IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-WC-00640 COA

RAYMOND D. LANGFORD — APPELLANT

VERSUS

SOUTHLAND TRUCKING, L.L.C. AND
MISSISSIPPI ASSOCIATED GENERAL CONTRACTORS
WORKERS' COMPENSATION FUND, INC. — APPELLEES

APPELLEES BRIEF

(ORAL ARGUMENT IS REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Southland Trucking, L.L.C., Employer and Mississippi Associated General Contractors Workers' Compensation Fund, Inc., Carrier, certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Raymond D. Langford - Appellant
2. William T. Reed - Counsel for Appellant
3. Southland Trucking, L.L.C. - Appellee
4. Mississippi Associated General Contractors Workers' Compensation Fund, Inc. - Appellee
5. Ronald T. Russell of Copeland, Cook, Taylor & Bush, P.A., Counsel for Appellees
6. Honorable Cindy P. Wilson, Administrative Law Judge - MWCC
7. Honorable William T. Harkey, Circuit Court Judge - Jackson County

RONALD T. RUSSELL
COPELAND, COOK, TAYLOR & BUSH, P.A.

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STATEMENT OF THE ISSUES

At issue is whether the ruling of the Circuit Court of Jackson County affirming the Mississippi Workers' Compensation Commission's denial of the claim of Raymond D. Langford for medical and disability benefits is supported by substantial evidence.

STATEMENT OF THE CASE

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

In the present worker's compensation claim, Claimant (Langford), Appellant herein, alleges in his Petition to Controvert that he sustained medical problems involving his heart and lungs which were allegedly caused by injurious exposure to chemicals at his place of employment on July 25, 2001. The Administrative Judge, based upon a review of all the lay and expert testimony evidence, concluded that the Claimant's testimony concerning the cause of the injury was not credible. On that basis alone the Administrative Judge determined that the claim should be denied, but more importantly, the Administrative Judge found the expert opinions provided by Dr. Robert Jones, Dr. William J. George and Dr. Robert Babcock to be more probative and the tests conducted extremely detailed. In comparison she found that the opinions rendered by Claimant's treating physicians were not based on a detailed accounting of all the facts and were not based upon reasonable medical probabilities as required by law. On this basis the Administrative Judge credited the testimony of the expert witnesses presented by the Employer and Carrier over those presented by Claimant. Accordingly, the Administrative Judge determined that the Claimant failed to prove that his lung and heart condition for which he was hospitalized on numerous occasions arose out of and in the course and scope of his employment with Southland Trucking Company and the claim for medical and disability benefits was denied in its entirety (P.V. II, p. 199-200)[1]. The Administrative Judge's denial of the claim was

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[1] References to hearing transcript are designated as "TR" followed by the page number or numbers. References to exhibits are identified as "EX" followed by the volume referenced and the page number or the date of the report. References to the pleading volume are identified as "P.V." followed by the page number. References to the Circuit Court Record are designated as "CR" followed by the page number or numbers.

appealed to the Full Commission which affirmed the ruling of the Administrative Judge. (P.V. II, p. 205). On further appeal the Circuit Court of Jackson County in a well reasoned decision concluded that the decision of the Full Commission is supported by substantial evidence and thus must be affirmed in accordance with law. (C.R. 110-113).

The matter is now before this Court on the issue of whether or not the Decision of the Circuit Court affirming the finding of the Mississippi Workers' Compensation Commission is supported by substantial evidence.

(ii) Facts And Testimony

Claimant, Raymond D. Langford, at the time of the alleged incident was 52 years of age and employed as a truck driver for Southland Trucking, a cement trucking business. Claimant's job involved hauling sand and gravel to Metro Concrete, a neighboring business. The drivers cleaned their trucks on the weekends, and to assist the drivers in cleaning the chrome rims and fuel tanks on their trucks, they used a cleaner called Crete Brite, which was stored at Metro Concrete[2] a nearby facility. On the afternoon of Wednesday, July 25, 2001, Claimant alleges he experienced an injurious exposure to toxic fumes when Kenneth Mitchell, a co-worker from Metro Concrete, assisted him in pouring Crete-Brite from a 55-gallon drum into a small container for him to allegedly use to clean the cement truck that weekend. Claimant alleges he was holding the smaller container and the Crete Brite, when being poured by Mr. Mitchell, "sloshed" and "spilled" on his hands and his shirt and he inhaled the vapors.

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2 Tanya Philbrook explained that the Southland truck drivers normally washed their trucks at Metro Concrete and used the Crete Brite stored in a storage shed at that site. (EX III, Exhibit "19", p. 13-14).

There is a substantial issue as to whether Claimant sustained any type of injurious exposure to Crete Brite while working on July 25, 2001. Also, various parts of Claimant's testimony regarding the July 25, 2001 event are not corroborated by testimony of other individuals or by the medical records. More importantly, Claimant's testimony at trial is contradicted by his own deposition testimony (TR p. 10, 19, 23-30). Under these circumstances, the Administrative Judge concluded in her Opinion that, based upon a review of all the evidence, Claimant's testimony concerning the cause of injury is not credible (P.V. II, p. 199). A review of the relevant testimony relied upon by the Administrative Judge, Full Commission, and Circuit Court follows:

a. Inconsistent Testimony from Claimant Regarding July 25, 2001 Event.

Appellant testified at deposition that the cap had just been taken off the 55-gallon drum and it was completely full of Crete Brite, so that when Mr. Mitchell poured the Crete Brite, it "sloshed" and "spilled" on Claimant's hands. (EX III, Exhibit "18", p. 17, 20-21). Claimant testified at deposition that the Crete Brite did not get on anything other than his hands. (Id., p. 21). However, at trial, Claimant added that the Crete Brite spilled on his shirt (TR p. 10).

Mr. Mitchell, on the other hand, testified that the 55-gallon drum out of which the Crete-Brite was being poured was about one-quarter to one-half full. (EX III, Exhibit "21", p. 22-25). Mr. Mitchell testified that if the drum had been full as Claimant alleges, it probably would have weighed 400 to 500 pounds and Mr. Mitchell would not have been able to handle the drum to be able to pour out the Crete Brite. (Id.). Mr. Mitchell further testified that when he was pouring the Crete Brite, he was watching where he was pouring and saw that about a quart spilled on the container and the concrete slab. (Id., p. 32, 34-35). Mr. Mitchell testified that Claimant was holding the smaller container by the handle. (Id., p. 34). Mr. Mitchell does not recall if the Crete

Brite spilled on Claimant's hands or feet, and therefore, Claimant's testimony regarding Crete Brite spilling on his hands and shirt remains uncorroborated. (Id.).

b. Question of Whether Claimant Took Crete Brite For His Personal Use.

In his deposition testimony, Claimant testified that after he filled the plastic jug with Crete Brite at Metro Concrete with the assistance of Kenneth Mitchell, he placed the jug in the back of his personal pick-up truck and drove next door to Southland, where he completed his paperwork for the day. (EX III, Exhibit 18, p. 18-19, 26-29). Claimant testified that when he arrived at Southland, he took the jug of Crete Brite out of the back of his personal pick-up truck and put it in the shop, and this is the last time he saw the jug of Crete Brite. (Id.). Claimant testified it was approximately 3:00 or 3:30 p.m. on July 25, 2001 when he finally got through doing his paperwork and left the office of Southland. (Id.). However, at trial he testified that he went home after he got the Crete Brite because the shop was already closed (TR. p. 12, 25-26).

Tanya Kristy Philbrook was the bookkeeper for Southland Trucking during the time period in which Claimant was employed. Ms. Philbrook was deposed on December 22, 2005 and her testimony is in direct contradiction to that of Claimant's deposition testimony. In particular, Ms. Philbrook testified that on July 27, 2001, two days after the alleged injurious exposure, she went to Ocean Springs Hospital to bring Claimant his paycheck. (EX III, Exhibit "19", p. 10). Claimant was in ICU and his was wife was visiting him at that time. (Id., p. 11). After some discussion, Ms. Philbrook offered to cash his paycheck and to bring the cash back to the hospital. (Id., p. 12).

While Ms. Philbrook was still visiting, the subject of Crete Brite came up. The Langfords told Ms. Philbrook that Claimant was in the hospital because he had a reaction to the Crete Brite. (Id., p. 11, 12). Ms. Philbrook explained in her deposition that Crete Brite is used by the

Southland truck drivers to clean the 18-wheelers. Ms. Philbrook further explained that the Crete Brite is stored at Metro Concrete, which is located just on the other side of the railroad tracks from Southland. Both businesses are owned by Jimmy Lane. The Southland truck drivers wash their trucks on the premises of Metro Concrete (Id., p. 6-9, 13-14, 21-22).

Ms. Philbrook went on to testify that she became aware that Claimant was in possession of Crete Brite. In Ms. Philbrook's presence at the hospital, Mrs. Langford was wanting to go home and wanted someone to take the Crete Brite out of the back of Claimant's personal pick-up truck before she left. (Id., p. 14-15). Ms. Philbrook testified that Claimant was not supposed to have Crete Brite in his personal possession. (Id., p. 15). In response, Ms. Philbrook told the Langfords she would take it out or get somebody to come get it out of his truck. (Id.). Ms. Philbrook testified that she called Eddie Jordan, a salesman for Metro Concrete, to get the Crete Brite. (Id.). Upon return to the hospital from cashing Claimant's paycheck, Ms. Philbrook saw that the Crete Brite was still in the back of Claimant's pick-up truck. (Id., p. 17). As such, Ms. Philbrook put the container of Crete Brite in the trunk of her car and returned it to Metro Concrete herself. (Id., p. 17, 29).

As can be seen, a significant inconsistency was appropriately noted by the Administrative Judge in the Claimant's testimony who testified in his deposition that he never saw the Crete Brite again after he allegedly put the jug in the Southland shop. This testimony was directly refuted by the testimony of Tanya Philbrook.

Faced with inconsistency, Claimant changed his testimony at trial. Claimant testified that after reading Ms. Philbrook's deposition testimony, he realized that he was mistaken. Claimant stated that he had not taken the smaller container of Crete Brite to the Southland shop because Southland was closed by that time. Claimant stated that he realized he probably should not have

taken the Crete Brite home, but that he had nowhere else to leave the container (TR p. 25-30). This testimony makes little sense because the place where Claimant obtained the Crete Brite was out in the open. Moreover, there would have been nothing to prevent him from leaving the container of Crete Brite back at Metro Concrete where he would be using it the following Saturday, three days later.

In any event, Appellant went on to testify that because he needed the Crete Brite to clean his truck that weekend and because Southland had locked the gates, he would not have been able to return to Southland and pick up the container before washing his truck that weekend. Again, little sense is made of Claimant's new testimony given the fact that the incident in question occurred on a Wednesday, and he would not need the Crete Brite to wash his truck until Saturday morning. Another question arises as to how could Claimant clean his truck on Saturday morning, as he says he had done every weekend prior to this incident, if he claimed Southland locked the gates? There apparently was no reason to take the Crete Brite home. Based upon these and other inconsistencies the Administrative Judge concluded that the testimony of the Claimant lacked credibility.

c. Claimant Used Crete Brite Before Without Any Problems, as Did Other Employees.

Claimant testified he cleaned his truck every weekend prior to the July 25, 2001 incident in question – about eight (8) or nine (9) times in all. (EX III, Exhibit "18", p. 45-46). Claimant admitted he had used Crete Brite on occasions prior to July 25, 2001 by pouring it full strength from a plastic jug into a pop-up spray bottle. (Id., p. 46-49). On these prior occasions, Claimant did not experience any difficulty. (Id.). Claimant also admitted he was unaware of any co-employee experiencing any difficulty from exposure to Crete Brite. (Id., p. 54).

In addition, Tanya Philbrook testified that during the nine years and eleven months that she worked for Jimmy Lane and Southland Trucking, she was not aware of anyone having any complaints from using the Crete Brite. (EX III, Exhibit "19", p. 18). Kenneth Mitchell testified that he had used Crete Brite off and on for about a year and a half while working at Metro Concrete and neither he nor anyone else that he is aware of had any problems or complaints. (EX III, Exhibit "21", p. 20-21, 36, 41).

d. Claimant Did Not Exhibit Usual Signs or Symptoms of Toxic Exposure Following July 25, 2001 Event.

Claimant testified at his deposition and at trial that he did not feel bad the remainder of the day on July 25, 2001. Claimant stated he went home, took a shower, ate dinner, watched television for a while and then went to bed. (EX III, Exhibit "18", p. 29-31). Claimant testified he first experienced shortness of breath when he awoke the next morning at approximately 2:00 a.m. to begin work at 3:00 a.m. (Id., p. 30). If one assumes Claimant's deposition testimony to be correct, it took approximately twelve (12) hours from the event until the onset of any symptomatology (i.e., shortness of breath).

In addition, Claimant testified that although the Crete Brite allegedly spilled on his hands, he experienced no rash, redness, blisters or any other observable effect of the Crete Brite being on his hands. (EX III, Exhibit "18", p. 30-31). Claimant further testified that the only symptom which he has experienced since July 25, 2001 has been shortness of breath. (Id., p. 43, 50). Claimant specifically denied experiencing any nausea, headache, dizziness, or other symptom allegedly as a result of his exposure to Crete Brite. (Id.).

e. Claimant's Testimony Regarding Onset of Symptomatology Is Inconsistent with the Medical Records.

Again, Claimant testified he first experienced shortness of breath when he awoke the next morning (i.e., July 26, 2001) at approximately 2:00 a.m. to begin work at 3:00 a.m., which, if correct, was approximately twelve (12) hours from the time of the event until the onset of his symptomatology (i.e., shortness of breath). The Singing River Hospital Emergency Room records, however, state Claimant first began to experience shortness of breath about twenty-four (24) hours to thirty-six (36) hours prior to admission, which would put the onset of symptomatology contemporaneous with the incident pouring Crete Brite. In other words, the history given by Claimant at the emergency room is not consistent with his deposition testimony, as regards his alleged onset of symptomatology.

Also inconsistent is the history that Claimant provided to Dr. Michael D. Horowitz, a cardiac surgeon consulted on August 6, 2001 by Dr. Pedone during the second hospitalization. According to Dr. Horowitz's Consultation Report, Claimant reported the following: "He said that he was doing very well until approximately two weeks ago. One night, he used an industrial cleaning product to clean a truck. The product is apparently named 'Everbrite' and contains a variety of caustic agents. He said that he inhaled fumes from this compound. The following morning, he went to Picayune in his employment as a truck driver. While returning, he began to feel badly." Obviously, the story told to Dr. Horowitz is completely different than the testimony of Appellant. Again, a question occurs as to whether Claimant used the Crete Brite for his own personal use after the July 25, 2001 event. Moreover, this indicates that Claimant's symptoms did not begin until after he dropped off the truck load on the morning of July 26, 2001 as opposed to when he first woke up at 2:00 a.m. that morning.

Based on the above, Claimant has provided three (3) different stories as to when his symptoms began. Thus the record presents credibility issues and the Administrative Judge and

the Commission as finders of fact and judge of credibility of witnesses were within their discretion in so ruling. *Roberts v. Junior Food Mart*, 208 So.2d 232.

(iii) Medical Testimony and Expert Testimony

The Employer and Carrier, Appellees herein, presented expert reports and testimony of Dr. Robert N. Jones, Dr. William J. George, and Dr. Robert Babcock, as evidence in support of their position that the Claimant did not sustain an **injurious** exposure to Crete Brite while working on July 25, 2001.

a. Opinions of Robert N. Jones, M.D., Internist, Pulmonologist, and Professor of Medicine.

Dr. Robert N. Jones is board certified in pulmonary diseases and internal medicine. He is also a Professor of Medicine at Tulane University Medical Center. Dr. Jones reviewed medical records and other materials in this case, as well as information about the concentrations of the hazardous ingredients listed on the Material Safety Data Sheet of Crete Brite. In his November 11, 2001 written report, Dr. Jones explains that Crete Brite is a solution of hydrochloric and hydrofluoric acids, plus ammonium bifluoride and butyl cello solve. (EX III, Exhibit "17"). Hydrochloric and hydrofluoric acid are the two principle ingredients. (Id.).

As explained by Dr. Jones in his written report, hydrogen chloride and hydrogen fluoride are gases, but when released into air they rapidly combine with the water of relative humidity to form hydrochloric and hydrofluoric acids, respectively. However, when put into dilute aqueous solution, as in the product of Crete Brite, they do not off-gas in significant amounts at ambient temperatures. In other words, Crete Brite does not emit fumes. Dr. Jones explains that unless either or both of these chemicals formed an aerosol (i.e., formed a mist or fog) while being poured from one container to the other, there would be no way for Claimant to have inhaled the

chemicals in any substantial quantity. And, if inhaled, there wou
and upper respiratory tract than to the trachea, bronchi, and lungs.

Based on his review of the medical records and other infor
opinion that Claimant probably did not receive any bronchial or lu
Jones' opinion is based on several lines of reasoning. First, the me
observation indicating Claimant had any severe inflammation of his moist surfaces (i.e., eyes, nose, mouth, throat, larynx), which one would actually see if Claimant suffered an inhalation injury. Second, the effects of hydrofluoric and hydrochloric acid are immediate and severe. Dr. Jones states that one could not have a substantial exposure without immediate burning of the contacted eye and upper respiratory tissues. A substantial exposure of the lower respiratory tract would produce an instant and unmistakable life-threatening injury, resulting in immediate hospitalization. This clearly did not occur in Claimant's case. He testified that there were no problems until the next day (TR p. 11, 29).

In addition, Dr. Jones explains that Claimant's illness of July 26 through 31 bears no distinctive feature of chemical pneumonitis. That diagnosis rests entirely on an assumption of a toxic exposure. In light of his above opinions, it is unlikely that any exposure, let alone toxic exposure, occurred. Finally, the illness of August to September 2001, in Dr. Jones opinion, was clearly "ARDS" or acute respiratory distress syndrome. Dr. Jones explains that the ARDS was delayed too long to be a likely result of an exposure on July 25, 2001, even assuming *arguendo* that an exposure occurred. Dr. Jones explains that ARDS is a syndrome of acute lung damage, of which chemical inhalation can be a cause, but that the chemicals in Crete Brite would have done so within one to a few days of inhalation – not weeks later. For all of these reasons, Dr. Jones

When? started Next day?

concludes there is no causal relationship between Crete Brite and any of Claimant's medical conditions.

b. Opinions of William J. George, Ph.D., Pharmacologist and Toxicologist.

Dr. William J. George is a Professor of Pharmacology and the Director of Toxicology at Tulane University Health Sciences Center. On September 24, 2001, Dr. George submitted a report in which it was his opinion that health effects claimed by Claimant were not a likely consequence of the July 25, 2001 event. (EX III, Exhibit "20"). In particular, Dr. George, relying on Claimant's deposition testimony, states there was no evidence of lacrimation (i.e., tearing, watering), eye irritation, nausea or vomiting at the time of the July 25, 2001 event. Claimant's skin did not blister or get red, and he did not seek medical attention for at least 24 to 36 hours after the exposure. Dr. George added that the July 25, 2001 event occurred outdoors and was of limited duration.

In addition, on April 4, 2005, Dr. George conducted a test at the laboratory of Tulane University Health Sciences Center to monitor the presence and concentration of hydrogen fluoride and hydrogen chloride in air resulting from the off gassing of a fixed volume of Crete Brite, which was allowed equilibrate for 24 hours in a closed chamber. Even in an enclosed chamber over a period of 24 hours, this test produced a level of hydrogen fluoride and hydrogen chloride of less than 0.5 parts per million. Dr. George explained that this was lower than the 1/6 to 1/10 of the workplace permissible exposure levels (PELs) for hydrogen fluoride and hydrogen chloride, as determined by OSHA, which are 3 parts per million and 5 parts per million, respectively. Importantly, and as explained by Dr. George, the exposure of Claimant was of limited duration (as opposed to 24 hours) and was outdoors (as opposed to an enclosed chamber), where there would be dilution into the open air. Therefore, based on his analysis, Dr. George

was of the opinion that levels of hydrogen fluoride and hydrogen chloride in air at the time of Claimant's reported exposure to Crete Brite on July 25, 2001 would have been insufficient to cause the injuries he is claiming.

c. Opinions of Robert Babcock, Ph.D., Chemical Engineer.

Robert Babcock, Ph.D., is a chemical engineer, and Department Head of the Department of Chemical Engineering at the University of Arkansas. (EX III, Exhibit "16", exhibit "1" to DP Babcock). Dr. Babcock performed an assessment as to whether the factual aspects of the alleged July 25, 2001 event would likely result in an exposure to Crete Brite which could have been injurious to Claimant. In particular, through the use of hydrogen chloride and hydrogen fluoride monitors, Dr. Babcock tested the acid composition of the vapor arising from Crete Brite, which is known to contain concentrations of hydrochloric acid and hydrofluoric acid. Dr. Babcock tested for the gas concentration in parts per million with the fume hood door shut in a static environment (wind wise) and then also with the fume hood blower on and the sash raised slightly to create a wind draft of between 2 and 3 m.p.h. (Id., p. 16). The gas detectors were observed for 15 minutes in both instances. The sensors detected levels of acid vapors varying between 0.1 and 0.2 parts per million. (EX III, Exhibit 16, exhibit "1", exhibit "2" to DP Babcock). Dr. Babcock testified that the results of his testing show that the level of hydrogen chloride and hydrogen fluoride stayed well below the permissible exposure limit for both these chemicals under both circumstances. Therefore, Dr. Babcock concludes that there was virtually no possibility that harmful exposure to hydrogen fluoride or hydrogen chloride gas occurred during the pouring of the Crete Brite from one container to the other. (EX III, Exhibit "16", exhibit "2" to DP Babcock, exhibit "1" to DP Babcock; p. 7-8).

(iv) Expert and Medical Testimony Relied Upon By Appellant

The Administrative Judge concluded that the medical records and deposition testimony of Claimant's treating physicians, none of whom were experts in toxicology or chemistry, were not based on a detailed accounting of all the facts and their opinions were rendered in terms of possibilities, not probabilities as required by law. The Full Commission agreed with that assessment and affirmed the decision of the Administrative Judge. The medical testimony presented by Appellant was as follows:

a. Harry B. Heitzman, M.D., Internal Medicine.

Dr. Heitzman treated Claimant during his first admission to Ocean Springs Hospital from July 26, 2001 through July 31, 2001. Dr. Heitzman explained that Claimant was admitted to the hospital on July 26, 2001 through the emergency room to his service because he was on unreferred call. (EX III, Exhibit "12", p. 5-6). Upon discharge, the "impression" of Dr. Heitzman included "probable chemical pneumonia." According to Dr. Heitzman, this "diagnosis" was a working diagnosis developed in the Ocean Springs Emergency Department, where Claimant had reported to the emergency room physician that he inhaled "Ever Brite" after it got on his hands at work. (Id., p. 9). Dr. Heitzman's impression upon discharge is based solely on a history provided by Claimant to the emergency room physician, without knowledge of the underlying factual circumstances regarding the alleged chemical exposure, as covered in the Statement Under Oath of Kenneth Mitchell, or any critical analysis of the medical and scientific facts regarding this claim. (Id., p. 29).

When Dr. Heitzman was deposed, he testified that in his opinion Claimant probably sustained a chemical exposure to "Ever Brite", and this exposure resulted in pulmonary problems for Claimant and aggravated his coronary condition. (Id., p. 12-13). On cross-examination,

however, Dr. Heitzman admitted that he was not aware of the chemical composition of "Crete Brite". (Id., p. 24). Dr. Heitzman admitted he has no idea about the chemical properties of the chemicals in Crete Brite. (Id., p. 26-27). Dr. Heitzman also admitted that he has no idea whether Crete Brite will actually give off harmful gaseous vapors (i.e., off gas) and not any type of aerosol (i.e., liquid) compound – that this question **would be better answered by a toxicologist or a chemist**.[3] (Id., p. 26-27, 34). Dr. Heitzman was also questioned extensively regarding the fact that Claimant had no evidence whatsoever of any upper respiratory tract, mouth, nasal passage or eye tissue irritation. (Id., p. 30-34). Dr. Heitzman stated he really had no good explanation for the fact that Claimant had no such irritation or inflammation, assuming Claimant actually inhaled chemicals which would be harmful to his lungs. (Id).

b. Gary M. Rodberg, M.D.

Dr. Rodberg was the pulmonary specialist consulted by Dr. Heitzman on July 27, 2001. Dr. Rodberg's Pulmonary Consultation includes the "impression" of "Ever Brite topical and inhalation exposure with possible chemical pneumonisitis, doubt infectious etiology." The word "possible" is emphasized because Dr. Rodberg's diagnosis indicates that chemical pneumonisitis was only a possible diagnosis as opposed to a probable diagnosis. Mere possibilities, as opposed to probabilities, will not establish the requisite causal connection. *Harrell v. Time Warner/Capitol Cablevision,* 856 So. 2d 503 (Miss Ct. App. 2003) *Georgia Pacific v. Gregory,* 589 So. 2d 1250, 1254 (Miss. 1991); *Cole v. Superior Coach,* 106 So. 2d 71, 72 (Miss. 1958).

[3] Notably , the only such opinions offered were offered by the Employer and Carrier.

c. **James A. Waldron, Jr., M.D., Ph.D.**

Dr. Waldron is the pathology professor from University of Arkansas for Medical Sciences who reviewed the slides prepared from the right lower lung biopsy of Claimant performed approximately one month following the July 25, 2001 event in question. Dr. Waldron's diagnosis was an acute lung injury, consistent with a chemical inhalation injury. On cross-examination, however, Dr. Waldron admitted that he was not sent slides from any other parts of Claimant's body. (EX III, Exhibit "15", p. 14). Dr. Waldron did not analyze whether Claimant had a topical injury from any chemical cleaner. (Id.). Most importantly, Dr. Waldon does not even know the nature of the chemical that Claimant was allegedly exposed to and therefore, he does not know how the chemical inhalation may have occurred. (Id., p. 15-16).

d. **Timothy Hiebert, M.D., Pulmonary Disease and Critical Care.**

Dr. Hiebert is a pulmonary specialist who examined Claimant on August 16, 2001 at Singing River Hospital, which was his second hospitalization following the alleged exposure to Crete Brite on July 25, 2001. Dr. Hiebert testified that based on the medical information he reviewed, particularly the report of the lung biopsy performed on Claimant which states that this showed a condition "consistent with" a chemical inhalation injury, it is his opinion that Claimant sustained an inhalation injury at the time of the alleged exposure to Crete Brite while working with Southland. (EX III, Exhibit "14", p. 10). However, Dr. Hiebert based his opinion on a limited history of the alleged chemical exposure. For instance, Dr. Hiebert did not know the time of day the exposure occurred. (Id., p. 30). Dr. Hiebert did not know the physical location of the exposure. (Id.). He did not know if it was indoors or outdoors. (Id., p. 32). He did not know the weather. (Id.). Dr. Hiebert had no information as to how the transfer of the chemical took place; i.e., where the 55-gallon drum was in relation to the container where the liquid was being poured

into. (Id., p. 31). Dr. Hiebert does not recall seeing a topical exposure, nor does he recall Claimant saying anything about a topical exposure. (Id., p. 30-31). Dr. Hiebert did not know for how long Claimant was exposed to the Crete Brite on July 25, 2001 at work. (Id., p. 33-34). Dr. Hiebert admits that these are all factual matters that are significant in determining whether Claimant had a significant exposure to chemicals that he said he was exposed to. (Id., p. 32).

Moreover, Dr. Hiebert's testimony is flawed because it lacks any information whatsoever regarding the physical and chemical properties of hydrochloric acid and hydrofluoric acid, the main components of Crete Brite. (Id., p. 36-39). In particular, Dr. Hiebert could not answer the following question: "Doctor, assuming that the concentration of the acid in Crete Brite is insufficient at ambient temperatures and pressures to cause vaporization of the acids, assuming that to be a fact, could this patient have possibly had an injurious exposure to either of those acids?" (Id., p. 40). His response: "I don't know the answer to that question." (Id.) Also, as was pointed out at trial by the Claimant, Dr. Hiebert was basing his opinion on an inaccurate history of Claimant having actually washed the truck with Crete Brite that night (TR p. 27-28). Which serves as further basis for discrediting any opinions expressed by him.

Even more bothersome is that Dr. Hiebert admitted that hydrochloric acid inhalation exposure usually results in pathological findings in the eyes, nose, mouth and upper respiratory tract, but there is absolutely no mention of any such pathology in the records of any physicians who examined Claimant. (Id., p. 41-46, 56-57). In other words, there is no proof that either hydrochloric or hydrofluoric acid have traveled to the lower part of Claimant's lungs (the area where the lung damage was noted to exist) without substantially affecting the upper airway path, mouth, nose and eyes. Dr. Hiebert had no explanation of how this could occur, thus further calling into question the efficacy of his opinion on the causation issue.

e. **Joseph A. Pedone, M.D., Cardiologist**

Dr. Pedone was the cardiologist consulted by Dr. Heitzman on July 27, 2001. Dr. Pedone's Cardiology Consultation is confusing because the History of Present Illness states: "He [Claimant] apparently was exposed to chemicals the day of admission." Claimant was admitted on July 26, 2001. If Claimant was exposed to the Crete Brite on Thursday, July 26, 2001 as Dr. Pedone's Cardiology Consultation suggests, as opposed to Wednesday, July 25, 2001 as Claimant alleges, then the alleged exposure to Crete Brite did not occur at work.

Moreover, Dr. Pedone explained that he saw Claimant one year prior to the July 25, 2001 event in question and at that time, Dr. Pedone believed Claimant to have mild moderate valve disease, which did not warrant valve surgery at that time. (EX III, Exhibit "13", p. 11). When Dr. Pedone saw Claimant on July 27, 2001, he was of the opinion that Claimant had multi-valvular heart disease involving the aortic valve, the mitral valve, as well as a high grade blockage in the mid portion of his right coronary artery. (Id., p. 8-9). Dr. Pedone recommended that Claimant have a double valve procedure surgery and coronary bypass surgery. (Id.). Dr. Pedone **did not** believe Claimant's coronary problem; i.e., the blockage of the coronary artery, was aggravated by the lung problem. (Id., p. 11).

As to the heart valve problem, Dr. Pedone could only state that it was "possible beyond a reasonable doubt" or "that's not impossible" that the lung problem could worsen the pre-existing valve problem. (Id., p. 11-13). Again, this testimony seems to be couched in terms of "possibilities" rather than "probabilities." Dr. Pedone admits there is nothing in the medical literature that Crete Brite is known to cause worsening of pre-existing heart valve problems. (Id.).

Dr. Pedone was also asked on cross-examination whether he has sufficient medical facts upon which to render an opinion in terms of a reasonable medical certainty as to whether Claimant sustained an **injurious** exposure to any chemicals at any time in July 2001. (Id., p. 19 - 20). Dr. Pedone responded that the main evidence he is "hanging my hat on" is the lung biopsy. (Id.). This lung biopsy merely states that the pathology is "consistent with" a chemical inhalation injury. Again, "consistent with" is a possibility as opposed to probability. Regardless, Dr. Pedone admits he doesn't know what chemicals Claimant was exposed to. (Id., p. 20). Dr. Pedone further admits there are other possible causes that could mimic the biopsy finding. (Id., p. 22).

In addition, like Dr. Heitzman above, Dr. Pedone has no idea about the chemical properties of the chemicals in Crete Brite. (Id., p. 24). Dr. Pedone also admitted that he has no idea whether the chemicals in Crete Brite will actually give off harmful gaseous vapors (i.e., off gas) at ambient temperature and pressure. (Id., p. 24-25). Dr. Pedone was then asked: "Assuming as a medical fact that this product [Crete Brite] does not off gas any type of harmful chemicals at ambient temperature and pressure, is there any way that this patient could have sustained an injurious exposure to this chemical by inhalation of fumes?" (Id., p. 25). Dr. Pedone responded: **"Assuming that it doesn't off gas at ambient temperature, you would have to doubt that."** (Id.).

Finally, Dr. Pedone is of the opinion that if a patient sustains an injurious inhalation of chemicals, one would have an indication of redness and irritation in the upper respiratory tract. (Id., p. 32-33). If Claimant had no medical findings of that nature, Dr. Pedone is of the opinion **that this would be unusual.** (Id., p. 33).

v. Summary of the Argument

Employer and Carrier assert that the decision of the Administrative as affirmed by the Commission was based upon the substantial, credible expert testimony presented at trial. In addition to noting the inconsistencies in the testimony of the Appellant, and finding that the testimony of the Appellant was not credible, the Administrative Judge and the Full Commission found the expert opinions of those experts submitted by Appellees, namely Dr. Robert Jones, Dr. William J. George and Dr. Robert Babcock, to be more probative and accorded their testimony greater weight than the testimony of the experts presented by Appellant. The Appellees assert that those three experts to which the Administrative Judge and the Full Commission accorded the greater weight possessed the requisite knowledge of the chemical properties and toxic nature of chemicals involved in this matter whereas the experts who testified at the request of the Claimant, Appellant herein, did not possess the requisite knowledge. Accordingly, the Administrative Judge and the Full Commission, as finders of fact and judge of credibility, properly accorded the greater weight to the witnesses with that knowledge.

vi. Legal Argument

PROPOSITION I

Standard of Review

The Workmen's Compensation Commission is the trier of facts as well as the Judge of the credibility of the witnesses. *Roberts v. Junior Food Mart*, 308 So.2d 232 (1975). When the decision of the Commission is before the Court on immediate appeal, the reviewing Court may not tamper with the findings of fact, where the findings are supported by a sufficient weight of the evidence. *University of Southern Mississippi v. Gillis*, 872 So.2d 60 (Miss. App. 2003 cert. denied) 873 So.2d 1032 (2004); *Natchez Equipment Company v. Gibbs*, 623 So.2d 270, (Miss.

1993). Even if the Court had been sitting as trier of fact and might have found differently based upon the record as a whole, this is not the test. On review, the test is whether the Order of the Commission is supported by substantial evidence and where so supported, it is error for the reviewing Court to reverse the Commission. *Penrod Drilling Company and Granite State Insurance Company v. Etheridge*, 487 So.2d 1330 (Miss. 1986) and *Babcock & Wilcox Company v. McClain*, 149 So.2d 523 (Miss. 1963).

Throughout much of Appellant's brief, opposing counsel insists on mischaracterizing what the Administrative Judge requested post hearing from the parties. In truth, what the judge requested, and what counsel for Appellees submitted was a legal memorandum brief addressing the issue of causation. This was not a proposed Order containing Findings of Fact and conclusions of law that was adopted and signed by the Administrative Judge.

Counsel for Appellant cites the case of *Greenwood Utilities v. Williams*, 810 So.2d 783 in support of Appellant's contention that a lessened deferential standard of review should apply to the Decision and Order of the Administrative Judge in the present matter. In that case the Judge adopted and signed an Order prepared by one of the parties.

In the present matter the Administrative Judge did not accept, adopt and sign a proposed Order prepared by Appellees. The Administrative Judge wrote her own Decision and Order after reviewing the respective positions of all parties submitted in the post-hearing briefs. She found the argument concerning the law and facts presented by Appellees to be more persuasive and utilized language and argument from Appellees' brief in her Decision and Order. There is nothing improper about this. This is what trial judges do as part of the decision making process which was clearly utilized by the Administrative Judge herein. As such, the reviewing Court's role is not to probe the mental process of the Administrative Judge or Commission behind a

judgment. See *Kitchens v. Jerry Vowell Logging*, 874 So.2d 456, and cases cited therein. Accordingly, the appropriate standard of review in this matter is whether the decision of the Mississippi Worker's Compensation Commission is supported by substantial evidence.

However, assuming strictly for purpose of argument herein that the deferential standard is lessened in this matter, the Circuit Judge noted that it is not *de novo*. The Circuit Judge found, based upon the record as a whole, that even utilizing a relaxed standard of review there exists on the whole substantial evidence supporting the Commission's findings of fact and decision. (CR 110-113.)

In addition, the Appellant was allowed Oral Argument in this matter before the Commission and Appellant's arguments were considered by the Commission as part of their decision making process as finders of facts. The Commission entered their own Order affirming the Decision of the Administrative Judge. This was not an order drafted by Appellees.

In worker's compensation cases negative testimony concerning the cause of the injury constitutes substantial evidence from which a claim can be denied where the Claimant's uncorroborated testimony is contradicted by other statements made by the Claimant that are inconsistent with the claim. *Penrod Drilling Company and Granite State Insurance Company v. Etheridge*, 487 So.2d 1331 (Miss. 1986); and see also *Dunn, Mississippi Workmen's Compensation,* (3d Ed.1982) § 264.

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

PROPOSITION II

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

Claimant bears the burden of proving by a fair preponderance of the evidence each element of his workers' compensation claim. These elements are: (1) an accidental injury, (2) arising out of and in the course of employment, and (3) a causal connection between the injury and the claimed disability. *Miss. Code Ann.* § 71-3-3. As to the second element; i.e., whether the injury was work related, there are two separate parts to consider. In the "course of" asks whether the employee was injured while furthering the employer's business at a time and place incident to the employment. *Spencer v. Tyson Foods, Inc.*, 869 So. 2d 1069, 1074 (Miss. Ct. App. 2004). In the present case, there is a serious question as to whether Claimant received an injurious exposure to Crete Brite on July 25, 2001 when he participated in this cleaner being poured from a 55-gallon container to a smaller container. As shown by the testimony and medical records discussed above, there is substantial evidence that Claimant was not injured during this event, and the credible evidence supports the decision of the Administrative Judge and the Full Commission as finders of fact.

As to the second part of the second element, in the "scope of", asks whether the employment was a substantial contributing cause of Claimant's disability. *Spencer*, 869 So. 2d at 1074. As demonstrated herein above, there is substantial evidence that the exact cause of Claimant's lung problem and heart problems for which he was hospitalized on multiple occasions beginning July 26, 2001 could not be ascertained to a reasonable degree of medical probability.

The Claimant has the burden of proving his claim beyond speculation and conjecture and he must prove that his injury is one which arises out of, and is sustained in, the course of employment. *Flintkote v. Jackson*, 192 So.2d 395 (Miss. 1966); *Johnson v. Gulfport Laundry & Cleaning Co.*, 249 Miss. 11, 162 So.2d 859 (1964). The burden further involves establishing every essential element of the claim, and it is not sufficient to leave anything to surmise or conjecture. *Harrell v. Time Warner/Capitol Cablevision,* 856 So. 2d 503 (Miss Ct. App. 2003) *Narkeeta, Inc. v. McCoy*, 247 Miss. 65, 153 So.2d 798 (1963).

In reference to a chemical exposure incident, the Claimant's burden in accordance with the Mississippi Workers' Compensation Act is two fold. First he must prove that there was not only an exposure to a chemical, but that a harmful or injurious exposure occurred and, the second part of the Claimant's burden of proof is that he must prove by reasonable medical probabilities that his medical problems for which he received medical treatment are causally related to the specific exposure. *See Hensarling v. Casablanca Construction Co., Inc.*, 906 So.2d 874 (Miss. Ct. App. 2005). Obviously, to meet this burden of proof requires expert testimony from witnesses with scientific knowledge of the chemical properties and toxic nature of the alleged chemicals involved. Id. The Administrative Judge and the Full Commission found the expert opinions of those experts submitted by Appellees, namely Dr. Robert Jones, Dr. William J. George and Dr. Robert Babcock, to be more probative and accorded their testimony greater weight than the testimony of the experts presented by Appellant. As demonstrated herein above, those three experts to which the Administrative Judge and the Full Commission accorded the greater weight possessed the requisite knowledge of the chemical properties and toxic nature of chemicals involved in this matter whereas the experts who testified at the request of the Claimant, Appellant herein, did not possess the requisite knowledge. Accordingly, the

Administrative Judge and the Full Commission, as finders of fact and judge of credibility, properly accorded the greater weight to the witnesses with that knowledge.

Dr. Robert Jones is board certified in pulmonary disease and internal medicine and he is also a professor of medicine at Tulane University. He emphatically testified that there was no way that Langford could have inhaled chemicals in any substantial quantity. He explained that had that occurred there would have been more exposure to the eyes, nose, and upper respiratory tract, but these tissues were not inflammed or harmed. The second point that was raised by this expert was that any effects from any severe inhalation would be immediate and severe requiring immediate hospitalization. Yet, no immediate dizziness, nausea, vomiting, burning to the eyes, respiratory tract and nasal passages were present and Langford's other symptoms involving shortness of breath, did not appear until hours to weeks later. Taking those factors into consideration it was his reasoned opinion, as found by the Administrative Judge and the Full Commission as finders of fact, that no causal relationship was established within reasonable medical probabilities and the actual findings do not meet the criteria for a diagnosis of chemical pneumonitis.

The second of the three experts whose testimony was relied upon by the Administrative Judge and the Full Commission, Dr. William George, is a professor of pharmacology and a director of toxicology at Tulane University. It was his opinion that the health problems were not likely the result of the subject incident involving Crete Brite on July 25, 2001. In support of that opinion, he cites facts that there was no eye irritation, nausea, vomiting, or blistering of skin at the time of the event. It was also noted that the person who was actually pouring the subject chemicals was directly above the chemicals being poured and he experienced no symptoms whatsoever. The event occurred outdoors and was of brief duration. It was also taken into

consideration that neither Langford or any of the other drivers had experienced problems with this chemical on the numerous occasions in the past that they had used the Crete Brite. Dr. George conducted a test in the laboratory at Tulane over a 24 hour period and it was observed that the off gassing levels were minute, being 1/6 to 1/10 of the acceptable work levels established by the Occupational Safety and Health Administration (OSHA). It was his opinion that taking all of these factors into consideration that the levels were insufficient to cause Langford's medical problems.

The third expert relied upon by the Administrative Judge and the Full Commission, Dr. Robert Babcock, is a chemical engineer who is Head of the Department of Chemical Engineering at the University of Arkansas. He also tested the acid composition of the vapor arising from Crete Brite to see if harmful levels exist. The result of his test was that the levels stayed well below permissible exposure limits for the chemicals hydrogen chloride and hydrogen fluoride gas. It was his learned opinion that virtually no possibility of harmful exposure occurred from the pouring of the chemical from one container to the other.

The testimony of these three witnesses whose testimony the Administrative Judge and Full Commission found to be more probative and persuasive than the opinions of the other experts clearly furnishes substantial evidence to support the opinion of the Administrative Judge and the Full Commission, the finders of fact. On the other hand, the opinions of those witnesses relied upon by Appellant, during cross examination fell apart. During cross examination Dr. Heitzman admitted that he had no idea about the chemical properties of Crete Brite. He admitted that the issue of whether or not Crete Brite will actually give off harmful gas is an issue that would better be answered by a toxicologist or a chemist who possessed that knowledge as he did not. Thus, Dr. Heitzman deferred to the witnesses that the Administrative Judge and Full

Commission relied upon. Also, as noted by the Administrative Judge and the Full Commission, Appellant offered no testimony from experts in the field of toxicology or chemistry. Therefore, the testimony of the experts relied upon by the Administrative Judge and the Full Commission remains unrebutted by any experts with the requisite chemistry or toxicology background. It was also noted by the testimony herein above, and a factor relied upon by the Administrative Judge, that Dr. Heitzman could not explain how there could have been chemical pneumonia if the upper tissues of the respiratory tract were not irritated and the only irritation occurred in the bottom of the lung. The Administrative Judge also explained in her opinion that for similar reasons the testimony of Dr. James Waldron, Jr., Dr. Timothy Hiebert and Dr. Joseph Pedone were based upon limited or no knowledge of chemicals that were involved in this matter and they lacked the background information necessary to form valid opinions on causation. Their testimony amounts to nothing more than speculation, conjecture and surmise which does not meet the Claimant's burden of proof. *Harrell v. Time Warner/Capitol Cablevision,* 856 So. 2d 503 (Miss Ct. App. 2003)

The Administrative Judge pointed out that Dr. Hiebert could not answer when questioned about vaporizing of the acids at ambient temperatures and pressures, and neither Dr. Hiebert or Dr. Pedone could explain how any hydrochloric or hydrofluoric acid could have traveled to the bottom of the lungs without damage to the upper tissues.

Clearly, the opinions of these witnesses relied upon by Appellant were flawed and the Administrative Judge and the Full Commission were fully within their discretionary authority to accord the greater weight to the other witnesses. The Commission, sitting as the finder of fact, has the power to determine which evidence it finds credible and which evidence it does not. As such, the findings of the Commission with regard to the credibility of evidence are due

substantial deference. Mississippi law does not require the Commission to give a treating physician's opinion more weight than an expert witness or expert physician opinion. *See Manning v. Sunbeam-Oster Household Products*, 979 So.2d 736 (Miss. Ct. App. 2008; *Hardaway v. Bradley*, 887 So.2d 793 (Miss. 2004). The Commission, as trier of fact, determines the credibility of conflicting medical opinion testimony with regard to treating versus non-treating physician status. *Mabry v. Tunica County Sheriff's Department*, 911 So.2d 1038, 1042 (Miss. Ct. App. 2005); and *Martinez v. Swift Transportation*, 962 So.2d 746.

Counsel for Appellant also suggests that the Courts have previously stated that doubtful cases must be resolved in favor of compensation so as to fulfill a beneficent purpose of the statute. Actually, the statutory provisions of the Mississippi Workers' Compensation Act state that the Act shall be **fairly construed** according to the law and the evidence, and makes no mention of favoring one party as opposed to the other (*Miss. Code Ann.* § 71-3-1). Furthermore, the suggestion of liberal application obviously does not mean all claims are to be decided in favor of the Claimant as the case law, including those cases cited by opposing counsel, all adhere to the legal concept that the Claimant has the burden of proof by preponderance of the evidence of the elements of the claim which are contested arguably and in good faith. Case law cited by the Claimant in support of his contention reaffirms that the Commission is the finder of fact and when supported by substantial evidence it is the duty of the Circuit Court to affirm the Commission's findings.

Furthermore, more recent case law further establishes that regardless of a liberal interpretation, the Claimant still must meet his burden of proof as it is incumbent upon a Claimant in worker's compensation cases to prove that he suffered an occupational disease as a result of his or her employment. Where the Mississippi Workers' Compensation Commission

finds that the Claimant has not met that burden and there is substantial evidence to support the Commission's decision, the Commission must be affirmed even though the evidence would convince the Appellate Court otherwise, were Appellate Court the fact finder. *Hensarling v. Casablanca Construction Co., Inc.*, 906 So.2d 874 (Miss. App. 2005). (See also *Dunn, Mississippi Workmen's Compensation*, Third Edition, Section 31-32 and see also *Mississippi Practice Series, Mississippi Workers' Compensation* § 1:6).

CONCLUSION

For all the foregoing reasons, Claimant has failed to meet an essential element of his burden of proof. Namely that his lung and heart condition for which he was hospitalized on numerous occasions did not arise out of and in the course of his employment with Southland Trucking Company.

The opinions and testimony of Dr. Robert Jones, Dr. William George, and Dr. Robert Babcock constitute substantial evidence that was found to be more persuasive by the triers of fact in this matter and as such, the findings of the Commission with regard to the credibility of evidence are due substantial deference by the Courts. The decision of the Full Commission affirming the Opinion of the Administrative Judge is based upon substantial evidence and fully supported by the record as a whole. Accordingly, the decision of the Commission and Circuit Court of Jackson County must be affirmed.

Respectfully submitted, this the 13th day of October, 2009.

SOUTHLAND TRUCKING, L.L.C., Employer / Appellee

MISSISSIPPI ASSOCIATED GENERAL CONTRACTORS WORKERS' COMPENSATION FUND, INC., Carrier / Appellee

COPELAND, COOK, TAYLOR & BUSH, P.A., Their Attorneys

BY: 
RONALD T. RUSSELL

CERTIFICATE

I, RONALD T. RUSSELL, of the law firm of Bryant, Dukes & Blakeslee, P.L.L.C., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing **Appellees Brief** to *William T. Reed, Esquire*, counsel of record for the Claimant, at his usual and regular mailing address of Post Office Box 1428, Pascagoula, Mississippi 39568-1428; *Honorable Cindy P. Wilson*, Administrative Judge, at her regular mailing address of Post Office Box 5300, Jackson, Mississippi 39296-5300; and *Honorable William T. Harkey*, Jackson County Circuit Court Judge at his regular mailing address of Post Office Box 998, Pascagoula, Mississippi 39568.

SO CERTIFIED on this the 13th day of October, 2009.


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