IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-WC-01783

MICHAEL KUKOR — APPELLANT

VS.

NORTHEAST TREE SERVICE, INC. AND LIBERTY MUTUAL INSURANCE COMPANY — APPELLEES

AND

JAY'S SERVICE COMPANY AND FIRST COMP INSURANCE COMPANY — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI; CIVIL ACTION NO. 2007-239(C)

BRIEF OF APPELLEES NORTHEAST TREE SERVICE, INC. AND LIBERTY MUTUAL INSURANCE COMPANY

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JAY'S SERVICE COMPANY AND FIRST COMP INSURANCE COMPANY MUTUAL 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 Circuit Court Judge may evaluate possible disqualification or recusal.

1. Michael A. Kukor, *Appellant*;

2. Northeast Tree Services, LLC, *Appellee*;

3. Liberty Mutual Insurance Company, *Appellee*;

4. Honorable Liles Williams, *Chairman*
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   Honorable John R. Junkin, *Commissioner*
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THIS, the 8th day of February, 2008.

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Mutual Insurance Company

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C. WHETHER THE COMMISSION'S FINDING KUKOR SUSTAINED A 75% LOSS OF WAGE EARNING CAPACITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This appeal involves a review of the decision of the Circuit Court of Madison County, Mississippi, which affirmed the Order of the Mississippi Workers' Compensation Commission ("Commission").[1] The Commission found Northeast Tree Service ("Northeast") and its workers' compensation carrier, Liberty Mutual Insurance Company ("Liberty Mutual"), liable to Appellant for temporary total disability benefits from May 20, 2003, through March 5, 2004, and permanent partial disability benefits for a 75% loss of wage earning capacity commencing March 6, 2004, paid on the basis of an average weekly wage to be determined on remand.

As the Commission remanded the case for further findings, i.e., average weekly wage, Northeast and Liberty Mutual submit the Commission's ruling is not final, and therefore not appealable, and, thus, this appeal as to these appellees should be dismissed. However, if it is determined the Commission's decision is final despite its instruction for further fact finding, Northeast and Liberty Mutual submit the Commission's decision is supported by substantial evidence and was properly affirmed by the Circuit Court.

A. Nature of the Case and Course of Proceedings

This particular appeal arises out of injuries sustained while Michael A. Kukor ("Kukor"), was employed as a tree trimmer for Northeast. As a consequence of his injuries, Kukor claims to have sustained a permanent disability.

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[1] Appellant's Brief incorrectly asserts that "[t]his matter is before the Court of Appeal [sic] of the Order of the Administrative Law Judge dated June 26, 2006." As the Commission is the statutory finder of fact, the decision on appeal is that of the Commission, not the Administrative Judge.

Following a hearing on the merits, the Administrative Judge entered an order on June 26, 2006, finding that Northeast and its carrier, Liberty Mutual, and Jay's Service Company ("Jay's") and its carrier, First Comp Insurance Company ("First Comp"), should jointly and severally pay and provide permanent and total disability benefits to Kukor at the rate of $314.03. (A.R.E. 5)[2] Aggrieved by the Administrative Judge's decision, Northeast and Liberty Mutual and Jay's and First Comp all appealed to the Full Commission. (R. 35). On April 18, 2007, the Commission entered its Order reversing the Order of the Administrative Judge and remanding the claim to the Administrative Judge for a further determination of Kukor's average weekly wage. (A.R.E. 6).

On May 16, 2007, Kukor filed his Notice of Appeal to the Circuit Court of Madison County, Mississippi. (A.R.E. 7). In his Notice of Appeal, Kukor set forth that he intended to appeal the portion of the Commission's Order as it relates to Jay's and First Comp and recognized the Commission's Order was not final as to Northeast and Liberty Mutual. (*Id.*) However, he "reserve[d]" his right to appeal the Commission's decision as to Northeast and Liberty Mutual if the Commission's Order was deemed final as to those parties. (*Id.*)

On September 14, 2007, the Circuit Court of Madison County, Mississippi, entered its Order, affirming the Commission's decision. (A.R.E. 8). It is from the Order that Kukor now appeals to this Court, seeking reinstatement of the Administrative Judge's Order. Northeast and Liberty Mutual submit the Commission's Order is not appealable because the Commission

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[2] For purposes of Appellee's Brief, citations to Appellant's Record Excerpts are abbreviated "A.R.E. ___". Citations to Appellee's record excerpts are abbreviated "R.E. __" and citations to the transcript and Commission record are abbreviated "Tr. __" and "R. __", respectively.

remanded the case to the Administrative Judge for further finding of facts. Therefore, Kukor's appeal is interlocutory and improper under Mississippi law. However, should this Court find the Commission's decision properly appealable, Northeast and Liberty Mutual submit the Order of the Full Commission is supported by substantial evidence and was properly affirmed by the Circuit Court. As such, the Circuit Court's decision should be affirmed.

B. Statement of Relevant Facts

On or about March 20, 2003, Kukor sustained injuries to his back and right and left arms during the course and scope of his employment with Northeast when he fell while trimming a tree. (A.R.E. 6). Northeast and its workers' compensation carrier, Liberty Mutual, admitted compensability of his injuries and paid indemnity and medical benefits accordingly. (A.R.E. 5).

After his fall, Kukor treated at the emergency room and was thereafter referred to Dr. James Ramsey. (R.E. 1). Dr. Ramsey diagnosed Kukor with bilateral distal radius fractures of the right and left upper extremities and performed surgical pinning and fixation of those fractures. (*Id.*) On October 10, 2003, Dr. Ramsey opined Kukor had reached maximum medical improvement and subsequently assigned him a 15% impairment to the right upper extremity and a 18% impairment to the left upper extremity. (*Id.*).

While treating with Dr. Ramsey, Kukor began complaining of lower back pain, and Dr. Ramsey referred him to Dr. John Davis, a neurosurgeon, who diagnosed an old anterior wedge fracture at T11 and an anterior osteophyte at T12. (R.E. 2). Dr. Davis did not recommend surgery but referred Kukor to Dr. Rahul Vohra for conservative treatment. (R.E. 2).

On November 3, 2003, Kukor presented to Dr. Vohra, who diagnosed a subtle compression fracture. (R.E. 3). Dr. Vohra recommended physical therapy and released Kukor to sedentary duty. (*Id.*). Following an functional capacity examination, Dr. Vohra assigned Kukor a 5% impairment to the body as a whole and restricted him to lifting thirty pounds occasionally and no repetitive bending, twisting or stooping. (*Id.*). Once Kukor was released to return to work, he never returned to work for Northeast. (R.E. 4). Mr. Jim Albritton ("Albritton") owns both Northeast and Jay's. (A.R.E. 6). Although Albritton offered to accommodate Kukor's light duty status, Kukor only returned to work for one day and never discussed his decision with Albritton. (A.R.E. 6).

At the hearing before the Administrative Judge, Mr. Pete Mills, a vocational rehabilitation expert, testified on behalf of Northeast and Liberty Mutual. (A.R.E 5 & 6, R.E. 5). Mr. Mills opined Kukor remains employable in the light to medium employment categories and that he has acquired certain job skills that will allow him to perform such jobs. (Tr. at 62; R.E. 5). Mr. Mills provided three labor market surveys to Kukor. (R.E. 5 & 6). Mr. Mills located available jobs within Kukor's vocational abilities that would pay $6.00 to $8.00 an hour and even up to $10.00 per hour. (Tr. at 58-60; R.E. 5 & 6). Although Kukor claimed to have applied for every job Mr. Mills recommended, when Mr. Mills contacted those prospective employers, most did not have any record of Kukor's supposed application. (Tr. at 44; R. E. 5 & 6). Further, Kukor testified he contacted over 118 employers, but did not receive any job offers. (Tr. at 30; R.E. 4). However, Kukor testified that he attached his medical records to his job applications. (Tr. at 45; R.E. 4). Mr. Mills testified that, by

attaching medical documents and reports to his applications, Kukor damaged his own chances of finding employment. (Tr. at 60-61; R.E. 5).

Albritton testified at the hearing that he owns two companies, Northeast and Jay's. He testified Northeast provides tree cutting and trimming services whereas Jay's provides debris removal and stump grinding services. (Tr. at 74; R.E. 7). Although the two businesses frequently provide these services simultaneously for customers; often, the businesses provide these services separately. (Tr. at 74-75; R.E. 7). Albritton explained that Northeast employed four or five employees that climb trees. (Tr. at 77; R.E. 7). The sixteen employees that work for Jay's never work for Northeast. (*Id.*).

Albritton utilizes separate payroll companies and separate insurance companies for Northeast and Jay's. (Tr. at 75; R.E. 7). If a Northeast employee works for both Northeast and Jay's within a pay period, that employee receives two separate payroll checks, one from each business. (*Id.*). Further, the payroll companies require separate withholding documents, and Mr. Albritton requires potential employees to complete separate job applications. (*Id.*). Due to recurrent business and word of mouth, Albritton does not advertise for Jay's but has business cards for both Jay's and Northeast. (Tr. at 84 & 85; R.E. 7).

Aside from Albritton separation of the two businesses due to the different services they provide, Albritton also separates the companies due to the cost and availability of workers' compensation insurance. (Tr. at 76; R.E. 7). Due to the dangerous nature of Northeast's employees' work, many insurance companies will not insure Northeast. Therefore, Albritton utilizes an assigned risk pool offered by Liberty Mutual for workers' compensation coverage. (Tr. at 76-7; R.E. 7). For Northeast, Liberty Mutual requires Mr. Albritton to pay a premium

of $35 for every $100 in salary paid whereas for Jay's, First Comp requires Albritton to pay a premium of $7 for every $100 in salary paid. (*Id.*).

The Commission, after considering all the facts and evidence, determined, in its role as statutory fact finder, that Kukor's theories of alter-egos, loaned servants and the like were all "red herrings." (A.R.E. 6). Looking at all the evidence, the Commission determined Kukor had been injured while working for Northeast, not Jay's. (*Id.*). Further, the Commission found Kukor was not permanently totally disabled, based upon the expert testimony of Mr. Mills and the Kukor's own questionable efforts to secure other employment. (*Id.*) The Commission noted Kukor was only 36 years old at the time of its decision and retained the ability and experience to return to a variety of jobs. (*Id.*). Therefore, the Commission found Kukor's permanent disability is not total, but assessed his loss of wage earning capacity at 75%. (*Id.*).

SUMMARY OF THE ARGUMENT

The parties dispute neither the fact that Kukor was working for Northeast as a tree trimmer at the time of the accident, nor that Kukor had worked for both Northeast and Jay's at various times. However, the evidence is clear the two companies cannot be held jointly and severally liable for one injury. Kukor received separate checks for the work he performed for the different companies. Further, his purported average weekly wage for Northeast was $72.00, and his average weekly wage for Jay's was $398.81. However, the Commission remanded the issue of average weekly wage to the Administrative Judge for a determination of wages earned by Kukor in the job in which he was working at the time of his injury, i.e. with Northeast, by determining the average weekly wage of a similar employee. As such, Northeast

and Liberty Mutual submit Kukor's appeal is interlocutory and therefore unauthorized. However, if this Court finds the Commission's Order final and, therefore, appealable, Northeast and Liberty Mutual would urge this Court that the Order of the Mississippi Workers' Compensation Commission is supported by substantial evidence in the record and should be affirmed.

ARGUMENT

A. Standard of Review

Time and time again, the Mississippi Supreme Court has reiterated the narrow and limited standard of review in workers' compensation appeals:

> The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge to the contrary notwithstanding.
>
> * * *
>
> [An appellate court may] reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

Smith v. Container General Corp., 559 So. 2d 1019, 1021 (Miss.1990) [quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss.1988)]. Thus, despite Kukor's repeated reference to the findings of the Administrative Judge, it is the Commission's decision with which this Court must concern itself, and, as is well-settled, "[t]he Commission is the finder of facts. And if those facts are based on substantial evidence [an appellate court lacks] the power to disturb them, even though that evidence would not convince [the court] were [it] the fact finders." *Olen Burrage Trucking Co. v. Chandler*, 475 So. 2d 437, 439 (Miss. 1985).

Simply stated, in workers' compensation cases, the Mississippi Workers' Compensation Commission is the ultimate finder of fact. *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273 (Miss. 1993); *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1021 (Miss. 1990). On appeal to both the Circuit Court and Supreme Court of the State of Mississippi, as to factual matters, the Commission's findings are entitled to great weight and deference. *Natchez Equip. Co.*, 623 So. 2d at 273. As long as the Commission's decision contains no error of law and is based on substantial evidence, both the Circuit Court, sitting as an intermediate appellate court, and the Supreme Court must not disturb the Commission's findings, and the Commission's Order must be affirmed. *Id.; KLLM, Inc. v. Fowler,* 589 So. 2d 670, 675 (Miss. 1991); *Strickland v. M. H. McMath Gin, Inc.* 457 So. 2d 925, 928 (Miss. 1984). An appeals court cannot substitute its judgment for the judgment of the trier of fact on factual questions. See *R. C. Petroleum v. Hernandez*, 555 So. 2d 1017 (Miss. 1990). It is with these standards in mind that the Court must consider the instant case.

B. The Order of the Commission is Interlocutory

"To be appealable, the order of the Commission must be a final order." *Southern Natural Resources, Inc. v. Polk*, 388 So. 2d 494, 495 (Miss. 1980). In *Cives Steel Co. v. Port of Rosedale*, 903 So. 2d 678, 680-81 (Miss. 2005), the Supreme Court held that the circuit court order remanding the case to the Commission for additional testimony and fact finding was not a final judgment; and therefore, the appeal from circuit court to the Court of Appeals was interlocutory and unauthorized.

Northeast and Liberty Mutual assert that Kukor's appeal is likewise interlocutory. In its Order, the Commission remanded this matter to the Administrative Judge "for the purpose

of receiving evidence sufficient to determine the average weekly wage of a person employed by Northeast in the same grade as Mr. Kukor and fixing his benefits accordingly." Kukor then proceeded to file his Notice of Appeal, thereby divesting the Commission of jurisdiction and the ability to determine the remanded issue until his appeal is either exhausted or dismissed. On the basis of well-settled precedent, Kukor's appeal is premature, and this Court would err if it considered the appeal at this time. Accordingly, this appeal should be dismissed and the case remanded to the Commission so that the Administrative Judge may carry out the Commission's directive to determine Kukor's average weekly wage.

C. The Commission's Finding Kukor was in the Course and Scope of His Employment with Northeast is Supported by Substantial Evidence

The Commission found the Administrative Judge erred by finding Northeast and Jay's were "one and the same" in order to justify a more substantial award and instead found the central issue was whether Kukor was in the course and scope of his employment with Northeast or with Jay's at the time of the work accident. The Commission's decision he was in the course and scope of his employment with Northeast is supported by overwhelming and substantial evidence. The parties do not dispute that Kukor was working for Northeast as a tree trimmer at the time of the accident. Instead, Kukor wishes to impute liability to a second company, simply because it is owned by the same individual. The reason he seeks to do so should be apparent: by bringing in a second employer, Kukor wishes to artificially increase his

average weekly wage and, thereby, his indemnity benefits, since he was only earning $72.00 a week working for Northeast.[3]

The Mississippi Workers' Compensation Act "does not provide for contribution between insurance carriers, or for any method by which the Commission may adjust equities between carriers." *Mid-South Packers Inc. v. Hanson*, 178 So. 2d 689, 691 (Miss. 1965). Further, not only does the Act not allow joint and several liability in workers' compensation cases, Mississippi jurisprudence no longer recognizes joint and several liability. Notably, the Administrative Judge cited no authority to support her finding that "[c]laimant really worked for one employer"and that "both Northeast/Liberty and Jay's/First Comp are jointly and severally liable for [c]laimant's workers' compensation injuries." Yet it is that unsupported conclusion Kukor wishes this Court to adopt.

In reversing the Administrative Judge's decision, the Commission correctly found the issue to be whether Kukor was in the course and scope of his employment with Northeast or with Jay's at the time of the work accident. The Commission's decision he was in the course and scope of his employment with Northeast is supported by substantial evidence. Though Albritton owns both companies, he testified each provides different services; Northeast provides tree cutting and trimming services whereas Jay's provides debris removal and stump grinding services. Although the two businesses frequently provide these services simultaneously for customers; often, the businesses provide these services separately. Albritton explained that Northeast employed four or five employees that climbed trees and

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[3] Although, as discussed herein, the actual amount of Kukor's average weekly wage has never been determined, as that issue was remanded for further fact finding by the Administrative Judge.

sometimes, when tree trimming was slow, worked for Jay's. However, the sixteen employees that worked for Jay's never worked for Northeast. Kukor was hired as a tree trimmer to work for Northeast.

Further separating the companies, Albritton utilized separate payroll companies and insurance companies for Northeast and Jay's and requires potential employees to complete separate job applications. Aside from separating the two businesses because they perform different services, Albritton also separated the companies due to the cost and availability of workers' compensation insurance. Due to the dangerous nature of Northeast's employees' work, many insurance companies would not insure Northeast, so Mr. Albritton utilized an assigned risk pool offered by Liberty Mutual for workers' compensation coverage.

Kukor's brief categorizes the provision of separate workers' compensation coverage for each business as somehow constituting a "sham." Yet, Kukor provides absolutely no basis for this inflammatory and highly improper accusation, at all. As the Commission correctly found, there is no prohibition against an employer utilizing two separate workers' compensation carriers for two separate businesses, especially when the work one business performs is more dangerous, and thus more costly to insure, than the other. Kukor's invective simply highlights the fact that he lacks any legal basis to assign the Commission's finding as error.

In support of his contention, Kukor attempts to liken the facts of his case to that of *Liberty Mutual Ins. Co. v. Holliman*, 765 So. 2d 564 (Miss. 2000). His rationale fails, however, because the Commission correctly determined that, in Kukor's case, Northeast and Jay's do not offer "joint services." Rather, Northeast only employs tree trimmers, whereas Jay's does not. No employee of Jay's offers the services provided by those of Northeast, and

Jay's employees do not work for Northeast. As such, there can be no finding of "joint service" as advanced by Kukor and, as found by the Commission, no law prohibits one owner from operating two businesses. Truly, Kukor's argument is the "red herring" the Commission found it to be, and should hold no merit here.

D. The Commission's Award of 75% Loss of Wage Earning Capacity is Supported by Substantial Evidence

Kukor's brief goes to great lengths to argue he should be found permanently totally disabled. That contention, however, is not proper upon appellate review. As the statutory finder of fact, the Commission is entitled to determine the degree of a claimant's disability. The only review permitted on appeal is whether the Commission's determination that Kukor sustained a 75% loss of wage earning capacity is supported by substantial evidence. If it is, the Commission's decision stands. Kukor's advocacy for a appellate finding of permanent total disability is improper under the standard of review.

As defined by Miss. Code Ann. §71-3-3 (I) (Rev. 2000), "'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." To determine disability, one must compare the employee's pre-injury wages with the employee's post-injury capacity to earn wages in the open labor market. *Karr v. Armstrong Tire & Rubber Co.*, 61 So. 2d 789, 792 (Miss. 1953). The Commission must evaluate the evidence as a whole to determine loss of wage earning capacity. *Guardian Fiberglass, Inc. v. LaSueur*, 751 So. 2d 1201, 1204-05 (Miss. Ct. App. 2005). Also, besides the medical evidence, the Commission must evaluate claimant's age, education, work

experience, and any other relevant factual criteria to determine the extent of disability, if any. *Meridian Professional Baseball Club v. Jensen*, 828 So. 2d 740, 747 (Miss. Ct. App. 2000).

In this case, Dr. Ramsey noted Kukor had reached maximum medical improvement and assigned him a 15% impairment to the right upper extremity and a 18% impairment to the left upper extremity. Dr. Vohra assigned Kukor a 5% impairment to the body as a whole and restricted him to lifting thirty pounds occasionally and no repetitive bending, twisting or stooping. Dr. Vohra also noted Kukor could return to work at a light to medium level.[4]

Further, Northeast and Liberty Mutual presented expert vocational testimony from Mr. Mills that Kukor retains employability in the light to medium categories and that he has acquired certain job skills that would allow him to perform such jobs. Mr. Mills provided three labor market surveys which found employers that would pay Kukor as much as $10.00 per hour. Kukor claimed to have applied for every job Mr. Mills recommended, but most employers had no record of him applying for a job. Kukor also offered that he had contacted over 118 employers, but received no job offers. Upon further inquiry, however, Kukor admitted he attached his medical records to his job applications. Clearly, the Commission had a substantial basis to believe Mr. Mill's expert testimony that Kukor has jobs available to him and to question the legitimacy of Kukor "bona fide" efforts to secure other employment.

In addition to the job opportunities Mr. Mills located, the Commission noted Albritton offered Kukor a light duty job once he was released to return to work. Kukor returned to work for only one day. Based on these facts, the Commission properly determined Kukor was not

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[4]The Commission properly treated this claim as one involving disability to the body as a whole due to the array of injuries claimant suffered.

permanently and totally disabled. Kukors protestations to the contrary are without merit. The record contains able substantial evidence to support the Commission's finding that Kukor sustained a 75% loss of wage earning capacity as the result of his injuries and, therefore, the Commission's decision should be affirmed.

CONCLUSION

Northeast and Liberty Mutual assert that this appeal is interlocutory as the Commission remanded this matter to the Administrative Judge for additional fact finding. Accordingly, this appeal should be dismissed so that the Administrative Judge may determine the proper average weekly wage as ordered by the Commission. However, if this Court finds the Commission's Order final and, therefore, appealable, Northeast and Liberty Mutual urge this Court to affirm the Order of the Mississippi Workers' Compensation Commission, which is supported by substantial evidence.

Respectfully submitted,

NORTHEAST TREE SERVICE, LLC and
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CERTIFICATE

I, W. Bienville Skipper, of counsel for Northeast Tree Service, Inc. and Liberty Mutual Insurance Company, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

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THIS, the 8th day of February, 2008.

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