IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2007-WC-00810

MARY ELLEN BOULDIN — APPELLANT

VERSUS

MISSISSIPPI STATE DEPARTMENT OF HEALTH — APPELLEE

AND

MISS. STATE AGENCIES WORKERS' COMPENSATION TRUST — APPELLEE

BRIEF OF APPELLEES

APPEALED FROM THE CIRCUIT COURT OF
TALLAHATCHIE COUNTY, MISSISSIPPI (SECOND JUDICIAL DISTRICT)

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CERTIFICATE OF INTERESTED PERSONS

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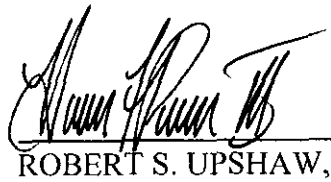

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I.

STATEMENT OF ISSUES

The sole issue to be decided in the appeal of this matter is whether the findings of fact and conclusions of law contained in the Orders of the Administrative Law Judge, the Mississippi Workers' Compensation Commission, and the Circuit Court of Tallahatchie County, Mississippi (Second Judicial District) are supported by substantial evidence in the Record, and are supported by Mississippi case law.

II.

STATEMENT OF THE CASE

A.

NATURE OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE MISSISSIPPI WORKERS COMPENSATION COMMISSION[1]

On June 28, 2004, the Appellant filed a Petition to Controvert alleging that on July 3, 2002, she was injured when a vehicle struck her as she crossed the street while walking during her lunch break, and as a result of this accident she sustained severe injuries which rendered her completely unable to return to work. R. 4. The Appellees denied the compensability of the claim, contending that the accident did not arise out of and in the course of her employment, and a hearing was held in the offices of the Mississippi Workers' Compensation Commission, in Jackson, Mississippi on January 19, 2006. R. 6. Following argument on stipulated facts, the Order of the Administrative Law Judge Linda A. Thompson issued on August 31, 2006, denying the claim for benefits and

[1] All citations to the Record in this brief will be in the following form: "R. ___."

dismissing the claim. R. 5-21.

Dr. Bouldin appealed the Order to the Full Commission on September 8, 2006, and following briefing on the issues, the Full Commission issued its Order on December 6, 2006, without further opinion, affirming the Order of Administrative Judge in all respects. R. 22. Dr. Bouldin appealed to the Circuit Court of Tallahatchie County, Mississippi (Second Judicial District), which affirmed the Order of Administrative Judge and the Full Commission Order on April 11, 2007. R. 284-285.

Claimant has appealed to this Court, seeking further review. R. 286-287.

B.

STATEMENT OF FACTS RELEVANT TO THE ISSUES

The following facts are stipulated by the parties, and were adopted wholesale by the ALJ in the Order of Administrative Judge dated August 31, 2006. R. 6-9.

1. The date of accident was July 3, 2002.

2. Claimant is and has been permanently, totally disabled since the date of accident.

3. Claimant's average weekly wage was such as to entitle her to the maximum weekly compensation rate of $322.90, based on her date of accident.

4. The Employer/Carrier has paid no workers' compensation benefits.

5. The Employer/Carrier received proper notice of Claimant's accident.

6. Claimant's job while working for the Employer on the date of accident was physician senior.

7. From the year 1990 and after, Claimant resided in Clarksdale, Mississippi.

8. For more than a year prior to the date of accident, Claimant's job was to furnish physician services for Coahoma County, Quitman County, Panola County, Tunica County and the

Second Judicial District of Tallahatchie County in Sumner, Mississippi at the state health departments located within said counties.

9. Claimant worked a set weekly and monthly schedule, rotating between the county health departments set forth above, working a particular county health department on a specific given day.

10. Claimant was reimbursed mileage from the Coahoma County Health Department to the other county health departments she worked pursuant to her schedule, based on temporary place of work, as defined in State Travel Policy Rules of Regulations.

11. Claimant's hours of work were 8:00 a.m. to 5:00 p.m. daily.

12. Claimant was paid a monthly gross salary which was based on an eight-hour work day/forty-hour work week.

13. Claimant's eight-hour work day included her travel time from Clarksdale to and from the other health departments she worked on a given date.

14. Claimant was entitled to a one-hour lunch break as a matter of right, usually taken after all patients had been seen.

15. Claimant was entitled to two breaks of fifteen minutes each day, as a privilege, assuming the work load permitted the same.

16. Claimant was entitled to leave the premises for any break.

17. Claimant was not paid for the one-hour lunch break.

18. On the day of the accident in question, Claimant was working at the Tallahatchie County Health Department in Sumner, Mississippi.

19. At the time of the accident which is the subject of this claim, Claimant was on her

lunch break.

20. While taking a walk on her lunch break on the city streets of Sumner, Mississippi, Claimant was struck by a motor vehicle and injured.

21. At the time of the accident in question, Claimant was not on the premises of the health department.

22. The accident in question occurred approximately forty yards north of the health department premises, as shown on the accident report.

23. There is a path from the premises of the health department to the street where Claimant was injured and this path runs between the City Hall/firehouse and a house which are north of the premises of the health department. The door on the northwest side of the health department is to the left of the path/sidewalk as shown on the photos as you approach the building.

24. When Claimant left the premises of the health department, she left through the rear door shown in photos, on the northwest side of the building.

25. At the time of the accident in question, Claimant was not performing services for the Employer.

26. At the time of the accident, the Claimant was in Sumner, Mississippi, because of her employment.

27. Clarksdale is approximately forty-two (42) miles round trip from her job location in Sumner, Mississippi; thirty-six (36) miles round trip from Marks, Mississippi; seventy-two (72) miles round trip from Tunica, Mississippi; and seventy-eight (78) miles round trip from Batesville, Mississippi.

28. Claimant traveled from Clarksdale, Mississippi, approximately nine (9) days per

month and worked out of Clarksdale, Mississippi approximately eleven (11) days per month.

29. Claimant lived in Clarksdale, Mississippi, and in the course of her employment, she traveled to Tunica, Mississippi, approximately two (2) times per month; Marks, Mississippi, approximately four (4) times per month; Sumner, Mississippi approximately two (2) times per month; and Batesville, Mississippi approximately one (1) time per month.

30. All parties in this action agree that the Addendum submitted by Mitchell Adcock to January 5, 2005 30(b)(6) Deposition of the Mississippi Department of Health will not be used in this matter and is withdrawn.

31. Dr. Bouldin did not have a pager or cell phone with her at the time of the accident.

The Administrative Law Judge also conducted a thorough review of the evidence elicited through deposition testimony in the case,[2] but for the purposes of the issues to be decided on appeal in this cause, the stipulated facts above are dispositive and are established as conclusive.

III.

SUMMARY OF THE ARGUMENT

The issue to be resolved by this Court is whether the ALJ, MWCC, and Circuit Court Judge properly decided, by substantial record evidence and in accordance with Mississippi law, that the July 3, 2002 accident and the resulting injuries to Appellant did not arise out of and did not occur in the course of her employment with her Employer.

The undisputed stipulations of fact reveal that the disposition of the claims herein, as detailed in the Orders of the ALJ, MWCC, and Circuit Court of Tallahatchie County, Mississippi (Second Judicial District) are entirely proper, and that the these Orders are eminently correct. The other

[2] See R. 9-15.

evidentiary materials submitted as evidence herein do not alter the stipulated material and relevant facts necessary to resolve these issues.

Dr. Bouldin articulated three theories for compensation. She argued that she is a "traveling employee," and under the cases interpreting the "traveling employee" rule, she was in the course and scope of her employment from the time she left her home for work on the date of the accident until such time as she returned to her home on the date of the accident, and accordingly, compensation must be granted. See Bryan Bros. Packing Co. v. Dependents of Murrah, 106 So.2d 675 (Miss. 1958); Houston v. Minisystems, Inc., 806 So.2d 292 (Miss. Ct. App. 2001). Applying an analysis based on King v. Norrell Serv., Inc., 820 So.2d 694 (Miss. Ct. App. 2000), the ALJ correctly found that Appellant was not a 'traveling employee,' but rather a 'commuting employee.' R. 15, 19-20. Further, the ALJ correctly found that Appellant was engaged in a deviation from her employer's business at the time of the accident, and thereby denied compensation and dismissed the claim for benefits. R. 20. These findings were adopted and affirmed by the MWCC and the Circuit Court Judge on substantial record evidence and as in accordance with Mississippi law. R. 22, 284-285.

Second, Dr. Bouldin argued that she is entitled to compensation under the "personal comfort" doctrine. See Collums v. Caledonia Mfg. Co., 115 So.2d 672 (Miss. 1959). Again, the ALJ correctly found the "personal comfort" doctrine inapplicable. R. 16. Again, this finding was adopted and affirmed by the MWCC and the Circuit Court Judge on substantial evidence and in accordance with Mississippi law. R. 22, 284-285.

Last, Dr. Bouldin argued that, due to the proximity of her accident to her place of employment, her injuries are compensable under the "threshold doctrine," which provides an exception to the bar for recovery under the "coming and going" rule. See Stepney v. Ingalls

Shipbuilding Div., Litton Systems, Inc., 416 So.2d 963 (Miss. 1982). The ALJ correctly found that the "threshold doctrine" did not apply to this claim. R. 17-18. This finding was adopted and affirmed by the MWCC and the Circuit Court Judge on substantial evidence and in accordance with Mississippi law. R. 22, 284-285.

It is well settled in Mississippi law that the workers' compensation claimant bears the overall burden of proving facts prerequisite to any recovery. T.H. Mastin & Co. v. Mangum, 61 So.2d 298 (Miss. 1952). The ALJ made specific findings of fact on substantial evidence, and proper conclusions of law in accordance with Mississippi decisions, that Appellant failed in her burden. The MWCC adopted the Order of the ALJ, in its entirety. R. 22. The Circuit Court of Tallahatchie County, Mississippi (Second Judicial District) found that the Order of the MWCC was based on substantial evidence, and in accordance with controlling law, and thereby affirmed the Order. R. 284-285.

Since the findings of fact and conclusions of law are supported by substantial evidence and Mississippi law, they must be affirmed by this Court. Westmoreland v. Landmare Furniture, Inc., 752 So.2d 444, 447-448 (Miss. Ct. App. 1999).

Accordingly the Appellees respectfully request this Honorable Court to affirm the Orders of the ALJ, MWCC, and the Circuit Court of Tallahatchie County, Mississippi (Second Judicial District).

IV.

ARGUMENT

As stated above, Appellant advanced three theories of recovery: (1) the "traveling employee" rule: (2) the "personal comfort doctrine"; and (3) the "threshold doctrine." As is shown more fully

below, Appellant's recovery fails on all three theories. Following a brief discussion of the standard of review, Appellees address each theory of recovery, and clearly and unequivocally show why the decisions of ALJ, MWCC, and Circuit Court Judge were supported by substantial evidence, and in accordance with controlling Mississippi law.

A. Standard of Review.

The standard of review to be employed by this Court when considering an appeal of a decision of the Mississippi Workers' Compensation Commission is well settled and established by law. An appellate Court must defer to the Commission's findings of fact if there is "a quantum of credible evidence" which supports the decision. Hale v. Ruleville Health Care Center, 687 So.2d 1221, 1224 (Miss. 1997). This standard of review requires that the Circuit Courts and the Mississippi Supreme Court shall not reverse a decision of the Mississippi Workers' Compensation Commission unless the decision was "arbitrary and capricious." Hale v. Ruleville Health Care Center, 687 So.2d at 1225.

Appellate Courts must consider the Commission as the ultimate finder of fact, and the function of this Court is to determine whether there is substantial credible evidence to support the Commission's findings. South Central Bell Telephone Co. v. Aden, 474 So.2d 584, 589 (Miss. 1985). Mississippi Courts have held that "substantial evidence" is more than a "mere scintilla" of evidence, but "substantial evidence" does not rise to the level of "a preponderance of the evidence." Delta C.M.I. v. Speck, 586 So.2d 768, 773 (Miss. 1991). As a result, substantial evidence "means such relevant evidence as reasonable minds might accept as adequate to support a conclusion." Id.

The Mississippi Workers' Compensation Commission enjoys the presumption that it made the proper determination as to the weight and credibility of the evidence and its factual findings are

binding on the appellate Court, provided the findings are supported by substantial evidence. Fought v. Stuart C. Irby Co., 523 So.2d 314, 317 (Miss. 1988). An appellate Court should reverse the Commission's Order only if it finds that the Order is clearly erroneous and contrary to the overwhelming weight of evidence. Myles v. Rockwell Int'l., 445 So.2d 528, 536 (Miss. 1984). An appellate Court may not re-weigh the evidence and substitute its decision for that of the Commission, but rather an appellate Court has the duty to defer to the Commission when its decision can be supported. Fought v. Stuart C. Irby Co., 523 So.2d at 317. The Court should not determine where the preponderance of the evidence lies when the evidence is conflicting, with the assumption being that the Commission, as the trier of fact, has previously determined which evidence is credible, has weight, and which is not. Oswalt v. Abernathy & Clark, 625 So.2d 770, 772 (Miss. 1993). Appellate Courts are thus bound by the factual findings made by the Commission, even if the evidence on the record would lead the appellate Court to a different conclusion. Sibley v. Unifirst Bank, 699 So. 2d 1214, 1218 (Miss. 1997).

what about conclusions of law?

B. The Findings of Fact and Conclusions of Law of the ALJ, MWCC, and Circuit Court Judge are Supported by Substantial Evidence, and Should be Affirmed on Appeal.

It is well settled in workers' compensation proceedings that the claimant bears the overall burden of proving facts prerequisite to her recovery. T.H. Mastin & Co. v. Mangum, 61 So.2d 298 (Miss. 1952).

The parties have stipulated that Appellant's injuries were sustained in the July 3, 2002 accident and have stipulated the nature and severity of the injuries. R. 6, ¶¶1-2. However, in determining whether an injury is compensable, an injury must be found both to arise out of and to occur in the course of employment. An injury arises out of an employment only when there is a

causal connection between the injury and the conditions under which the work is required to be performed. Persons v. Stokes, 76 So.2d 517 (Miss. 1954). In order for an injury to be compensable, it is necessary that the injury result from some risk to which claimant's employment exposes her. Persons v. Stokes, 76 So.2d at 519.

An injury occurs in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be in the performance of her duties, while she is fulfilling those duties, while engaged in the furtherance of the employer's business. Persons v. Stokes, 76 So.2d at 519. An activity is related to the employment if the activity carries out the employer's purposes or advances the employer's interests directly or indirectly. Id.

However, if a servant steps aside from the master's business on some purpose of her own disconnected from her employment, the relationship of master and servant is temporarily suspended and this is so no matter how short the time, and the master is not liable for an employee's acts during such a period of deviation. Id. (citing Stovall v. Jepsen, 13 So.2d 229, 230 (Miss. 1943)).

The Appellees assert that, based upon the facts as stipulated by the parties, and detailed above, the ALJ, MWCC, and Circuit Court Judge correctly found that there is no basis for an award of compensation to Appellant. The Appellees have shown, as the ALJ, MWCC, and Circuit Court Judge correctly found, that Appellant was injured while on a deviation from her employment, which was not in the furtherance of her employer's business, but rather a personal mission. R. 20.

1. The ALJ, MWCC, and Circuit Court Judge Correctly Found, Upon Substantial Evidence and in Accordance with Mississippi Law, That Claimant Was Not a Traveling Employee.

Appellant argued her first theory of recovery under the "traveling employee" rule. A "traveling employee" is regarded as being in the course of employment from the time the employee

leaves home on a business trip until she returns, and the employment covers both time and place of travel *except in deviation cases or where she was on a personal mission or errand of her own.* Bryan Bros. Packing Co. v. Dependents of Murrah, 106 So.2d 675, 677 (Miss. 1958). (emphasis added).

To the contrary, in the case of an employee having a fixed place of employment, the employee, and not the employer, generally assumes the hazards associated with going to and coming from the place of employment. Hurdle and Son v. Holloway, 749 So.2d 342, 348 (Miss. Ct. App. 1999). Thus, injures received in transit to or from the job are generally not deemed compensable under the Mississippi Workers' Compensation Act. Id.

A traveling employee is one who goes on a trip to further the business interests of her employer, such as a traveling salesperson or a person attending a business conference for the benefit of her employer. King v. Norrell Serv., Inc., 820 So.2d 692, 694 (Miss. Ct. App. 2000) (citing Bryan Bros. Packing Co. v. Dependents of Murrah, *supra*, 106 So.2d at 677).

A traveling employee is an employee for whom travel is an integral part of the job; the traveling employee *differs from the ordinary commuter*, and by virtue of the employment is exposed to greater risks than those encountered by the traveling populace. King v. Norrell Serv., Inc., 820 So.2d at 694 (emphasis added).

The Appellees have argued, and three separate Orders have properly concluded, that Dr. Bouldin was not a "traveling employee" for purposes of compensability, but rather that she was a commuting employee which would remove her from the application of the "traveling employee" rule. R. 19. Dr. Bouldin was not a traveling salesperson, was not a route salesperson, and was not an employee whose work necessarily entailed travel away from her employer's premises incidental

to her work duties.

In the record, it is stipulated that Dr. Bouldin had a fixed place of business. Specifically, she worked a set weekly and monthly schedule, rotating between the county health departments of Coahoma County, Quitman County, Panola County, Tunica County, and Tallahatchie County, and worked at a particular county health department on a specific given day. R. 6, ¶¶8-9. Appellant also had a set work schedule from 8:00 a.m. to 5:00 p.m. daily. R. 7, ¶11. Because of her fixed place of employment (although variable), it is immaterial that Appellant resided in Clarksdale, Mississippi, and worked in various Delta locations. R. 6, ¶¶7-8. Dr. Bouldin merely commuted from her home to these various fixed places of employment within her set work schedule.

Illustrative of this point is the Court's opinion in King v. Norrell Serv., Inc., *supra*. In that case, the claimant was employed by a temp agency in Batesville, Mississippi, who was placed by the agency in a job at Oxford Wire and Cable Company in Oxford, Mississippi. King v. Norrell Serv., Inc., 820 So.2d at 694. Her employment at Oxford Wire required her to travel from her home in Batesville to the plant in Oxford. Id. The claimant was injured in an automobile accident returning to Batesville after leaving a day's work at Oxford Wire. Id. The claimant sought compensation from her temp agency, and argued that since she had no fixed site of employment, she should be considered a "traveling employee". Id. at 695. The Court of Appeals disagreed, and found that the focus on the claimant's employment should be on whether her work duties began only after arriving at a specific and identifiable work place designated by the temp agency, and the focus should remain the same even though the claimant could have been reassigned to *a different work place daily, weekly, or monthly*. King v. Norrell Serv., Inc., *supra* at 695. Thus, the Court ruled that King was

Did she get mileage?

not a traveling employee, and denied her compensation.[3]

Appellant asserts in her brief, without explanation, that she is not a "commuting employee" but is a "traveling employee" due to the fact that: "Unlike the other employees at the health department in Sumner, Dr. Bouldin was receiving reimbursement for her travel. Dr. Bouldin was paid differently due to her position/title and job responsibilities." Brief of Appellant, at p.6. This statement is not verified by any record citation, and is not altogether true. For instance, Stephanie Coker, staff nurse with the Mississippi State Department of Health, likewise was a commuting employee, who was remunerated for her travel time. R. 124-125. As is duly, and correctly, noted by the ALJ, the manner of Appellant's remuneration does not make her a traveling employee as that term is used in workers' compensation matters. R. 19. To the contrary, Appellant's remuneration for travel time would entitle her to compensation if she was injured while driving to work, or returning to her home. R. 19; FN 3, infra.

Based upon the foregoing, the ALJ, MWCC, and Circuit Court Judge properly concluded that Dr. Bouldin failed to meet the definition crafted by the Courts for a "traveling employee" and, as such, is not entitled to the protection of the "traveling employee" rule. R. 19. Since Dr. Bouldin was a commuting employee, any reliance on the "traveling employee" rule is misplaced.

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[3] One material distinction between the employment of King and Dr. Bouldin, is that Dr. Bouldin was compensated for her travel time to and from her home to the various county health departments, whereas King was not. R. 7, ¶¶11-13; King v. Norrell Services, Inc., *supra*, at 694. While this is a distinction, it is a distinction without a difference. The fact that Dr. Bouldin was compensated for her travel time does not make her a traveling employee; she is still a commuting employee, as she had a set schedule daily, weekly, and monthly at a fixed place of employment. The fact that she was paid for her travel time would only be relevant if she was actually injured while she was traveling from her home in Clarksdale to any of the various county health departments, or while returning to her home in Clarksdale from one of the county health departments. In such a case, due and owing to the fact of her compensation for travel by her Employer, this would not provide her with the benefit of the "traveling employee" rule, but would provide an exception to the "going and coming" rule. See, e.g., Wallace v. Copiah County Lumber Co., 771 So.2d 316, 318 (1955). R. 19.

Nevertheless, regardless of whether Dr. Bouldin was or was not a "traveling employee," she must be denied compensation for her injuries. Appellees reiterate the "traveling employee" rule from the two most-cited sources: A "traveling employee" is in the course of her employment from the time she leaves home on a business trip until she returns, and the employment covers both time and place of travel, ***except in deviation cases or where the employee was on a personal mission or errand of her own.*** Bryan Bros. Packing Co. v. Dependants of Murrah, 106 So.2d 675, 677 (Miss. 1958) (emphasis added); "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip. ***except when a distinct departure on a personal errand is shown."*** Smith & Johnson, Inc. v. Eubanks, 374 So.2d 235, 237 (Miss. 1979) (internal citations omitted, emphasis added). Thus, any employee, whether a traveling employee or, as here, a commuting employee, may deviate from the course and scope of her employment, and any injury while on such a deviation is not compensable.

This premise was most recently tested by the Mississippi Court of Appeals in Houston v. Minisystems, Inc., 806 So.2d 292 (Miss. Ct. App. 2001). While the claim in Houston v. Minisystems, Inc. was ultimately found to be compensable, nevertheless, the traditional rule was followed, and much discussion was made regarding deviation. The facts of that case, while wholly distinguishable from the facts herein, nevertheless merit discussion.

In Houston v. Minisystems, Inc., there was no doubt that the Houston was a traveling salesperson. Houston v. Minisystems, Inc., 806 So.2d 292, 293-294. In that case, Houston had been traveling on a business call in the course and scope of her employment, and, while en route to her business call, the appointment was canceled. Id. When Houston, already on the road in furtherance

of her call, found out about the cancellation, she traveled to have lunch with her daughter at her daughter's home. Id. Following her luncheon with her daughter, she then began her travel back to her employer's office, and while en route, was involved in an automobile accident which resulted in her death. Id.

The dispute in that case centered over whether, at the time of her death, Houston had abandoned or deviated from the business of her employer, and if so, had she returned to her employer's business before she was killed. Houston v. Minisystems, Inc., 806 So.2d at 294. The Mississippi Court of Appeals, in adopting the findings of the ALJ and Full Commission, found particularly probative that, "when Ms. Houston was at her daughter's house eating lunch, she was engaged in a personal deviation from her employer's business, but the minute she got back in her company car and began driving toward her business headquarters in Sardis, during the normal working hours of the day, she had resumed her business mission." Id. at 294. Thus, any employee, whether a traveling employee or not, may deviate from the course and scope of her employment. Bryan Brothers Packing Co. v. Dependents of Murrah, *supra*, 106 So.2d at 677; Persons v. Stokes, *supra*, 76 So.2d at 519.

In affirming the Order of the ALJ in Houston v. Minisystems, Inc., the Court of Appeals adopted the narrow inquiry of the ALJ: "The work connectedness required by the Workers' Compensation Act for compensability is not a function of the points on a compass nor number of miles, nor particular routes. **It is a function of the nature of the activities in which the claimant was engaged at the time of the accident."** Houston v. Minisystems, Inc., 806 So.2d at 894. (emphasis added).

However, in this case, the stipulated facts clearly show the nature of the activities in which

Dr. Bouldin was engaged at the time of her accident, and leave the firm conclusion that she deviated from her employment at the time of her accident. Dr. Bouldin's hours of work were from 8:00 a.m. to 5:00 p.m. daily, and she was entitled to a one hour lunch break as a matter of right, usually taken after all patients have been seen. R. 7, ¶¶11, 14. She was not paid for her one hour lunch break, and was entitled to leave the premises for any break. R. 7, ¶¶17, 16. At the time of the accident giving rise to this claim, Dr. Bouldin was on her one hour lunch break, and was not paid for this break. R. 7, ¶¶19, 17. She left the premises of her employer on the date of the accident for the purpose of taking a walk on her lunch break, and was actually engaged in the activity of taking a walk on her unpaid lunch break when she was struck by motor vehicle and sustained the injuries for which she is seeking compensation herein. R. 7, ¶¶21, 20. Most importantly, it is stipulated that, at the time of the accident in question, Dr. Bouldin **was not performing services for her employer**. R. 8, ¶25.

Based upon these stipulated facts, and the decisions of the Mississippi Workers' Compensation Commission and the Mississippi Courts, the ALJ, MWCC, and Circuit Court Judge properly concluded that the nature of the activity in which Dr. Bouldin was engaged at the time of the accident was wholly personal to her and had nothing whatsoever to do with her employment or job duties. R. 20. She deviated from the course and scope of her employment when she left the employer's premises, taking a walk on her lunch break, which was on time not compensated by her Employer and in which time she was not performing services for the benefit of her employer. R. 20.

The stipulated facts in the record defeat Dr. Bouldin's recovery under the Mississippi Workers' Compensation Act for the injuries sustained as a result of the July 3, 2002 pedestrian/car accident which rendered her permanently and totally disabled.

The ALJ, MWCC, and Circuit Court Judge correctly found that Appellant was a commuting

employee and not a traveling employee. Dr. Bouldin has argued in her brief that, " . . .when Bouldin's activity of walking during her lunch break is viewed as 'a whole', her injuries did occur while she was in the course and scope of her employment." Brief of Appellant, at p.1-2. Nevertheless, it is inescapable under the facts of this case that Appellant, as properly determined by the ALJ, MWCC, and Circuit Court, deviated from her master's employment on the date of the accident: she was engaged in a personal mission, taking a walk, while on an unpaid lunch break away from the premises of her employer. She was injured away from the employer's premises. The parties have stipulated that she was not performing any services for her employer at the time of the accident. As the decisions of the Mississippi Workers' Compensation Commission and the Mississippi Courts hold, any deviation from the master's employment renders injuries sustained while on that deviation not compensable by the employer. This is so regardless of whether the employee is a "traveling employee" or whether the employee is a commuting, regular employee working fixed hours and places of employment. Thus, viewed as "a whole," as Dr. Bouldin suggests, she clearly deviated from her employment at the time of the accident, and thus her accident did not arise out of, and did not occur in the course of, her employment.

Accordingly, the ALJ, MWCC, and Circuit Court Judge properly found that Dr. Bouldin is not entitled to compensation as this claim did not arise out of and in the course of her employment; and specifically found that Dr. Bouldin was a commuting employee, who deviated from her master's employment at the time of the accident. R. 19-20. This finding was based on substantial evidence stipulated in the Record, and is in accordance with decisions of the MWCC and Mississippi law; accordingly, this finding must be affirmed by this Court. Westmoreland, *supra*, 752 So.2d at 447-448.

2. The ALJ, MWCC, and Circuit Court Judge Correctly Found, Upon Substantial Evidence and in Accordance with Mississippi Law, That Claimant Was Not Engaged in a "Personal Comfort" Activity at the Time of the Accident.

Dr. Bouldin's second basis for compensation in this case rests upon the application of the "personal comfort" doctrine. As the ALJ, MWCC, and Circuit Court Judge correctly found, there is no support for an award of compensation on this basis. R. 16.

The Mississippi Courts have held that an injury resulting from a "personal comfort" activity of an employee, which is reasonably incidental to the employment, although not a necessity of it, may be compensable under the Workers' Compensation Act. See Collums v. Calendonia Mfg. Co., 115 So.2d 672 (Miss. 1959).

In that case, the claimant, Collums, purchased a soft drink from a vending machine kept on the employer's premises for the convenience and refreshment of its personnel. Id. at 672. It was customary for Collums and other employees to purchase soft drinks during breaks. Id. Collums purchased a beverage, drank from it, and became ill after she realized that the beverage bottle contained part of a mouse. Id. The Court in Collums found her injuries to be compensable under the Act. Id.

It is important to note that in the Collums case, the incident occurred on the employer's premises while Collums was engaged in an activity "reasonably incidental" to the employment, although not a necessity of it, in drinking a beverage on her break. Id. This decision is in line with the basic premise in workers' compensation to compensate employees having fixed hours and fixed place of work for injuries occurring on the employer' premises. See Vardaman S. Dunn, *Mississippi Workmen's Compensation*, §178. Other examples of the "personal comfort" doctrine identified by

Dunn include: (1) brushing teeth; (2) applying self-medication; (3) going to the telephone; (4) changing clothes; (5) drinking water; (6) taking refreshment; (7) seeking warmth or shelter; (8) attending the call of nature; (9) washing up after work; (10) seeking fresh air; and (11) smoking and procuring tobacco. See Vardaman S. Dunn, *Mississippi Workmen's Compensation*, §178.

The ALJ, MWCC, and Circuit Court Judge found that Dr. Bouldin was not engaged in a personal act pursuant to the "personal comfort" doctrine which would provide compensation to her for her injuries in the present case. R. 16. It is stipulated and undisputed that she was not upon the premises of her employer at the time of the accident, but had deviated from her employment by taking a walk away from the premises on her one hour unpaid lunch break. The accident did not occur on the premises of the employer. At the time of the accident, Dr. Bouldin was not performing any services for her employer, nor was the occasion of her personal mission, i.e., her walk on her unpaid lunch break, reasonably incidental to her employer's business. Again, when viewing Dr. Bouldin's activity of taking a walk, off the employer's premises on her unpaid lunch break as a whole, her injuries while so engaged remain non-compensable. Thus, the ALJ, MWCC, and Circuit Court correctly held that Dr. Bouldin's arguments in this regard fail, and accordingly, they correctly denied her compensation on this argument.

3. The ALJ, MWCC, and Circuit Court Judge Correctly Found, Upon Substantial Evidence and in Accordance with Mississippi Law that the "Threshold Doctrine" Does Not Apply.

Appellant has raised a final argument in favor of compensation, namely that the close proximity of the place of the accident to employer's premises operates in favor of the application of the "threshold doctrine" for compensation. Again, the Appellees assert, and the ALJ, MWCC, and Circuit Court Judge correctly found, that the "threshold doctrine" is inapplicable in the present case.

R.18.

The hazards encountered by employees while going to or returning from their regular place of work, before reaching or after leaving the employer's premises, are not ordinarily incident to the employment, and for this reason injuries resulting from such hazards are in most instances held not to be compensable as to arising out of and in the course of the employment. Wallace v. Copiah County Lumber Co., 77 So.2d 316, 318 (Miss. 1955) (internal citations omitted).

The general rule is subject to the following exceptions recognized by Mississippi Courts: (1) where the employer furnishes the means of transportation or remunerates the employee; (2) where the employee performs some duty in connection with the employment at home; (3) where the employee is injured by some hazard or danger which is inherent in the conditions along the route necessarily used by the employee; (4) where the employer furnishes a hazardous route; (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 an affect, a part of such premises. Id. This last exception to the "going to and coming from" rule is known as the "threshold doctrine."

At the outset, it should be noted that there is absolutely no evidence in the record to reflect whether, at the time of the accident, Dr. Bouldin was actually returning to her employer's premises at the time of the accident giving rise to her injuries. It cannot be assumed that she had completed the personal mission which constituted the deviation from her employment, the walk on her lunch break, and no evidence introduced in the record states otherwise. Also, it is only logical that a walk begins when a person leaves the premises and ends when they are back on the premises. Further, it is undisputed and stipulated that Dr. Bouldin was struck by motor vehicle and injured while taking

a walk on her unpaid lunch break, off the premises of the health department, and while not performing services for her employer. R. 7-8, ¶¶17, 19-21, 25.

The "threshold doctrine" is stated to contain two parts: (1) the presence of a special hazard at the particular off premises point, and (2) the close association of the access route with the premises, so far as going and coming are concerned. Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc., 416 So.2d 963, 964 (Miss. 1982) (internal citations omitted). The clearest case for compensability is found when the off-premises route is the only means of access to the premises. Id. (internal citations omitted). The Stepney decision is wholly inapplicable to the claimant's contentions herein. In the Stepney case, claimant was employed by Ingalls Shipbuilding, and was entitled to a 30 minute lunch break each day. Id. at 963. On the date of the accident, while driving along the sole access road leading into the shipyard and its parking lot, claimant was involved in a two car accident and was seriously injured. Id. The accident occurred on the access road in front of the Ingalls employment office. Id. At the time of the accident, and during the lunch break, claimant was driving his own personal car, was not being reimbursed for transportation expenses, and was not paid any remuneration. Id. He had not been instructed to perform any duty or task for Ingalls during his lunch period. Id.

The Court in Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc., found six factors which necessitated application of the "threshold doctrine" exception to the "coming and going" rule: (1) the access road was the sole access and exit to the Ingalls Shipyard and the place of claimant's employment; (2) although the street was a public road, it was used principally by the employees of Ingalls; (3) during shift changes and lunch breaks, thousands of Ingalls' employees exited and entered the plant by that sole access route; (4) the premises on each side of the access road were

owned and used by Ingalls, and Ingalls had erected a sign warning its employees of hazards incident to the access roads; (5) Ingalls knew and recognized that the intersection of the access road and the road leading to the employment office constituted a hazard; (6) the appellant was exposed to a greater hazard than the general public for the reason that he worked regularly every week and was required to cross the dangerous intersection on its way to and from work each day. Id. at 966.

None of these factors are applicable to the matter before the Court. Dr. Bouldin's employment with the Mississippi State Department of Health did not place her in greater hazard than the ordinary walking public in Sumner, Tallahatchie County, Mississippi. R. 18. There is no evidence in the record that the volume of the employees, or patients, coming to or coming from the Tallahatchie County Health Department made this street more dangerous by virtue of the heavy use, nor is there any evidence that the Tallahatchie County Health Department knew of, or recognized any, greater hazard in the use of this road by its employees. R. 18. There is no evidence that the street on which Dr. Bouldin was injured or the path mentioned in the stipulations is the sole access route to the health department. Thus, the ALJ, MWCC, and Circuit Court Judge correctly found that the 'threshold doctrine' is inapplicable to any analysis of the present claim for benefits, and denied compensation accordingly. R. 17-18.

Last, there is nothing in the record which advances Dr. Bouldin's theory that she was actually returning to work at the time of the accident, only assumptions. Brief of Appellant, at p. 6. An employee who claims an exception to the coming and going rule has the burden of proving that she falls into one of the exceptions. Edward Hyman Co. v. Rutter, 130 So.2d 574 (Miss. 1961). The ALJ, MWCC, and Circuit Court Judge correctly found that Claimant did not prove facts sufficient to fall into the purview of the exceptions to the "coming and going rule" as discussed in Wallace v.

Copiah County Lumber Co., *supra*, and Stepney v. Ingalls Shipbuilding Div., Litton Systems, Inc., *supra*. and correctly applied the law with respect to the "threshold doctrine." R. 17-18. Accordingly, the Court should affirm the Orders of the ALJ, MWCC, and Circuit Court.

V.

CONCLUSION

The Appellees acknowledge the nature and severity of Dr. Bouldin's injuries, and naturally sympathize with her. However, her injuries are simply not compensable under the Mississippi Workers Compensation Act, as correctly found by the ALJ, MWCC, and Circuit Court Judge.

This Court is bound to affirm the findings of fact of the ALJ and MWCC as long as they are supported by substantial, credible evidence. Siemens Energy and Automation, Inc. v. Pickens, 732 So.2d 276, 282 (Miss. Ct. App.1999). The Appellees have not asked the ALJ, the MWCC, or the Circuit Court to weigh any evidence, or to make credibility determinations, as it is unnecessary to do so in this case. To the contrary, all material facts necessary to the determination of the issues in this matter have been stipulated by the parties.

Further. this Court can overturn a decision of the MWCC only for an error of law, for an unsupported finding of fact, or where a decision was arbitrary and capricious. Id. The reasoning of the ALJ is in lock-step with the decisions of the Mississippi courts, and supported by valid caselaw, and was adopted by the MWCC in its entirety, and affirmed by the Circuit Court. Dr. Bouldin asserts that the ALJ improperly decided issues of law with respect to whether or not she was a "traveling employee" on the date of the accident. Dr. Bouldin relies extensively on one case, Houston v. Minisystems, Inc, cited *supra*, and discussed at length above. Dr. Bouldin has obviously overlooked the fact that the Houston case was decided by ALJ Thompson, who also decided the instant matter. Certainly this Court will not overlook that fact.

For the reasons set forth above, the Appellees respectfully request this Court to affirm the findings of fact and conclusions of law of the ALJ, MWCC, and Circuit Court.

Respectfully submitted this the 26th day of October, 2007.

BY: _____
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CERTIFICATE OF SERVICE

I, Harris F. Powers, III, of counsel to Appellees herein, do hereby certify that I have this day caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing documents unto:

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CERTIFIED this the 26th day of October, 2007.

_____
HARRIS F. POWERS, III, MBN: [redacted]