose of the statute." *E.g., Barham v. Collum Forest Products Center, Inc.,* 453 So. 2d 1300, 1304 (Miss. 1984); *Big Two Engine Rebuilders v. Freeman,* 379 So. 2d, 888, 889 (Miss. 1980); *Evans v. Continental Grain Co.,* 372 So. 2d 265, 269 (Miss. 1979).

Further, the Honorable Court has pronounced: "Questions of whether an injury arose 'out of or in the course of employment' as required by statute is a conclusion of law and if doubtful, should be resolved in favor of compensation." *Bolivar County Gravel Co. v. Dial,* 634 So. 2d 99,

103 (Miss. 1994). This Court has also made reference to the weight or "great weight of the evidence" and has acted thereon to reverse a denial of compensation, in the strict application of the "substantial evidence rule" as in common law is doubtful. *See, King v. Westinghouse Electric Corp.*, 92 So. 2d 209 (Miss. 1957), wherein it is said that "doubtful cases should be resolved in favor of compensation." While Mr. Ladner is ever mindful that the Commission is the sole judge of the weight and sufficiency of the evidence, on the other hand, the Commission is burdened with the responsibility not to arbitrarily reject the evidence contrary to the rule governing judicial actions. As stated in *Vardaman Dunn,* Section 272, Mississippi Workers' Compensation:

> Evidence which is not contradicted by positive testimony or circumstances, and which is not inherently improbable, incredible or unreasonable, cannot, as a matter of law, be arbitrarily or capriciously discredited, disregarded or rejected, even though the witness is a party or interested; and unless uncontradicted evidence is shown to be untrustworthy, it is to be taken as conclusive and binding on the triers of fact. If unimpeached testimony is supported by all the circumstances in the case and if there are no substantial grounds within the record upon cogent and logical emphasis may be drawn to the contrary, the Commission may not base its decision upon speculation that the witness might have been mistaken or untruthful and something else might have possibly occurred. *See, Tanner v. American Hardware Corp.*, 119 So. 2d 380 (Miss. 1960); *Machine Products Co. v. Willemon,* 107 So. 2d 114 (Miss. 1958); *Shivers v. Biloxi Gulfport Daily Herald,* 110 So. 2d 359 (Miss. 1959).

As this Honorable Court is also aware in its judicial review of findings of the Mississippi Workers' Compensation Commission, it also extends to a determination of whether the Commission's decision is clearly erroneous. The standard for that test provided by this Court in *Central Electric Power Assn. v. Hicks,* (110 So. 2d 351, 356 (Miss. 1959), is as follows:

> A finding of fact is clearly erroneous when, although there is slight evidence to support it, after a review of the entire evidence and the record, the Court is left with a definite and firm conviction that a mistake has been made by the Commission in its finding of fact and in its application of the Act. *Id.*, at 357.

The Court further noted:

> In reviewing awards or denials of compensation benefits, the Court shall examine the record to determine whether the salutary policies and humane purposes of the Compensation Act are being carried out in the particular case; and further, whether the Act is receiving the broad and liberal construction which the statute requires, without over-emphasis on technicalities and on "form over substance." *Id.*, at 357.

When reviewing compensation cases on appeal, this Honorable Court has noted that the function of the circuit court is to determine whether there is substantial, credible evidence which supports the facts and determination by the Commission. However, this Court has also noted that the substantial evidence rule does not require a circuit court or the Mississippi Supreme Court to act as a "rubber stamp" every time a workers' compensation case is appealed. Although great weight is given to the findings of the Workers' Compensation Commission, the Workers' Compensation Act does provide court review of questions of law and fact. *See, Bechtel Construction Co. v. Bartlett*, 371 So. 2d 308, 401 (Miss. 1979). When the issue is one of law rather than fact, there is a *de novo* standard of review. *Shelby v. Peavey Elec. Corp.*, 724 So. 2d 504, 506 (Miss.Ct.App. 1998).

Mr. Ladner would contend and submit to this Honorable Court that after a review of all the evidence and the record in this matter, the Circuit Court judge erred in affirming the Workers' Compensation Commission's decision and its fact finder, the administrative law judge.

Mr. Ladner's contention is that the administrative law judge and Commission acted arbitrarily and capriciously by disregarding expert testimony submitted by the claimant through the testimony of Louis Rash, a certified civil engineer. At no time did the administrative law judge or the Commission find that the testimony of Mr. Rash was contradicted or incredible of belief, and that same should not be accepted as it relates to his opinion that the Grand Bear Blvd. (1) was the only ingress and egress to the Grand property; and (2) that for all practical purposes, Grand Way Blvd. is

a part of the employer's premises and the only route that you had to get to the employer's premises and there is absolutely no other route to travel or get to the Grand Bear Golf Course. Thus, it was uncontradicted through Mr. Rash's testimony that Mr. Ladner was subjected to a degree of exposure greater than the general public who generally used the road; that Richard Ladner was in a different position because he traveled the road seven days a week where the special hazards of this road existed. He testified Mr. Ladner was exposed on a daily basis to significant hazards each day associated with this particular road that he had to travel to arrive at the work site.

The administrative law judge as well as the Workers' Compensation Commission clearly erred as matter of law by (1) submitting that the claimant only attempted to use subsection 4 of the generally accepted exceptions to the "going and coming rule."

An employee who claims an exception to the general "going and coming rule" as set out above on page 12 of this brief, must prove that his situation comes within one of the generally accepted exceptions.

The most recent pronouncement regarding the exceptions to the "going and coming rule" is the case of *Duke v. Parker Hannifin Corp.*, 925 So. 2d 893 (Miss. 2006). The Court of Appeals in reversing the circuit court and Workers' Compensation Commission stated the following:

> We note that the Commission concluded, based on the record facts, that the decedent did not fit any of the exceptions to the so-called "going and coming rule." The Mississippi Supreme Court has expressed the general "going and coming rule" as follows: "Hazards generally encountered by employees while going 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." *Miller Transporters, Inc.*, 350 So. 2d, at 691. The Mississippi Supreme Court, however, has established the following specific exceptions to the general "going and coming rule": (1) where the employer furnishes the means of transportation, or remunerates the employee; or (2) where the employee performs some duty in connection with his employment at home; or (3) where the employee is injured by some hazard or danger which is inherent in the conditions along the route

necessarily used by the employee; or (4) where the employer furnishes a hazardous route; or (5) where the injury results from a hazardous parking lot furnished by the employer; or (6) where the place of injury, although owned by one other than the employer, is in such close proximity to the premises owned by the employer, as to be, in effect, a part of the premises; or (7) when the employee is on a special mission or errand for his employer or where the employee is accommodating his employer.

The Court concluded in reversing the Commission:

Duke asserts that these facts demonstrate that the decedent was on a special mission or errand from Parker Hannifin at the time of her death. We agree. The record supports a conclusion that the decedent was within the period of her employment, at a place where she would reasonably be in performance of her duties, while fulfilling her duties and furthering the business of her employer. Moreover, even though it was not established that the decedent took the back-up tapes from the plant on the morning in question, it is clear she was in possession of those tapes and the computer when the accident occurred. It is further clear from the record that the decedent was not released from work and that she was responsible for safeguarding the information on the tapes and the computer. It is the longstanding rule of this Court that doubtful cases must be resolved in favor of compensation, so as to fulfill the beneficent purpose of the statute. *Marshall Durbin Co. v. Warren,* 633 So. 2d 1006, 1010 (Miss. 1994). Therefore, we find there was not substantial evidence to support the Commission's conclusion that the tragic circumstances surrounding the decedent's death did not fit in any of the exceptions to the "going and coming rule." Consequently, we reverse the judgment of the circuit court and remand with instructions to send the cause back to the Mississippi Workers' Compensation Commission for a determination of benefits.

When this Court reviews the testimony in this case from the record made before the Workers' Compensation Commission as well as reviewing the finding of the administrative law judge, it is very clear that the administrative law judge disregarded the testimony of Mr. Louis Rash, the certified road design engineer, without finding that his testimony was incredible of belief. The administrative law judge found as follows:

In Mr. Ladner's case, however, the action occurred more than a mile from the employer's gate and from the land owned by the employer, and the property on both sides of Grand Way Blvd. is part of the Desoto National Park, not the Grand Casino. The Casino has no posted signs about dangerous conditions of Grand Way Blvd.

> There is no history of motor vehicle accidents along Grand Way Blvd. until Mr. Ladner's accident. There are no road intersections or railroad crossings along the six miles of road. Additionally, Grand Way Blvd. is not principally used by employees or patrons of Grand Bear Golf Course and Country Club. It is a road with a long history of hunters, hikers and others out in the woods to enjoy recreation and national forests. It is not a heavily traveled road in the sense of the road in the *Stepney* case where thousands of Ingalls employees traveled several times a day. There is no dispute that Grand Way Blvd. is full of curves, that there is limited shoulder areas along many sections of the road, and that trees grow closer than one car width to the road. The speed limit is posted at either 25 or 15 mph and double lines advise there is no passing on the road – the county's recommendation for safe driving along the road. The roadway is in very good condition, and the sides of the road are striped. Grand Way Blvd. resembles many other old country roads in Mississippi (for example, Old Agency Road in Madison County, MS).

As the Court can readily ascertain, there was not one statement in the judge's finding relative to the testimony of Mr. Rash. Even the county engineer, Bobby Kneasal testified the road was not designed to be a fully paved road so they reduced the speed limit to 25 mph in order to accommodate the traffic that they felt could be accommodated safely. Further, the judge found there was no history of motor vehicle accidents along this road. As the facts indicated, the accident happened on January 14, 2001, and the road had only been paved for approximately one year prior to the accident. It appears that the administrative law judge was looking for a long history of accidents, however, it doesn't take a long history of accidents to make a road hazardous if there is testimony from a competent qualified civil design engineer indicating that it is in fact hazardous as indicated by Mr. Rash when he testified that the shoulders on each side of the roadway are only 2-3 foot and they are not very distinct for slopes or back-slopes along the area. In fact, some of the surface draining ditches along the side of the road are completely vertical which make it unsafe to get off the road at all. Further, Mr. Rash testified that he was of the opinion this was a hazardous road based upon the curvature of the road, the length of the curves, the radius of the curves and that all speed limits which

were set along this whole 6.2 mile length at 25 mph was based strictly upon the hazardous conditions of the road as confirmed by the county engineer.

Mr. Rash further testified that the site distance was negligible because primarily the vegetation is right up against the edge of the road or within five feet of the leading edge of the road and there are very sharp turns at numerous locations along the 6.2 miles. Mr. Rash testified there are some places the speed limit is 15 mph and that the turns are very dangerous because there is no visibility of what you are going to see when you make the turn.

In reference to the specific area where the collision occurred, Mr. Rash testified the curve was actually a little bit more of a degree of curvature in that particular point and that it was slightly going up hill as well. Mr. Rash testified that for all practical purposes this road is a part of the employer's premises in that it is the only vehicular route to the Grand Bear premises; that it was paved at the request of the employer and paid for by the employer as well. There was absolutely no other route to travel to get to the Grand Bear Golf Course. Mr. Rash testified that Mr. Ladner, in his opinion, was subjected to a greater degree of exposure because he traveled seven days a week and the only other people going down this road were those who were going to the Golf Course to take in the amenities. Further he testified that the only other usage of it was by hunters during hunting season. It is very clear to all concerned that deer season is only approximately 2-3 months out of a year, and the reminder of the year there are no hunters along this road. Further there are no recreational facilities set up by the National Forestry Commission for the use of the government-owned property. There was absolutely no testimony in the record that the judge could draw from the record where she quoted, "It is a road with a long history of hunters, hikers and others out in the woods to enjoy recreation and the national forest. There is absolutely no testimony from anyone who testified in this

case that this road is heavily traveled by anyone enjoying the national forest. There is absolutely no testimony to show that this national forest is even used by the general public; in fact, to the contrary, this national forest is government-owned property with no facilities whatsoever for the general public.

Additionally, how the administrative law judge and the Commission could compare Grand Way Blvd. with older country roads in Mississippi, for example, Old Agency Road in Madison County, MS and find by analogy that this is a road without hazardous conditions, defies the imagination since there was absolutely no testimony that she could draw this conclusion from in this record.

Clearly within the seven exceptions set out, the claimant in this case, through expert testimony proved (1) that the employee was injured by some hazard or danger which is inherent in the conditions along the route necessarily used by the employee; (2) that the employer basically furnished the hazardous route because it is the only route available; with the employer paying for the improvements to same; (3) the area where the injury took place, although the road was owned by the National Forestry Service, it was in such close proximity to the employer's premises to be in effect a part of the premises. The claimant did not meet one of the exceptions, the claimant met three of the exceptions and should be entitled to the liberal interpretation of these exceptions in order to find compensability and an exception to the "going and coming rule."

It appears from this writer's view of the administration decision that the administrative law judge was trying to distinguish the *Stepney v. Ingalls Shipbuilding* case involving the shipbuilding road where the Supreme Court determined the injuries were compensable when it looked at six significant facts. The administrative law judge did not attempt in any way, shape or form set out

how the claimant did not met any of the exceptions, but in fact made a bold unsupported statement that the Grand Way Blvd. is not principally used by employees or patrons at Grand Bear Golf Course and Country Club. There is no testimony to that effect. The administrative law judge made an unsupported conclusion that "in conclusion this is a most unfortunate motor vehicle accident which occurred before the claimant reached his employer's premises on a road that does not present hazards any more exceptional than any other winding rural road through a forest upon which there is a recommended 25 or 15 mph speed limit." It is quite apparent the administrative law judge did not give claimant the benefit of any statutory presumptions previously set out nor is there substantial evidence in the record to support the conclusions of fact and law.

Mr. Ladner is of the opinion that if the administrative law judge had the benefit of *Duke v. Parker Hannifin Corp., supra.,* which was decided on November 22, 2005, (after the administrative decision she rendered on June 9, 2005), there probably would have been a different administrative decision, considering the specific language supporting compensability as the Appeals Court recognized and set out in *Parker, supra.*

CONCLUSION

Based upon a thorough review of the record, the evidence does not support the Circuit Court's findings and clearly there was no substantial evidence to support its conclusion. Mr. Ladner respectfully requests this Honorable Court to reverse the order of the Circuit Court judge in affirming the decision of Commission and its fact finder, the administrative law judge and remand with instructions to send this cause back to the Mississippi Workers' Compensation Commission for determination of benefits with the cost of this appeal to be assessed to the Appellee.

Respectfully submitted, this the 9/17 day of May, 2007.

RICHARD W. LADNER, II (Claimant/Appellant)

BY: _____

JAMES K. WETZEL, His Attorney

CERTIFICATE OF SERVICE

I, JAMES K. WETZEL, attorney of record for the Claimant/Appellee, do hereby certify that I this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to Ronald T. Russell, Esquire, with the law firm of Bryant, Dukes & Blakeslee, at their usual mailing address of P. O. Box 10, Gulfport, MS 39502; to the Honorable Lisa P. Dodson, Circuit Court Judge, Harrison County, First Judicial District, Gulfport, Mississippi; and to the Honorable Linda A. Thompson, Administrative Law Judge, Mississippi Workers' Compensation Commission, P. O. Box 5300, Jackson, MS 39296.

DATED this the 17th day of May, 2007.

JAMES K. WETZEL, ESQUIRE

JAMES K. WETZEL, Esquire
JAMES K. WETZEL & ASSOCIATES
1701 24th Avenue
P. O. Box I
Gulfport, MS 39502
(228) 864-6400 (ofc)
(228) 863-1793 (fax)
MS Bar No. [redacted]
Attorney for Claimant/Appellee