IN THE SUPREME COURT OF MISSISSIPPI
NO. 2009-WC-00835-COA

CONCERT SYSTEMS USA, INC. ALLEGED EMPLOYER/APPELLANT

VERSUS

JOHN WEAVER CLAIMANT/APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY

CERTIFICATE OF INTERESTED PARTIES

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. Honorable Lawrence P. Bourgeois
2. Concert Systems USA, Inc., Alleged Employer/Appellant
3. Randy Frierson, the owner and President of Concert Systems
4. Candi Frierson
5. Dave Drake
6. John Weaver, Claimant/Appellee
7. Administrative Judge Mark Henry
8. Donald P. Moore, Franke & Salloum, PLLC, Counsel for the Alleged Employer/Appellant
9. James K. Wetzel, Counsel for the Claimant/Appellee

DONALD P. MOORE
COUNSEL FOR CONCERT SYSTEMS USA, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

OTHER **PAGE**

STATEMENT OF ISSUES

1. Whether the Full Commission and the Circuit Court erred in finding that claimant was an employee and not an independent contractor.

2. Whether the Full Commission and the Circuit Court erred in finding that Concert Systems had six employees, thus, subjecting it to the workers' compensation statute.

STATEMENT OF THE CASE

The initial trial of this matter was held before Administrative Judge Mark Henry on August 8, 2007. At the time of the hearing, claimant had not yet reached maximum medical improvement. The hearing was to address the issues of (1) whether claimant was an independent contractor or an employee of Concert Systems, (2) whether on the date of claimant's motor vehicle accident, July 15, 2006, Concert Systems had five or more employees subjecting them to the Workers' Compensation Act and (3) the reasonableness and necessity of certain medical treatment.

On November 15, 2007, Administrative Judge Mark Henry issued his Decision and Order. In his Order the Administrative Judge finds that claimant was an employee of Concert Systems USA, Inc. explaining, the "conclusion is not as clear cut as in some other cases, but the Administrative Judge is also aware that our Workers' Compensation Law is to be broadly construed and that doubtful cases are to be resolved in favor of the claimant." MWCC CP[1], p. 43. The Administrative Judge also found that Concert Systems USA, Inc. regularly had at least six employees and is therefore subject to the Workers' Compensation Act. MWCC CP, p. 44.

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[1]MWCC CP denotes Mississippi Workers' Compensation Commission Court Papers, MWCC TR denotes Mississippi Workers' Compensation Commission Transcript, MWCC CX and EX denotes Claimant's and Employer's Exhibits from Mississippi Workers' Compensation Commission's Trial, CP denotes Circuit Court Papers and TR denotes Circuit Court Transcript.

Employer filed a Petition for Review Before the Full Commission on November 21, 2007, (MWCC CP, pp. 46-47) and briefs were filed with the Mississippi Workers' Compensation Commission (hereinafter "Commission"). On June 23, 2008 the Commission entered a Full Commission Order summarily affirming the Decision and Order of the Administrative Judge. MWCC CP, p. 48.

Employer then filed an appeal with the Circuit Court of Harrison County, First Judicial District on July 2, 2008. MWCC CP, pp. 49-51. Again both parties filed briefs, and on April 22, 2009 Circuit Court Judge Larry Bourgois issued his Order affirming the Administrative Judge and Full Commission's findings.

On May 21, 2009 Employer filed a timely appeal to this Court.

SUMMARY OF ARGUMENT

Employer contends that the Administrative Judge and the Full Commission erred in finding claimant was an employee and not an independent contractor as the finding is not supported by substantial evidence and is arbitrary and capricious. Additionally, Employer contends that the Administrative Judge, the Full Commission and the Circuit Court Judge erred in finding that Concert Systems had sufficient employees to subject it to the workers' compensation statute as the findings are not supported by substantial evidence and are arbitrary and capricious.

STANDARD OF REVIEW

The Appeals Court must reverse the judgment of the Commission if the judgment lacked the support of substantial evidence, was arbitrary and capricious, or contained an error of law. Weatherspoon v. Croft Metals, Inc., 853 So.2d 776, 778 (Miss.2003). When, as here, the Commission accepts the ALJ's findings and conclusions, the findings and conclusions of the ALJ

are reviewed as those of the Commission. McDowell v. Smith, 856 So.2d 581, 585 (Miss. Ct. App.2003). Substantial evidence is defined as more than a "mere scintilla," but it does not rise to the level of a preponderance of the evidence. Delta CMI v. Speck, 586 So.2d 768, 773 (Miss.1991).

STATEMENT OF THE FACTS

Concert Systems produces concerts for musicians. MWCC TR, pp. 106, 119. Specifically, Concert Systems or more particularly, Randy Frierson would perform services for artists and help with their needs. MWCC TR, p. 106. On occasion, Concert Systems would provide the instruments, sound equipment or technicians needed for the production of the concert. Id.

John Weaver, claimant herein, is a 67 year old truck driver. MWCC TR, p. 14. Claimant's work history includes working as a bricklayer and driving trucks. MWCC TR, pp. 14-15. In 1985, claimant began driving a truck full time and in 1997 until approximately 2000 he had his own truck driving business named Weaver Transport, Inc. MWCC TR, p. 15. In approximately 2000, he sold his truck driving business. MWCC TR, p. 16. Thereafter, he began driving for Southern Trucking. Id. He also drove a truck for Gulf Coast. MWCC TR, p. 17.

Claimant did not want a full-time job and therefore he quit working for Southern Trucking. He heard about Concert Systems and contacted them to try and drive for them. Id. at 18. Claimant testified that Concert Systems did not need anyone at that time, but they informed him that they would call him if they needed him. Id. Eventually, Concert Systems contacted the claimant. However, when asked about the conversation and what Concert Systems explained to him they needed, he admitted the following:

Q: [They] Just said we need to employ you as a full-time driver?

A: No. They didn't say nothing about a full-time driver.

Q: A part-time driver?

A: Yeah. Well, they just wanted a driver because they said, **occasionally** - - they didn't know how much it would consist of, but they needed a driver when they were setting up, you know, carrying the equipment around.

MWCC TR, p. 18. (Emphasis added). He further testified:

Q: How long before July 15 of '06 would that have been? Would that have been- -

A: I think about two years when I first started with them, but, of course, I didn't work on a regular basis. It was just on a temporary basis if - - **on need, you know, if they needed me.**

MWCC TR, p. 18. (Emphasis added).

Claimant began driving for Concert Systems on an as needed basis in 2003. As a matter of fact, claimant admitted he only drove for them five or six times in the three years prior to his injury date. MWCC TR, p. 54. Claimant was paid a daily rate plus expenses per haul or job. MWCC TR, pp. 21, 91-92. Claimant also received a Form-1099 documenting his earnings for tax purposes. MWCC TR, pp. 69, 111, 112. No taxes or social security were taken out of the claimant's earnings, claimant had to pay his own tax, FICA and other withholdings as he was self-employed. MWCC TR, pp. 32, 65.

In July of 2006, at the time he was involved in the accident, claimant had not driven for Concert Systems at all during that year or since Hurricane Katrina in August, 2005. MWCC TR, pp. 33, 54. Randy Frierson, the owner and President of Concert Systems, testified that claimant only drove for Concert Systems five to seven times total in the three years prior to his injury. MWCC TR, p. 120.

Prior to Hurricane Katrina Concert Systems primarily did work on the Gulf Coast as that kept them very busy. MWCC TR, pp. 125, 133. As a matter of fact, Randy Frierson testified that "prior to Katrina, our company was doing gang busters." MWCC TR, p. 125. Specifically, Concert Systems' main vendors were the casinos on the Coast and a majority of the time the equipment would remain at the casinos. MWCC TR, p. 106. Following Hurricane Katrina and particularly at the time of claimant's accident, Concert Systems did not have any shows on the Gulf Coast as the casinos were closed for at least a year. MWCC TR, pp. 107-108. Therefore, Concert Systems had to find another source of income. MWCC TR, p. 107. In order to do so, it opened up an office in Tampa and began to move its business and create a new customer base in Tampa. Id.

Dave Drake does maintenance and repair work on production gear on a freelance basis for various companies including Concert Systems. MWCC CX-3, pp. 5-6, 39. Mr. Drake testified that he was paid "loosely" either by the hour or for the task with no set or scheduled hours or days he had to work for Concert Systems. MWCC CX-3, p. 6.

Dave Drake is not an employee of Concert Systems. That is not disputed and even in his opinion the Administrative Judge did not count Mr. Drake as an employee. MWCC CP, pp. 39, 43-44. Dave Drake was merely an independent contractor who performed work on an as needed basis for Concert Systems as did claimant. On occasion, as part of his responsibilities in ensuring equipment was repaired or set up properly, he would drive equipment to various locations and assist with the set up. MWCC CX-3, p. 19. However, as previously stated, his primary skill and purpose served for Concert Systems was his maintenance/repair work on production gear. MWCC CX-3, pp. 5-6, 39.

Dave Drake was supposed to make the run to Tampa which the claimant was on at the time of the accident, and while he was there, he was supposed to do some necessary work on the equipment for Concert Systems; however, unfortunately, at the time of the run, Dave Drake's mother was not in good health and he did not feel comfortable leaving her to travel to Tampa. MWCC TR, pp. 110-111, 122. Thus, in July of 2006, Dave Drake contacted claimant and asked if he was interested in making the run. At trial, claimant explained that he was not sure if he could do the run because he was still working for Gulf Coast and was not sure when he was coming in but he told Mr. Drake that if he could he would. MWCC TR, p. 34. Thus, it was up to claimant if he wanted or could accept the run. It worked out that claimant was available to make the run to Tampa to bring the equipment. MWCC TR, p. 35.

Claimant only spoke to Dave Drake regarding the Tampa run. MWCC TR, pp. 33-34. Claimant never spoke to anyone with Concert Systems such as Candi or Randy Frierson. MWCC TR, pp. 112, 121. As a matter of fact, at trial Randy and Candi Frierson testified that they did not know Dave Drake contacted the claimant and that Dave Drake did not have the authority to hire John Weaver for the run or any other task. MWCC TR, pp. 99, 100, 112, 121, 124.

On July 15, 2006, on his way back to Gulfport from Tampa, Florida, claimant was involved in a motor vehicle accident. Claimant was rear-ended by an eighteen wheeler tanker truck. Claimant was injured and taken to Myriad Hospital. MWCC TR, pp. 42-44. Claimant had a third party claim against the party responsible for the accident. MWCC TR, p. 70. (This suit has recently been settled).

At the time of the hearing on this matter, claimant had not yet reached maximum medical improvement. The hearing was to address the issues of (1) whether claimant was an independent

contractor or an employee of Concert Systems, (2) whether on the date of claimant's motor vehicle accident, July 15, 2006, Concert Systems had five or more employees subjecting them to the Workers' Compensation Act and (3) the reasonableness and necessity of certain medical treatment.

On November 15, 2007, Administrative Judge Mark Henry issued his Decision and Order. In his Order the Administrative Judge states that in finding that claimant was an employee of Concert Systems USA, Inc. the "conclusion is not as clear cut as in some other cases, but the Administrative Judge is also aware that our Workers' Compensation Law is to be broadly construed and that doubtful cases are to be resolved in favor of the claimant." MWCC CP, p. 43. The Administrative Judge also found that Concert Systems USA, Inc. regularly had at least six employees and is therefore subject to the Workers' Compensation Act. MWCC CP, p. 44.

Employer filed a Petition for Review Before the Full Commission on November 21, 2007, (MWCC CP, pp. 46-47) and briefs were filed with the Mississippi Workers' Compensation Commission (hereinafter "Commission"). On June 23, 2008 the Commission entered a Full Commission Order summarily affirming the Decision and Order of the Administrative Judge. MWCC CP, p. 48.

Employer then filed an appeal with the Circuit Court of Harrison County, First Judicial District on July 2, 2008. MWCC CP, pp. 49-51. Circuit Court Judge Larry Bourgois affirmed the Administrative Judge and Full Commissions findings, essentially without analysis or explanation. Thereafter, the Employer filed a timely appeal with the Mississippi Supreme Court.

ARGUMENT

I. THE RECORD AND MISSISSIPPI LAW DO NOT SUPPORT THE FINDING THAT CLAIMANT WAS AN EMPLOYEE AND THEREFORE THE FINDINGS BELOW ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE ARBITRARY AND CAPRICIOUS AND SHOULD BE REVERSED.

The "control test" and the "relative nature of the work test" are two tests which the Mississippi Supreme Court employs to determine whether the claimant was an independent contractor or an employee. Shelby v. Peavey Electronics Corp., 724 So.2d 504 (Miss. Ct. App.1998) citing Brown v. E.L. Bruce Co., 175 So.2d 151, 154 (1965) (stating that the various tests enumerated in previous opinions are simply methods to be used as an aid in determining whether or not the contractor was an employee, an agent, or a person engaged in an entirely different business, the services of which are contracted to another as an independent contractor).

Additionally, Mississippi Code, Section 71-3-3(r) defines "independent contractor" for purposes of the Workers' Compensation Act as:

> any individual, firm, or corporation who contracts to do a piece of work according to his own methods without being subject to the control of his employer except as to the results of the work, and who has the right to employ and direct the outcome of the workmen independent of the employer and free from any superior authority in the employer to say how the specified work shall be done or what the laborers shall do as the work progresses; one who undertakes to produce a given result without being in any way controlled as to the methods by which he attains the result.

Miss. Code Ann. § 71-3-3(r) (Rev.1995).

The Boyd Court addressed both of these tests and explained the control test as follows:

> . . . In general, it is said that the right to control, not actual control of, the details of the work is the primary test of whether a person is an independent contractor or an employee. . . . It is the ultimate right of control, not the overt exercise of that right, which is decisive. Probably the four principal factors under the control test, are "(1) direct evidence of right or exercise of control; (2) method of payment; (3) the furnishing of equipment; and (4) the right to fire." . . .

Boyd v. Crosby Lumber & Mfg. Co., 166 So.2d 106, 108 (Miss. 1964). In regards to the second test the Boyd Court stated:

> . . . (2) the relative nature of the work test. The latter contains these ingredients: "the character of the claimant's work or business-how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on-and its relation to the employer's business, that is, how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job." . . .

Boyd, 166 So.2d at 110.

Furthermore, in regards to the nature of the work test the Mississippi Supreme Court in Kughn v. Rex Drilling Co., 64 So. 2d 582 (Miss. 1953) explained that "where a job is one that becomes necessary at unpredictable intervals and is not a protracted one, as in the case of repairs to machinery, the work is ordinarily not considered as being an integral part of the regular business of the employer." In Kughn, the decedent was hired to splice some cables for Zach Brooks Drilling Company and died from a cerebral hemorrhage shortly after finishing the job. The Mississippi Supreme Court explained that Kughn held himself out as an expert in splicing cables, he fixed his own price, fixing the cable, which he had done for Zach Brooks on several other occasions in the past, was not part of the regular business of Zach Brooks and only had to be done at unpredictable intervals. Id. at 586. Furthermore, in finding Kughn an independent contractor the Court looked to the fact that Kughn was not told how to splice the cables, he left when he finished the task, he was not carried on Zach Brooks payroll and no deductions were made from his pay. Id. at 586-887.

Similarly, Mississippi Courts have explained that an independent contractor situation exists when as in the case at hand, a person is hired to merely perform a certain task. For example, in Crosby Lumber & Mfg. Co. v. Durham, 179 So. 285, 287-88 (Miss. 1938) the Court defined an

independent contractor relationship as one who contracts with another to do something for him, but was not controlled nor subjected to right of control by such other with respect to his physical conduct in performance of the undertaking. The Court then held that a contract between a trucker and lumber company created an independent contractor relationship because the contract in issue expressly provided the lumber company with no control over methods of hauling. See also Fruchter v. Lynch Oil Co, 522 So. 2d 195, 199 (Miss. 1988) (stating that if principal was concerned only with ultimate results rather than the details of agent's work, then principal was not employer and therefore, not liable for agent's acts). The Court in Cook v. Wright, 171 So. 686, 689-91 (Miss. 1937) also found that a subcontract to haul constituted a contract for service and not for employment even though materials were to be hauled and delivered in accordance with approved plans, specifications, and requirements.

In citing American Jurisprudence the Mississippi Supreme Court has pointed out an important fact regarding this issue: "Examination of the definitions substantially adopted by most of the courts makes it evident that one of the basic elements of the independent contractor relationship is the fact that the contractor has an independent business or occupation." Brown v. E. L. Bruce Co., 175 So.2d 151, 154 (Miss. 1965) citing 27 Am.Jur. Independent Contractors § 2 pp. 482-483 (1940).

Additionally, Larson's Workmen's Compensation Law, Section 45, states "the modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." Larson's Workmen's Compensation Law, Section 45.

1. Transporting/hauling equipment is not an integral part of the regular business of Concert Systems.

Initially, employer maintains that the Courts below erred in finding claimant's sporadic truck driving for Concert Systems an integral part of the regular business of Concert Systems as this finding is not logical or in accordance with Mississippi Law. Therefore, the "modern tendency" to find employment would not apply in the case at hand. Concert Systems is a company that produces concerts. MWCC TR, pp. 119-120. Producers provide many services. Randy Frierson, the owner and president of the company is essentially the producer. His expertise and knowledge is why the company is hired. As producer, Randy Frierson, performs services for artists and helps with their needs. MWCC TR, p. 106. Concert Systems provides the instruments, sound equipment and primarily the expertise of the sound and lighting technicians needed for the production of concerts. Id. These tasks encompassed in the jobs of a producer are the companies main or integral purpose.

In some cases, as part of its services Concert Systems hires an independent contractor, such as Dave Drake, a sound technician, to set up and run (or even repair) certain equipment. In an even smaller percentage of those cases, again certainly not a majority of them, the location of the concert requires the equipment to be transported by a driver with a commercial drivers license. Thus, on those few occasions a licensed truck driver, such as the claimant, is hired to transport the equipment. At trial Randy Frierson testified that "we're not a trucking company and we don't do that by nature. We're a sound company, a lighting company." MWCC TR, p. 127. He further testified that Concert Systems did not transport equipment back and forth between Tampa and Gulfport. Id. The drive claimant was making at the time he was injured was a one time haul transporting the business equipment to its new place of business. Clearly, the transporting of equipment is not the main

purpose or integral part of the regular business of Concert Systems, especially transporting equipment from Gulfport to Tampa, as there was no concert in either Tampa or Gulfport. In this instance, Concert Systems merely needed some of their equipment transported to Tampa on a one-time basis. Furthermore, Claimant's driving services were only used five to six times in three years, the entire time that Concert Systems and the claimant had a working relationship. MWCC TR, p. 54. Concert Systems would not be able to remain in business if it only had five to seven jobs in three years! Moreover, the claimant would not be able to support himself or his family if he only worked five to seven trips in three years.[2]

Thus, the findings of the Courts below are not supported by substantial evidence, are arbitrary and capricious and should be reversed.

2. Claimant was a truck driver who provided his own professional service of driving commercially and performed a specific task for Concert Systems on an "as needed" basis at unpredictable intervals while he was simultaneously driving as an independent contractor for other companies.

Secondly, the Courts below failed to consider or did not properly consider the fact that claimant furnished an independent business or professional service. The claimant drove trucks for a living. He drove for various entities. Claimant was a truck driver who drove trucks for different entities or for whomever he chose, whenever he chose. MWCC TR, pp. 34, 61. He was lending out his services as a licensed truck driver to the public and was paid for those services. As a matter of fact, the day before he drove for Concert Systems on the trip at issue here, he drove for Gulf Coast. MWCC TR, p. 34. Furthermore, claimant almost turned down the opportunity to drive to Tampa

[2]Lets not forget that claimant was actually driving for another company at the time. Claimant clearly worked for who he wanted, when he wanted and if he wanted. Thus, if he wanted he could have set his own prices. He chose his own route and used his own license, skill or expertise in driving and was not told how to do his job.

for Concert Systems because he was driving for another company and was not sure he would be back in time to drive for Concert Systems. MWCC TR, p. 34. Thus, clearly it was up to claimant if he wanted to accept the run and he was under no obligation to drive the run to Tampa for Concert Systems. Claimant furnished to Concert Systems a separate or independent service other than that which Concert Systems provided on an everyday basis. It was a special task for which Concert Systems needed to hire an experienced individual, claimant, an independent contractor, who provided the necessary service.

Contrary to claimant's contentions at trial, claimant provided an independent business or professional service. Claimant's skill as a commercial truck driver is an independent business or service, even if the claimant no longer had a "separate company." MWCC TR, p. 51. Claimant was still providing his "service" of truck driving to various entities or the public at large. Moreover, claimant was paid a daily rate plus expenses per haul or job. MWCC TR, pp. 21, 91-92. (Emphasis added). Claimant also received a Form-1099 documenting his earnings for tax purposes and was not on Concert Systems' payroll. MWCC TR, pp. 69, 112. No taxes or social security were taken out of the claimant's earnings, claimant had to pay his own tax, FICA and other withholdings as he was self-employed. MWCC TR, p. 65.

Concert Systems hired the claimant on occasion to perform a task: driving a load of equipment from point A to point B. The claimant was hired to perform a certain task and only that task. When claimant's task was over, his "employment" with Concert Systems was over with no mention, indication or guarantee of ever performing any work for Concert Systems again.

Claimant admittedly did not drive for Concert Systems after Hurricane Katrina until the trip from Gulfport to Tampa in July, 2006 where Concert Systems had relocated after Hurricane Katrina.

MWCC TR, pp. 33, 54. Thus, claimant went at least 11 months without doing any work for Concert Systems prior to the subject accident and had no concerns about if they would ever need him again. Moreover, in regards to the Tampa trip, claimant was not even "hired" or contracted with by Concert Systems and was instead contacted by David Drake to make the run, who had no authority to do so. MWCC TR, pp. 100, 112, 121, 124. As a matter of fact, David Drake was supposed to make the run himself because he was also supposed to repair some equipment while in Tampa. Dave Drake was undisputedly not even an employee. Claimant was only filling in for Dave Drake and by doing so Concert Systems purpose for the trip was not even fulfilled. MWCC TR, p. 123.

Claimant was needed for a limited time and when or how often he would be needed was unpredictable. There was no obligation on the part of the claimant to be available when Concert Systems needed something hauled and there was no minimum or maximum times a month or year on either side of the arrangement that claimant's services were retained. He was "hired" for one driving job at a time with no future commitments and at the completion of the job he was paid a daily rate agreed upon by the parties. MWCC TR, p. 32. Claimant received a check with no deductions or withholdings taken out of his daily rate and was provided a 1099 at the end of the year. Id.

Thus, clearly, the claimant was not an employee of Concert Systems as he could work or not work as he pleased with no future commitment or obligation by either party and provided a separate or independent service, truck driving, other than that provided by Concert Systems, producing concerts and providing and running the sound and lighting. Thus, the finding of the Courts below that claimant was an employee was in error and contrary to law as claimant provided a separate independent service to Concert Systems and was an independent contractor.

Additionally, the Courts below erroneously found that the arrangement between the parties was terminable at will and therefore an indicator that claimant was an employee. Upon completion of a driving job, claimant and Concert Systems could both choose not to enter into another driving agreement. In this situation that is not an indicator of an employee. Since claimant worked for himself he could not be terminated by Concert Systems. He could, obviously, just as with every independent contractor, not be retained by Concert Systems again. Clearly, this factor was incorrectly found to be in favor of an employer/employee relationship.

In light of the foregoing, Mississippi Law supports Concert Systems position that claimant was an independent contractor. Consequently, the Courts below erred as a matter of law in their findings, which are not supported by substantial evidence and are therefore arbitrary and capricious and should be reversed.

3. Concert Systems did not exert control over the claimant but merely provided him amenities and information necessary for him to be able to provide his services as part of the customary terms of a contract for services with a truck driver.

Concert System arranging for Weaver to have a place to sleep was not such control as to render him an employee. Per Federal DOT requirements claimant is only permitted to drive a certain amount of hours before taking time off to rest. Thus, Concert Systems making arrangements for the claimant to sleep is merely Concert Systems honoring its part of the arrangement as previously established during prior jobs. This is done so Mr. Weaver would not have to expend his own funds or sleep in the truck, if he had already driven too much that day or the equipment was not ready to be transported on the next leg of the trip. Except when the load/equipment was not ready to be transported, Concert Systems did not set the rules that claimant could not drive straight through. Additionally, Weaver did not have to sleep in the hotels where Concert Systems made arrangements

for him. This was not a requirement between the parties. The agreement between the parties was that Claimant drove the truck and was paid a certain figure and expenses per day for his knowledge, skill and expertise. As one of claimant's expenses was sleeping accommodations, Concert Systems merely assisted claimant by making the sleeping arrangements for him. Moreover, it was more than likely easier for both parties for Concert Systems to make the reservations since it was paying for them, to prevent the need for Weaver to gather, save receipts etc to be reimbursed.

Claimant even testified at trial that Concert Systems did not give him "specific instructions". TT, p. 29. Obviously Concert Systems would tell him where to bring the loads and when; however the Mississippi Supreme Court has held that this is not an indicator of control but is merely providing necessary information. See generally Cook v. Wright, Supra. Most importantly, the job of hauling the loads from point A to point B, what Weaver was hired to do, was not under Concert Systems control. Claimant was also solely responsible for inspecting the vehicle prior to driving it, as required by DOT guidelines. MWCC TR, pp. 59-60.

In regards to the route that was taken, Randy Frierson testified at trial that although as a courtesy or to be helpful on occasion they may have printed directions off of Map Quest, as a rule of thumb, Concert Systems did not tell drivers how to drive or which route to take but just wanted the loads to arrive on time and safely. MWCC TR, p. 121. (Emphasis added). Moreover, Claimant testified that he would have to drive a certain route to ensure he went across the appropriate scales due to DOT guidelines. MWCC TR, p. 59. Clearly, Concert System's main concern was that the loads reached their destination on time and safely. The only controls on the claimant were actually Federal DOT guidelines.

Claimant was an independent contractor hired due to his skills and professional license to perform one task for Concert Systems. The lower Courts erred in finding otherwise. Moreover, claimant is not left without a recourse for his injuries and time off of work due to this accident as he has a third party claim against the party responsible for the accident.[3] MWCC TR, p. 70.

In the alternative, even if it can be found that claimant was a "casual" employee while he was driving for Concert Systems at one time, this relationship changed after Hurricane Katrina and was not reflective of claimant's relationship with Concert Systems at the time of the claimant's accident. Thus, claimant's former relationship should not be used to determine his relationship at the time of the accident. Hurricane Katrina destroyed and shut down all of the casinos on the Gulf Coast and therefore Concert Systems had no vendors or clients on the Coast. Concert Systems moved its base of operations to Tampa following Hurricane Katrina. MWCC TR, p. 107. Not only did claimant not drive for Concert Systems following Hurricane Katrina until the haul to Tampa approximately 11 months after Hurricane Katrina, but when he did drive for them again in July 2006 it was merely a one time trip bringing equipment from Gulfport to Tampa. MWCC TR, pp. 33, 54, 123. The trip to Tampa was a one time trip transporting some of Concert Systems equipment to its new base of operations. This is not an integral part of its purpose or business. Moreover, obviously, the Hurricane and Concert Systems moving its base of operation changed any alleged relationship between Concert Systems and claimant. Logistically it would be inefficient to have a driver from Gulfport transport Concert Systems equipment to concerts when the majority of the equipment and the base of operations had moved to Tampa, Florida months prior.

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[3]As a matter of fact during the pendency of the appeal process claimant has settled his Third Party matter receiving $700,000 from the driver of the other vehicle due to this motor vehicle accident.

Thus, if claimant was a casual employee when he was driving equipment to concerts for Concert Systems, following Katrina, when there was no base of operations out of Gulfport, claimant obviously would no longer be needed to drive from Gulfport to the various concerts for Concert Systems. In that regard, even if claimant was an employee of Concert Systems in the past, following Hurricane Katrina and at the time of the accident, claimant was no longer an employee and was only an independent contractor hired to perform one specific haul. Therefore, the lower courts erred in finding the claimant was an employee at the time of the motor vehicle accident as their findings are not supported by substantial evidence, are not in accordance with the law and are arbitrary and capricious under the circumstances. Employer requests that the lower courts' decisions be reversed.

II. THE LOWER COURTS' FINDINGS THAT CONCERT SYSTEMS IS SUBJECT TO THE WORKER'S COMPENSATION STATUTE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, IS CONTRARY TO LAW AND IS ARBITRARY AND CAPRICIOUS AS CONCERT SYSTEMS DID NOT HAVE THE REQUISITE NUMBER OF EMPLOYEES.

Concert Systems did not have the requisite number of employees to be subject to the Mississippi Workers' Compensation Statute. Therefore, the lower courts erred in finding the Workers' Compensation Statute applied to Concert Systems.

Mississippi Code Annotated Section 71-3-5 entitled "Application" states what entities shall constitute employers subject to the provisions of the Mississippi Workers' Compensation Act. Specifically, Section 71-3-5 states

> The following shall constitute employers subject to the provisions of this chapter: Every person, firm and private corporation, including any public service corporation but excluding, however, all non-profit 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, expressed or implied.

Miss. Code Ann. § 71-3-5 (Rev. 2000). Moreover, employer is defined by the Act as "a person, partnership, association, corporation and the legal representative of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation." Miss. Code Ann. § 71-3-3e (Rev. 2000).

In his Decision and Order, the Administrative Judge found that Concert Systems had four regular employees on its payroll on the date of the accident and in addition included Randy and Candi Frierson as employees. Thus, he concluded that Concert Systems had at least six employees. MWCC CP, p. 43. The Circuit Court Judge did not address whether Randy and Candi Frierson were employees and instead found that since it was undisputed that Concert Systems had four employees, and claimant was found to be an employee, the worker's compensation statute was applicable. CP, p. 81.

Thomas Randall Frierson, III, (Randy Frierson), is the creator and incorporator of Concert Systems. As such, he designated himself as the President or CEO of Concert Systems USA, Inc. when the company was incorporated. MWCC TR, p. 118. Moreover, as the owner, incorporator and President/CEO of the company, when he married Candi Frierson he appointed her Vice President and/or Chief Financial Officer of Concert Systems USA, Inc. MWCC TR, p. 104, 119.

Section 71-3-5 of the Mississippi Code states that "workmen or operatives" are to be counted when determining if an employer has the requisite number of employees to be subject to the Workers' Compensation Act. Moreover, Dunn's on Mississippi Workers' Compensation Law states that:

> A corporate official, as such, who has rejected coverage under the Act, is <u>not a workmen or operative</u> within the intent of the Act.

Vardaman S. Dunn, Mississippi Workmen's Compensation § 15 (3d ed. 1982). (Emphasis added).

In the case at hand, at the hearing of this matter, Randy Frierson testified that prior to the workers' compensation policy expiring, Candi and Randy Frierson were excluded under the workers' compensation policy. MWCC TR, p. 134. As officers of the corporation, Randy and Candi are not automatically covered under the worker's compensation Act or worker's compensation policies. Thus, pursuant to Section 71-3-5 of the Mississippi Code and Dunn's, Randy and Candi are not and should not be considered "workmen or operatives" under the Act when determining if Concert Systems had the requisite number of employees. Thus, the Administrative Judge and the Full Commission erred in including Randy and Candi Frierson as employees.

Additionally, the Mississippi Supreme Court has addressed this issue and has held that generally officers are not employees covered under the Workers' Compensation Act unless they elect to be covered. Specifically, in American Surety Co. v. Cooper, 76 So. 2d 254 (Miss. 1954), the Mississippi Supreme Court looked to this issue and explained that:

> With the single exception of Oklahoma, every state which has dealt judicially with the status of 'working partners' has held that they can not be employees. California, Michigan and Nevada have included by special statutory enactment working partners who receive separate wages beyond their share in the profits.

American Surety Co., 76 So. 2d at 437.

The Court further explained that the basis for such is that "one cannot be an employer and an employee at one and the same time." Id. at 437. The original Act did not allow for a member of a partnership, firm, association, or officer of a corporation to obtain coverage under the Act. The 1950 amendment however, allows for these persons to obtain coverage under the Act with his affirmative election to take such coverage. Id. (Emphasis added). Thus, logically, if the affirmative

action to take coverage is not done then the Act alone does not provide coverage. The Court in American Surety also stated:

> the provisions appearing in the original act, effective January 1, 1949, permitting a member of a partnership to be counted among the requisite number for qualification under the act, was eliminated in the 1950 amendment and is no longer in force.

American Surety Co., 76 So. 2d at 257. Specifically, in the American Surety Co. case, the Supreme Court held that the Act did not apply to the claimant but that he could have obtained coverage under the Act had he elected to do so, which he did not do. Id. at 257.

Randy and Candi were officers not contemplated to be covered under the Act unless they took some affirmative action to obtain coverage. Randy and Candi did not elect to have workers' compensation insurance coverage when they had a workers' compensation policy in effect. Therefore, they did not elect for the Act to cover them as is permitted under the amendment to the Workers' Compensation Act. Concomitantly, Candi and Randy are not to be counted as employees when determining whether Concert Systems has the requisite number of employees to subject them to the Workers' Compensation Act. The Judge and the Full Commission erred in finding otherwise. Including Randy and Candi Frierson, the President and Vice President of Concert Systems as employees for workers' compensation purposes is improper and not in accordance with Mississippi Law and therefore the finding should be reversed.[4]

Furthermore, the compensation act is based upon employment, and liability thereunder is limited to disability or death arising out of and in the course of employment. Miss. Code Ann. § 71-3-7 (Rev. 2000). An employee, by definition, includes only a person in the service of an employer

[4]Concert Systems arguments against the finding that Weaver was an employee is addressed supra.

under contract of hire and one who performs services for another without receiving payment does not qualify as having been "hired" under the Act. Vardaman S. Dunn, Mississippi Workmen's Compensation § § 119-120 (3d ed. 1982) citing Miss. Code Ann. § 71-3-3(d) (Rev. 2000). Thus, since Candi Frierson did not receive compensation for her work performed for Concert Systems, she is not an employee under the terms of the act and should not be counted as same.

Clearly, the Administrative Judge and Commission's findings are not supported by substantial evidence, not in accordance with Mississippi law and are therefore, arbitrary and capricious. Accordingly, the Administrative Judge and consequently, the Full Commission, erred in their findings and Concert Systems should be found to have had only four employees at the time of claimant's injury. Moreover, as previously argued Weaver was clearly not Concert Systems employee and therefore also does not count to make the workers' compensation act applicable to Concert Systems. Therefore, the lower courts' findings should be reversed and it should be found that Concert Systems USA, Inc. is not subject to the Workers' Compensation Act.

CONCLUSION

Based upon the nature of claimant's work for Concert Systems and the lack of control that Concert Systems exerted over the claimant, claimant was not an employee. Transporting/hauling equipment is not an integral part of the regular business of Concert Systems which produces concerts. On occasion, at unpredictable intervals, claimant and Concert Systems entered into an arrangement whereby claimant would make a one time haul. The contract was merely for claimant to perform a specific task and the arrangement or relationship between the parties would cease upon completion of that one task. No future commitment by either party for future work existed and neither party was obligated to offer a haul or accept a haul. Claimant was paid a daily rate and

provided a Form 1099 at the end of the year. Moreover, Concert Systems did not exert control over the claimant but merely provided him amenities and information necessary to comfortably provide his services pursuant to the customary arrangement with truck drivers in the industry. Thus, claimant was an independent contractor hired due to his knowledge, skills and professional license to perform one task for Concert Systems and the lower courts erred in finding otherwise.

Additionally, the Administrative Judge and the Full Commission erred in finding Concert Systems had six or more employees at the time of claimant's injury. Randy and Candi Frierson are officers of the corporation excluded by the worker's compensation act and not placed under the acts purview by Concert System's workers' compensation insurance policy and therefore should not be counted as employees. Accordingly, the lower courts' findings are not in accordance with Mississippi Law and their findings should be reversed and it should be found that Weaver was not an employee of Concert Systems at the time of his accident and Concert Systems only had four employees and is therefore not subject to the Workers' Compensation Act.

Respectfully submitted,

CONCERT SYSTEMS USA, INC., Employer (Alleged),

BY: FRANKE & SALLOUM

BY: _____

DONALD P. MOORE

CERTIFICATE OF SERVICE

I, DONALD P. MOORE, of counsel for the Employer (Alleged), do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing to:

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This, the 15th day of September, 2009.

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