IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROY WHITE and KEVIN WHITE,
d/b/a R. & K. TIMBER **APPELLANTS**

Versus **NO. 2007-WC-01209-COA**

JOE JORDAN **APPELLEE**

BRIEF OF APPELLEE

Oral Argument Requested

Appeal From: The Circuit Court of Newton County

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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 Judiciary may evaluate possible disqualification or recusal.

1. Joe Jordan ,Appellee
2. Thomas L. Tullos, Attorney for Appellee
3. Roy White ,Appellant
4. Kevin White, Appellant
5. Steven D. Slade, Esq. Attorney for Appellants
6. Honorable Marcus D. Gordon-Circuit Court Judge, Newton County
7. Mississippi Workers' Compensation Commission, Phyllis Clark, Secretary
8. George Dukes, Co-Claimant

THOMAS L. TULLOS

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STATEMENT OF THE CASE

This case deals with whether or not the job related injury suffered by the Claimant, Joe Jordan, falls within the ambit of the Workers' Compensation Act (hereinafter referred to as the Act). The Claimant asserts that it does, but the appellants, the employers herein, argue that they did not fall within the requirements of the Act at such time as the Claimant was injured.

The Claimant was injured on July 16, 2003. He subsequently filed his motion to controvert, and on May 11, 2006, the ALJ rendered an Order finding that the Claimant's injury did fall within the act and awarded the Claimant benefits. The employers filed an appeal to the full commission. On November 9, 2006, the full commission affirmed the ruling of the ALJ. (R.E. 1,2)

Thereafter, the employers filed an appeal to the Circuit Court of Newton County. On June 29, 2007, the Circuit Court affirmed the full Commission. (R.E. 3)

George Dukes and Joe Jordan were employed by Kevin and Roy White in the latter part of June, 2003, as saw hands in their logging operation. They were paid $90.00 per day. It should be noted that the Claimant had worked for Hickory Timber Company which had gone out of business in December, 2002. Hickory Timber had been owned by Roy White's wife but was managed by Roy White.(Tr. 17, 18, 19, 20, 28, 31, 32, 33).

Thereafter, Roy White decided to go back into the logging business. In late June, 2003, he hired the Claimant and six other men as his work force. The logging operation started in earnest in the last week of June, 2003. The Whites regularly employed two saw hands, a skidder operator, a mechanic, two truck drivers, and a foreman.
(Tr. 22, 23, 25, 26, 28, 29, 32, 35, 36, 51, 52, 53, 54, 116, 117, 118, 119, 128, 129, 130)

For reasons best known unto themselves, the Whites wrote payroll checks on June 27, 2003, but paid their employees in cash for the weeks ending July 4 and July 11,2003 Although the claimants worked three (3) days during the week ending July 18, only one payroll check was written for one (1) member of the whole logging crew and that check was payable to Joe Jordan. George Dukes was not paid for almost a year. (Tr. 62, 96, 97).

On July 16, 2003, the Claimant and George Dukes were severely injured while in the process of felling a tree. As the tree fell, another tree behind them fell upon them. No determination was ever made why this tree fell upon them.(Tr. 120)

Joe Jordan suffered a crush type injury to the chest and a transection of the spinal cord at T5/T6. He is paralyzed from the waist down which will require him to be confined to a wheelchair for the rest of his life. Because of his paralysis and other related medical conditions including spasticity, he will suffer chronic pain. Dr. Domenic P. Esposito, Jordan's primary treating physician, stated in a medical report dated February 21, 2005, that Jordan will never again regain any type of use of his legs in any capacity whatsoever.(See Dr. Esposito's medical report, R.E.4).

After his injury, the Claimant discovered that the Whites did not have workers' compensation insurance. However, the Whites had taken out a disability policy for their employees which did pay a few weeks of disability payments to Dukes but paid no disability payments to Jordan. On the benefits schedule page, Roy White gave the information that he had seven (7) employees as of June 24, 2003.(Tr. 60, 61) (R.E. 5)

The Whites did eventually obtain workers' compensation insurance on July 28, 2003. However, this coverage did not provide any benefits to Jordan or Dukes. (Tr. 89)

The Whites did file a motion to bifurcate after March 29, 2005. At the hearing on April 4, 2005, their attorney said " It was my, suppose a suggestion - it was in the form of a motion, but it was my suggestion to the Commission to do it that simply to - to clarify the record and separate the record as to what portion of the hearing addressed which issue." The Administrative Law Judge overruled the motion and proceeded to trial. But no harm accrued to the Whites. (Tr. 12, 13, 14)

At the hearing it became painfully apparent that the Whites kept poor records and paid by cash. During discovery the Appellee requested copies of all documents which would reflect how much had been paid to Jordan and Dukes. Roy White testified that he did have a time book which would reflect days and hours worked by his employees, but he had not looked for it and did not produce it. (Tr. 48, 49)

SUMMARY OF THE ARGUMENT

1.

Pursuant to § 71-3-5, Miss. Code Ann., 1972 as amended, employers fall within the ambit of the Mississippi Workers Compensation Act if the employer:

> ... have in service five (5) or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied.

The Mississippi Supreme Court in Jackson v. Fly, 65 So.2d 782, 784-785 (Miss. 1952) defined the meaning of "regularly employed" as:

> .... all employment in the usual course of trade, business, profession or occupation of the employers, the question whether the number of men employed is such as to bring the employer within the act is to be determined by the character of the work in which they are employed, however brief or long, and not by the character of the employment, whether regular, casual, occasional, periodical, or otherwise, so long as they are hired to do work in the common or usual business of the employer.

In the case at bar the employers had seven (7) "regularly employed" workmen. Therefore, the employers fell within the Act.

2.

This is a workers' compensation case--not a criminal case nor a divorce action based upon a charge of uncondoned adultery. The appropriate standard of proof is by a preponderance of the evidence--not beyond a reasonable doubt nor by clear and convincing evidence. Further, doubtful claims should be resolved in favor of compensation, so as to fulfill the beneficial purpose of statutory law.

3.

Pursuant to § 71-3-7, Miss. Code Ann. 1972, compensation shall be payable for the disability of an employee from injury arising out of and in the course of his employment, and every employer who falls within the Act is liable for and shall secure the compensation payable to the employee. Further, an employer's liability under the Act is not affected by his failure to obtain insurance.

4.

The Commission was not in error when it ruled that certain occupational accident benefits were not creditable as payments made "in lieu of compensation." Further, the Commission did not err when it ruled that the Claimant did not make an election of his remedy by accepting benefits payable under an accident policy.

ARGUMENT

STANDARD OF REVIEW

An appellate court must defer to an administrative agency's findings of fact if there is even a quantum of creditable evidence which supports the agency's decision. Hale vs. Ruleville Health Care Center, 687 So.2d 1221, 1224 (Miss. 1997). " This highly deferential standard of review essentially means that this Court and the circuit courts will not overturn a Commission decision unless said decision was arbitrary and capricious." *Id.* at 1225; Georgia Pacific Corporation vs. Taplin, 586 So.2d 823 (Miss. 1991).

The Mississippi Supreme Court has held:

> We do not sit as triers of fact; that is done by the Commission. When we review the facts on appeal, it is not with an eye toward determining how we would resolve the factual issues were we the triers of fact; rather, our function is to determine whether there is substantial and creditable evidence to support the factual determination by the commission.

South Central Bell Telephone Co. vs Aden, 474 So.2d 584, 588 (Miss. 1985). Stated differently, this court may reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of evidence. Myles v. Rockwell Int'l., 445 So. 2d 528, 536 (Miss. 1983) (citing Masonite Corp. v. Fields, 229 Miss. 524, 91 So. 2d 282 (Miss. 1956)); Riverside of Marks v. Russell, 324 So.2d 759, 762 (Miss. 1975). Appellate courts may not simply reweigh the evidence and substitute its decision for that of the Commission. Indeed, this court has a duty to defer to the Commission when its decision can be supported. Fought v. Stewart C. Irby Co., 523 So. 2d 314, 317(Miss. 1988).

ISSUES

ISSUE NO. 1

THE COMMISSION'S RULING WAS APPROPRIATE, DID APPLY THE CORRECT LEGAL STANDARD, AND WAS SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE

A.
PREPONDERANCE OF THE EVIDENCE VERSUS CLEAR AND CONVINCING PROOF

The employers are attempting to require Jordan to prove his case, not by a preponderance of the evidence, but by clear and convincing proof. This is not a quasi- criminal case. § 71-3-83, Miss. Code Ann., 1972, is not the controlling statute in this case. It plays no part in this case. § 71-3-83 is a penal statute that places a monetary fine and up to a year in jail upon an employer for failure to secure the payment of compensation to an injured claimant. The claimant is not attempting to have the employers fined nor incarcerated. Even if the claimant desired to do so, he could not in this case. In order to avail himself of §71-3-83, the claimant would have to employ the services of the criminal courts of Newton County, Mississippi. There, the employers would be entitled to mount a defense and be tried by a jury of their peers.

B.

APPROPRIATE STANDARD OF PROOF

The appropriate standard of proof in this case is by a preponderance of the evidence. "To establish entitlement to benefits under workers' compensation, the claimant bears the burden of proving by a preponderance of the evidence each element of the claim of disability." See: Bryan Foods, Inc. v. White, 913 So. 2d 1003, 1008 (Miss. App. 2005); Hedge v. Leggett & Platt, Inc., 641 So. 2d 9, 13 (Miss. 1994).

Further, "[D]oubtful claims should be resolved in favor of compensation, so as to fulfill the beneficial purpose of statutory law". See: Sharpe v. Choctaw Electronics Enterprises, 767 So. 2d 1002, 1006 (Miss.2000); Frito-Lay, Inc. v. Leatherwood, 908 So. 2d 175, 180 (Miss. App. 2005); Miller Transps., Inc. v. Guthrie, 554 So. 2d. 917, 918 (Miss. 1989); Walker v. Delta Steel Bldgs. and Builders, 878 So. 2d. 113, reh. den., cert. den., 878 So. 2d. 66 (Miss. App. 2003); Peco Foods of Mississippi v. Keyes ,820 So. 2d 775(Miss. App. 2002).

C.

CASE LAW DISTINGUISHED

It should be noted in two earlier cases involving employers who fell within the Act but who violated § 71-3-83, the Supreme Court did not state that the claimants had to prove that their claim fell within the Act beyond a reasonable doubt or by clear and convincing proof. In Pascagoula Crab Company v. Holbrooks, 94 So. 2d 233, 234 (Miss. 1957), the Court had the perfect opportunity to state that the claimant was laboring under an heightened standard of proof. But it did not. In Jackson v. Fly, 60 So. 2d 782 (Miss. 1952) the Court looked with disfavor upon the employer and said:

> ... The object of the statute is to shift the burden resulting from the accidents of our intense industrial activities from the employer to the general public. It is humane in its purpose, and its scope should be enlarged rather than restricted. Its provisions should be liberally construed, so as to include all services that can be reasonably said to come within them. pg. 786 .

The cases cited by the employers are not applicable to the case at bar. The employers first cite McFadden v. Miss. State Bd. of Medical Licensure, 735 So. 2d 145 (Miss. 1999). McFadden deals with a quasi-criminal situation whereby a physician is charged with prescribing pain narcotics to drug abusers without appropriate reason or control. The Court held that since

the licensure statutes and regulations at issue were penal in nature, then the Board was required to prove its case by clear and convincing evidence. (pg. 152).

In the case at bar, Jordan is only trying to obtain his rightful benefits. He is not attempting to penalize monetarily the employers nor is he trying to put them in jail. Simply put, this action is a civil action as opposed to a criminal or quasi-criminal action.

The employers reliance upon Miss. Transp. Com'n v. Dewease, 691 So. 2d 1007 (Miss. 1997) is misplaced. Dewease dealt with the narrow issue of whether or not penalties would be imposed for the untimely payment of medical benefits. It did not deal with the issue of whether or not the employer fell within the Act. But the Court did say:

> ...Workers Compensation claims, and the laws that govern them, are to be construed broadly and liberally in favor of the claimant. (at pg. 1016)

Finally, the employers rely upon Delchamps, Inc., v. Baygents, 578 So. 2d 620 (Miss. 1991). But this reliance is misplaced as well. Baygents deals with the imposition of the twenty percent (20%) penalty on unpaid disability installments as allowed pursuant to § 71-3-37 (6). The Court did not say that the issue of whether an employer falls within the Act should be strictly construed nor did it say that the claimant has to prove that the employer falls within the Act by anything more than a preponderance of the evidence. As a matter of fact, Baygents does not address this issue at all.

D.

THE COMMISSION FOLLOWED THE APPLICABLE LEGAL STANDARD IN REGARDS TO DETERMINING THAT THE EMPLOYER HAD FIVE OR MORE EMPLOYEES REGULARLY EMPLOYED AS REQUIRED BY § 71-3-5

§71-3-5, Miss. Code Ann., 1972, holds that the following employers shall fall within the parameters of the Act:

> Every person, firm and private corporation, including any public service corporation but excluding, however, all nonprofit charitable, fraternal, cultural, or religious corporations or associations, that have in service five (5) or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied.

In order to prove that the employer employed five or more workmen, the Claimant must meet this burden by the preponderance of the evidence. (See Claimant's argument in subpart B).

The employers wrongly assert that the phrase "regularly in the same business" has not been defined by Mississippi case law. To the contrary the phrase was very early on defined by the Supreme Court in Jackson v. Fly, 60 so. 2d 782 (Miss. 1952). (It should be noted that in 1952 an employer was required to employ eight (8) employees before he fell within the Act.) The Court quoted with approval 58 Am. Jur., Workmen's Compensation, §87, pg. 640, as follows:

> ... Under an act applicable to employers having not less than the specified number of workmen or operatives regularly employed, which defines the term 'regularly' as meaning all employments in the usual course of trade, business, profession or occupation of the employers, the question whether the number of men employed is such as to bring the employer within the act is to be determined by the character of the work in which they are employed, however brief or long, and not by the character of the employment, whether regular, casual, occasional, periodical, or otherwise, so long as they were hired to do work in the common or usual business of the employer. pg. 784-785.

In further definition of the word "regularly" the Court quoted Larson's Workmen's Compensation Law, Vol. 1, § 52.20, pg. 769:

> ...Since the practical effect of the numerical boundary is normally to determine whether compensation insurance is compulsory, an employer cannot be allowed to oscillate between coverage and

> exemption as his labor force exceeds or falls below the minimum from day to day. Therefore, if an employer has once regularly employed enough men to come under the act, he remains there even when the number employed temporarily falls below the minimum....
>
> * * * * *
>
> ....The word 'regularly' is not synonymous with constantly or continuously. The work may be intermittent and yet regular. Men may be regularly but not continuously employed... The word "regular" is used in the act as an antonym of the word "casual" and, when an employee is regular, or "regularly employed," he is not casual...pg 785

The Court then ruled that the employer, although he never had more than seven employees working at any time, did fall within the Act because he did "regularly" employ more than eight employees in his work. pg 785.

Fly was explicitly followed in Mosley v. Jones, 80 So. 2d 819, 821 (Miss. 1955), and Falco Lime v. Mayor of Vicksburg, 836 So. 2d 711 (Miss. 2002).

In the case at bar, the employers had employed seven (7) workmen in late June, 2003. These seven (7) men were regularly employed in the logging operation through the date of the accident, and all seven (7) men were actually on the job when this horrific accident occurred. (Tr. 28, 31, 32, 33, 35, 51, 52, 57, 58, 61, 85)

Based upon the testimony of the employers, they fall within the Act.

E.

THE WEIGHT OF EVIDENCE DID VERIFY THAT FIVE OR MORE WORKMEN WERE REGULARLY EMPLOYED BY THE EMPLOYERS

The claimant would incorporate his earlier arguments in regards to the fallacy of the employers' arguments that the claimant must prove by clear and convincing evidence that the

Employers regularly employed five (5) or more employees. The Employers' arguments are not sound in the law nor in the evidence.

From an evidentiary standpoint, the claimants would refer this Commission to Roy White's testimony at page 28 of the transcript:

> Well, I hired Mr. Dukes, and I hired Mr. Jordan; and I hired a couple of truck drivers. I think it was Tony Buckley and Mr. Avis Gibbs, I believe was driving the trucks.
>
> ****
>
> I had Mr. Dawkins out there as a foreman and also Mr. Albert Johnson, and they were kind of working as co-foremen when I first went back in the business...

Kevin White testified as follows on page 85:

> Q. All right. Mr. White, do you have personal knowledge of which employees worked on a day to day basis in that last month (sic) of June?
>
> A. I- of course, I know that Joe and George did, Albert Johnson, Don Dawkins. I don't remember Earlee for sure during that time, but he was out there on in through July, I know, and, of course, Arvis Gibbs and Tony Buckley drove, you know, our trucks.

In regards to payment records, it is clear that the Whites paid their employees with checks in June, 2003. George Dukes testified that he was paid in cash for the work performed for the first two weeks of July, 2004. (Tr. 117, 118, 131). It is interesting that Dukes' testimony was uncontradicted by the Whites. Roy White said that it was possible that he paid his employees in cash. (Tr. 59) Kevin White stated that he knew that his employees worked during the month of July, 2003, admitted that only one (1) paycheck was written in July, but he could not explain

how the other employees were paid during the rest of the month. (Tr. 95, 96). It should be noted that the Whites' bank statements reflected that only one (1) payroll check was written during the entire month of July, 2003, and that check was made payable to Joe Jordan. None of the other employees received a check even though the Whites admitted that the crew was working in July. (Tr.50, 52, 53, 54, 55, 80, 92, 93). It would seem logical that if the Whites did not pay by check then they paid in cash. There was also a good deal of contradictory testimony in regards to how many days were worked during the first two (2) weeks of July by the logging crew. George Dukes testified that the crew worked nine (9) days the first two (2) weeks and the first two and a half (2½) days the week in which he was injured. (Tr. 115, 116, 117, 118).

Interestingly, Roy White testified that he had a time book which would reflect the number of hours and days worked by his employees. However, he not only did not produce the purported time book but stated that he had not even looked for it. It would be logical to assume that the time book was not produced because its contents would have been adverse to the Whites' position (Tr. 48, 49, 50). Furthermore, on December 24, 2003, the Claimant served his First Request for Production of Documents upon the Whites. Request to Produce No. 6 asked them to produce all payroll and attendance records for the Claimant. The employers never produced nor gave any indication that any time book or books existed in regards to the Claimant. It can only be assumed that this information would have been contrary to the Whites' other testimony. (R.E. 6).

For the Whites to now complain that the claimant did not prove his case is contrary to the notion of fair play in light of the Whites' failure to produce relevant and material documents which would have been of aid to the Commission in deciding this case.

ISSUE II

THE RULING OF THE COMMISSON CORRECTLY APPLIED THE LAW IN REGARDS TO REQUIRING THE EMPLOYERS TO OBTAIN WORKERS' COMPENSATION INSURANCE COVERAGE PRIOR TO THE TIME THAT THE CLAIMANT SUFFERED AN ON THE JOB INJURY.

The appellee objects to this issue being raised at this late date. Impossibility to obtain workers' compensation coverage was not raised as an affirmative defense in the answers to the petition to controvert. Neither (R.E.7, 8, 9) Neither Roy White nor Kevin White ever testified that it had been impossible to obtain workers' compensation coverage. The thrust of their testimony was that they were not subject to the Act and, therefore, not required to obtain coverage.

The only testimony about this particular matter is to be found on pages 86 and 87 of the transcript. Kevin White testified that they, the employers, had not even attempted to get worker's compensation before late July, 2003, which was after the Claimant was injured. They had not talked to anyone about procuring coverage. Therefore, it would seem that the employers' argument that they could not obtain coverage is meritless in view of the fact that they did not attempt to get coverage at all until after the Claimant and George Dukes were injured. However, they were able to get coverage when they did apply for it. As a matter of fact, the employers obtained coverage on July 28, 2003, twelve days after the accident.(Tr. 88)

From a close reading of Kevin White's testimony, it is clear that the employers did not obtain coverage until twelve days after the accident because of a decision made on their part to limit the expenses of their logging operation--not because of the impossibility of obtaining coverage. (Tr. 89)

The argument of the appellants runs counter to the requirements of the Act. § 71-3-7, Miss. Code Ann., 1972 as amend., states as follows:

> Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regards to fault as to the cause of the injury or occupational disease...
>
> * * * * *
>
> Every employer to whom this chapter applies shall be liable for and shall secure the payment to his employees of the compensation payable under its provisions.

Based upon this statute there is no waiting period, no grace period, allowable to the employer. If the employer falls within the Act and an employee is injured in the course of his employment, then the employer shall be liable for the payment of compensation to and for the benefit of the employee. Further, the Mississippi Supreme Court in Dawson's Dependents v. Delta W. Exploration Co., 245 Miss. 335, 147 So. 2d 485 (1962) held that an employer's liability under the Act is not affected by his failure to obtain insurance.

ISSUE III

THE RULING OF THE COMMISSION WAS CORRECT IN RULING THAT THE CLAIMANT DID NOT WAIVE HIS RIGHTS TO WORKERS' COMPENSATION BENEFITS BY ACCEPTANCE OF BENEFITS PAID UNDER AN AIG POLICY AND FURTHER THAT THE EMPLOYERS ARE NOT ENTITLED TO A CREDIT FOR PAYMENTS MADE UNDER THIS POLICY

A.

SHOULD LINDEN LUMBER COMPANY HAVE BEEN DISMISSED FROM THE CASE

The Claimant takes no position in regards to whether or not Linden Lumber should have been dismissed from the case. The Claimant looks to Roy White and Kevin White for satisfaction of his workers' compensation benefits.

B.

DID THE CLAIMANT WAIVE HIS RIGHTS TO WORKERS' COMPENSATION BENEFITS WHEN HE WAS PAID BENEFITS UNDER AN ACCIDENT POLICY

In regards to the issue of whether the claimant waived his rights to workers' compensation benefits, the claimant denies that the payment of certain medical bills by the AIG policy terminated his rights to benefits pursuant to the Act. The argument of the employers flies in the face of long established precedent in Mississippi. See: Riddell v. Cagle, 227 Miss. 305, 85 So. 2d 926 (1956). In Miss Workers' Compensation, Dunn 3rd Ed., §24, we find the following language.

> Non-waiver by acceptance of either benefits. The exclusiveness of the Act is also applied when the beneficiaries elect to claim compensation, and in such event liability is imposed without reference to other forms of insurance benefits which may have been secured, in lieu of compensation insurance, by the employer for the benefit of the employee or his dependants. Thus, liability under the Act is not discharged, in whole or in part, by the payment and acceptance of the proceeds of a life and accident policy taken out by the employer for the benefit of the employee and his dependents and such payment may not be considered as an advance payment of compensation.

The mere fact that the Claimant received certain benefits does not take this case from within the Act. If it did, then every employer who has procured disability policies and accident policies for their employees would immediately terminate them for fear that payment and acceptance of benefits would destroy the exclusivity of the Act.

C.

ARE THE EMPLOYERS ENTITLED TO A CREDIT FOR BENEFITS PAID UNDER THE AIG POLICY

The employers also argue that they are entitled to credit for any payments made pursuant

to the AIG policy. First, the Claimant did not receive any payments directly from the AIG policy. Whatever payments made by the AIG policy was paid in regards to medical bills. Therefore, since some of the medical bills were paid by AIG, the Claimant fails to see how these payments would have any import in this matter. However, in regards to the question of disability payments payable directly to the Claimant, the Claimant would deny that the employers are entitled to any set off at all.

Although the employers argue that these benefits were paid in lieu of workers' compensation benefits, and should be credited accordingly, the policy in question is not, by its own terms, a workers compensation policy. Instead, this policy specifically provides that the benefits provided thereunder are not in lieu of workers' compensation benefits, but are instead separate benefits payable outside the applicable workers' compensation law. Even the employer admits this was a "non-compensation common law insurance policy."

In Sawyer v. Dependents of Head, 510 So.2d 472 (Miss. 1987), an uninsured employer was sued in tort, and also under the Workers' Compensation Law, by the dependants of a deceased employee, and was allowed to take credit against his workers' compensation liability for certain common law liability payments paid on his behalf. The Court reasoned that, under Miss. Code Ann. §71-3-71, (rev. 2000), any common law recovery obtained by a claimant should be credited against the claimant's workers' compensation recovery, whether the common law recovery arises from a claim made against a third party, or against the employer itself. 510 So. 2d at 476-480. There is no issue here arising under § 71-3-71, and no separate common law liability claim has been filed against the Employers.

In the case at bar, the uninsured employers did not pay benefits to the Claimant as the result of a common law liability claim filed against them. Instead, the claimant received

payments under the terms of a non-workers' compensation occupational accident insurance policy. In Riddell v. Cagle's Estate, 85 So.2d. 926 (Miss. 1956), the dependants of a deceased worker filed a claim for workers' compensation benefits against the employer who "neither secured insurance to cover his [workers' compensation] liability nor became a self insurer." 85 So.2d at 926. Instead, the employer secured an accidental death insurance policy, and upon the death of his employee, this policy paid the widow $5,000.00. When the widow and children were awarded workers' compensation benefits, the employer sought credit for the accidental death benefits paid under the aforementioned policy. 85 So. 2d at 96.

The Court denied the employer credit for these payments, and stated:

> The Commission did not approve Riddell's unorthodox method of protecting himself against liability for workmen's compensation benefits; and obviously would not have done so if it had been called on for that purpose. The policy did not purport to pay workmen's compensation benefits.
>
> * * * * *
>
> The appellant's act in purchasing the $5,000 policy on the life of Cagel did not release him from liability to Cagle's widow and dependents for such benefits as they are entitled to under the Workmen's Compensation Act.

85 So.2d at 927.

This decision was later upheld in Hedgepth v. Fair, 418 So. 2d. 814 (Miss. 1982), a similar case where an uninsured employer sought credit for $5,000.00 in life insurance benefits which had been secured by the employer and which were paid to the dependants of an employee killed on the job. As in the present case, the employer contended that "because he had voluntarily purchased the policy, the payment of [proceeds by the] insurance company constituted an advanced payment of compensation within the purview" of the Workers' Compensation Law,

and should be credited against the employer's worker's compensation accordingly. 418 So.2d at 815.

The court rejected this claim because the employer "was neither a self-insurer nor otherwise within the act" which, in turn, belies its claim that benefits paid under a policy of insurance completely separate from and outside of the Workers' Compensation Law should be considered an advance payment of workers' compensation benefits, or a payment in lieu of workers' compensation benefits. 418 So. 2d at 815-816.

The upshot of these cases is that an employer subject to the Workers' Compensation Law may not evade the requirements thereof, and once caught, excuse their or mitigate their actions by offering completely unrelated insurance policies or proceeds as a substitute for proper workers' compensation insurance or approved self insurance. Otherwise, employers would feel perfectly free to evade the Workers' Compensation Law, knowing that if a cheaper insurance alternative could be found, this would be sufficient to discharge their workers' compensation liability.

Employers may provide other disability or accident related benefits which are, as in Western Electric, Inc. v. Ferguson, 371 So.2d. 864 (Miss. 1979, "complementary to the compensation act."; but, they cannot evade the requirements of this Act and try to substitute a non-workers' compensation insurance policy in the place of acceptable workers' compensation insurance.

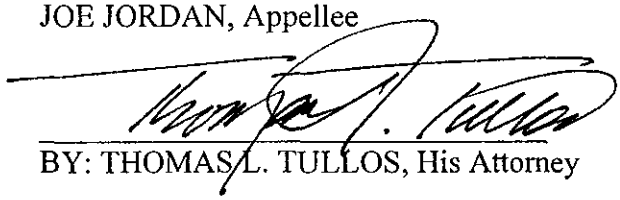
CONCLUSION

The Claimant suffered a horrific injury on July 16, 2003, while in the course and scope of his employment. The employers had at least seven workmen regularly employed in their business at the time of the accident. For reasons best known unto themselves, they failed to have

workmen's compensation insurance. They were under a clear legal duty to have the claimant covered by workers' compensation insurance. The record is clear that they simply failed to procure the insurance. From a close review of the employer's testimony it is obvious that they failed to procure the coverage because they simply did not want to incur the added expense. If the employers did not want to run the risk of personal liability, then they should not have started their work activities until they had procured the insurance coverage.

The employers have done all within their power to avoid their duties and responsibilities under the law in this matter. More than four years have elapsed since the claimant was injured. It is high time for the employers to step up to the plate and shoulder their moral and legal responsibilities.

Respectfully Submitted
JOE JORDAN, Appellee



BY: THOMAS L. TULLOS, His Attorney

CERTIFICATE OF SERVICE

I, Thomas L. Tullos, attorney for Joe Jordan, Appellee, do hereby certify that I have delivered by U. S. Mail, postage prepaid, the foregoing Brief of Appellee to:

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(Attorney for Employers)

Honorable Marcus D. Gordan
Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

Mississippi Workers' Compemsation Commission
Att: Phyllis Clark, Secretary
P.O. Box 5300
Jackson, MS 39296-5300

This the 14 day of December, 2007.

THOMAS L. TULLOS

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