IN THE COURT OF APPEALS IN THE STATE OF MISSISSIPPI

CAUSE NO. 2009-WC-01536-COA

KENNETH JOE MIXON — CLAIMANT/APPELLANT

VERSUS

GREY WOLF DRILLING COMPANY AND BRIDGEFIELD CASUALTY INSURANCE CO. — EMPLOYER AND CARRIER APPELLEES/CROSS APPELLANTS

On Appeal from the Circuit Court of Simpson County, Mississippi; The Honorable Robert G. Evans, Circuit Judge, in *Kenneth Joe Mixon, Claimant vs. Grey Wolf Drilling Company and Bridgefield Casualty Insurance Company, Employer/Carrier,* Docket No. 2009-243 and MWCC Case No.: 0109745-H-2026

BRIEF OF THE APPELLEES/CROSS APPELLANTS, GREY WOLF DRILLING COMPANY AND BRIDGEFIELD CASUALTY INSURANCE COMPANY, EMPLOYER AND CARRIER

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CERTIFICATE OF INTERESTED PERSONS

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3. Kenneth Joe Mixon - Claimant/Appellant

4. Grey Wolf Drilling Company
   Bridgefield Casualty Insurance Company - Employer and Carrier/Appellees

5. Administrative Law Judge Denise Turner Lott

6. Mississippi Workers Compensation Commission

7. Honorable Robert G. Evans - Circuit Court Judge, Simpson County, Mississippi

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STATEMENT OF THE CASE

This matter is a workers' compensation case that was initially heard before Administrative Law Judge Denise Turner Lott on March 14, 2008, in Jackson, Mississippi. Following the hearing and upon consideration of the evidence, Judge Lott issues an Order on May 30, 2008, which found that Claimant/Appellant had suffered a compensable injury in the course and scope of his employement with Grey Wolf Drilling Company on June 4, 2001. Additionally, Judge Lott determined that Claimant's average weekly wage at the time of the injury was $1290.00, and that Claimant suffered a seventy-percent (70%) occupational loss of use of his upper extremities as the result of the injury.

From this ruling, the Employer and Carrier appealed to the Full Commission. The Full Commission entered an Order on May 26, 2009, affirming in part and reversing in part the Order of the Administrative Judge. The Commission upheld the Administrative Judge's determination that Claimant suffered a compensable injury on June 4, 2001. However, the Commission reversed the Administrative Judge's determination of Claimant's average weekly wage and occupational impairment to Claimant's upper extremities. The Commission determined that Claimant's correct average weekly wage was $607.88, and found that Claimant suffered only a twenty-five percent (25%) occupational loss of use of his upper extremities.

From the Commission, the Claimant/Appellant appealed to the Circuit Court of Simpson County, Mississippi, to which the Employer and Carrier/Appellees filed a cross-appeal. Circuit Court Judge Robert G. Evans entered an Order affirming the Commission's decision on August 29, 2009.

From this decision, the Claimant/Appellant appealed to this Court, to which the Employer

and Carrier/Appellees filed a cross-appeal.

STATEMENT OF THE FACTS

Claimant alleged a work injury occurring on June 4, 2001, when he received an electrical shock injury due to a lightning strike. At the time of the alleged injury, Claimant was employed with Grey Wolf Drilling, which required him to work on a land-based oil rig. On the day of his alleged injury, Claimant stated that he was working on the rig attempting to loosen nuts and bolts. (Tr. at page 24). At that time, a storm came up and Claimant alleged that lightning struck the rig and ran through him (Tr. at page 27).

As a result of this incident, Claimant was taken to the emergency room at Magee Hospital where he was treated by Dr. Kelli Smith. (Ex. 1). Claimant was later treated at Hattiesburg Clinic by Dr. William Morrison (Ex. 2) and Dr. Andrew Whitehead (Ex. 4). Claimant was also seen at Hattiesburg Clinic by Dr. Robert Wilkins for heart palpitations. (Ex. 3). During this treatment, Claimant underwent left shoulder surgery performed by Dr. Morrison in December of 2001. (Ex. 3) Dr. Morrison later performed surgery on Claimant's right shoulder in February of 2002. *Id.* Shortly thereafter, Dr. Morrison left Hattiesburg Clinic, and Claimant was referred to Dr. Raymond Whitehead for his future treatment needs. In January of 2003, Dr. Whitehead performed a second surgery on Claimant's right shoulder. (Ex. 4). Dr. Whitehead eventually placed Claimant at maximum medical improvement on August 23, 2004. *Id.*

At the present, Claimant is employed by the University of Southern Mississippi aboard a research vessel named *The Tommy Monroe*. (Tr. pg. 41) Claimant described this as a ninety-seven foot research vessel used by the students and professors/scientists employed with the University, as well as Stennis Space Center. *Id.* Claimant testified that he has held this job since

he began working part-time as a dock hand in August of 2002. (Tr. at page 24).

SUMMARY OF THE ARGUMENT

It is clear from the facts and evidence of record that the Mississippi Workers' Compensation Commission erred in determining that Claimant's shoulder injuries were causally related to the lightning incident which allegedly occurred on June 4, 2001. Of the four physicians that testified in this matter, two concluded that a lighting strike was simply incapable of producing the Claimant's shoulder injuries. Furthermore, the two physicians that testified in Claimant's favor based their causal opinions upon speculation and theory rather than medical probabilities. Additionally, neither physician's description of the mechanism of injury comported with Claimant's description of the actual incident. Based upon the foregoing, the credible medical evidence clearly preponderates in the favor of no causal connection. Therefore, the Commission's determination to the contrary is not supported by substantial evidence.

While the Commission erred in finding that Claimant suffered a compensable injury, they correctly determined Claimant's average weekly wage. The Administrative Judge in this matter incorrectly failed to consider Claimant's "down time" in the calculation of his pay period, and thus Claimant's average weekly wage was grossly overinflated. The Commission correctly found that Claimant's pay period should include "on," as well as "off" time, and their decision is supported by substantial evidence.

Finally, should this Court affirm the Commission's decision that Claimant suffered a compensable injury to his shoulders as a result of the alleged lightning incident, the Commission's findings regarding Claimant's occupational loss of use of his upper extremities should also be affirmed. The Administrative Judge failed to correctly determine Claimant's "usual

employement" as the term is defined by the applicable case law, and therefore the Judge's finding that Claimant suffered a seventy-percent (70%) industrial loss of use was in error. The Commission considered Claimant's employment history and current wage-earning capacity in holding that he suffered only a twenty-five percent (25%) occupational loss of use, and their finding was supported by substantial evidence.

STANDARD OF REVIEW

The decision of the Mississippi Workers' Compensation Commission is afforded great deference, and its findings may not be overturned on appeal if they are supported by substantial credible evidence. *Atlas Roll-Lite Door Corp. v. Ener,* 741 So.2d 343, 346 (Miss.1999). A Commission decision that is supported by substantial evidence may not be set aside even if the reviewing court would have reached the opposite conclusion. *Vance v. Twin River Homes, Inc.*, 641 So.2d 1176, 1180 (Miss. 1994). In short, the Commission's decision may be reversed only if it is found to be clearly erroneous and contrary to the overwhelming weight of the evidence." *Chestnut v. Dairy Fresh Corp.,* 966 So.2d 868, 870 (Miss. Ct. App. 2007)(quoting *Barber Seafood, Inc. v. Smith,* 911 So.2d 454, 461 (Miss. 2005)). The Mississippi Court of Appeals has described "clearly erroneous" as follows:

> "[W]hen, although there is some slight evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made by the Commission in its findings of fact and in its application of the [Workers' Compensation] Act."

Taylor v. First Chemical,19 So.3d 160, 163 (Miss. Ct. App. 2009) (*quoting J.R. Logging v.*

Halford, 765 So.2d 580, 583 (Miss. Ct. App. 2000)). Accordingly, as long as the record contains credible evidence which, if believed, would support the Commission's determination, the decision must be affirmed. *McCarty Farms, Inc. v. Banks,* 773 So.2d 380, 387 (Miss. Ct. App. 2000).

I. THE COMMISSION'S DETERMINATION THAT CLAIMANT SUFFERED A COMPENSABLE INJURY WAS NOT SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE.

Claimant was diagnosed with rotator cuff damage to both shoulders, and ultimately underwent two surgeries to his right shoulder and another to his left shoulder. The Administrative Judge concluded, and the Commission confirmed, that substantial evidence supported the existence of a causal connection between Claimant's shoulder injuries and his alleged electrical shock incident at work. However, the overwhelming evidence presented in this case does not support that conclusion.

It is undisputed that Claimant was working in the course and scope of his duties for the Employer on June 4, 2001. At the time, Claimant was employed as a "floorhand" and was in the process of removing nuts from threaded bolts on a land-based oil rig, when a thunderstorm blew over. (Tr. pg. 27). Claimant stated that "all of a sudden, it's like I could hear the crack and I just felt it just run right through both my hands, right through my chest. I felt the electricity." *Id.* Claimant stated that it drove him back, and he began stepping backwards immediately to get away from the rig. (Tr. pg. 27-28). When asked to describe his positioning and reaction to the alleged lightning strike, Claimant explained that at the time he was bending over and the shock caused him to be "jolted up." However, Claimant clarified that he was not violently "thrown up" and he did not fall. (Tr. pg. 61). Furthermore, Claimant indicated that he immediately let go of

the rig the moment he felt the electricity. (Tr. pg. 62).

Claimant stated that he continued to experience pain and tightness in his chest, so he was driven to the ER at Magee General Hospital. Upon admittance, Claimant explained to Dr. Kelli Smith that he was standing near a body of water when he felt the lighting strike and rise up through his feet to his waist. (Exhibit CL-1, pg. 19). **Claimant did not indicate that he was "thrown" by the electricity**. *Id.* Dr. Smith released Claimant from Magee General Hospital with no findings of any damage to Claimant's shoulders. (Exhibit CL-1).

Based upon Claimant's history of the incident, the medical findings, and minor degree of Claimant's injuries, Dr. Smith testified that it was her belief that Claimant suffered an indirect lightning strike, and the electricity he received traveled through a surrounding conductor before affecting him. (Exhibit CL-1, pg. 22). Dr. Smith opined that any such occurrence would have yielded a low-voltage shock. *Id.* Dr. Smith specifically noted that **an analysis of Claimant's isoenzymes confirmed that Claimant received a low dose of electricity, if any at all.** Specifically, Dr. Smith noted that **Claimant's BUN and CPK numbers were too low to indicate that Claimant absorbed a strong electrical charge**. *Id.* Dr. Smith further noted that **Claimant's EKG results did not indicate that Claimant had suffered an injury due to lighting strike** (Exhibit CL-1, pg. 22-23).

Dr. Smith testified that it would be unusual for a lighting strike to cause a torn tendon or muscle. (Exhibit CL-1, pg. 33). Dr. Smith noted that it would require an extremely high voltage charge for electricity to successfully tear a rotator cuff. (Exhibit CL-1, pg. 23). **Dr. Smith specifically testified that it would have been practically impossible for Claimant to have suffered a torn rotator cuff from the comparatively low electrical charge that entered his**

body. *Id.*

In finding that Claimant's shoulder injury was causally related to the alleged lightning strike, the Administrative Judge specifically noted that Dr. Smith had only performed an isoenzymes analysis one time, and commented that a subsequent examination **may** have revealed higher CPK levels. However, the Administrative Judge completely failed to consider Dr. Smiths's testimony that, in her medical opinion, **it was impossible for an indirect lightning strike to have torn a rotator cuff!** Furthermore, the simple fact that Dr. Smith cannot rule out that Claimant suffered a rotator cuff injury due to a lightning strike does nothing to bolster the issue of causation. Rather, it is the Claimant's burden to put forth evidence of causation by a preponderance of the evidence, and his own treating physician opined that there was practically zero medical probability that Claimant suffered an injury to his shoulder in the manner alleged.

In the days following his release from Magee General Hospital, Claimant began to experience problems with his right shoulder. Thereafter, on June 11, 2001, Claimant reported to the Hattiesburg Clinic for right shoulder pain and was examined by Dr. William Morrison. (Exhibit CL-2, pg. 6). In reviewing the Claimant's history, Dr. Morrison testified that it was his understanding that Claimant was "thrown" by the force of the electrical charge. *Id.* In fact, Dr. Morrison explicitly stated that he did not believe it to be significant whether Claimant suffered a direct or indirect lighting strike, because it was his opinion that Claimant's reaction to the charge caused the injury at issue. Specifically, Dr. Morrison testified as follows:

> **My feeling was at the time that he had this violent – you know, as the witnesses testify, it was "as if he was shot out of a cannon,"** that he had some very forceful muscular contraction and positioning of his shoulders during this episode that caused it. . . . [T]he mechanism of the way he described to me would be certainly

> consistent with the injuries that I saw to his shoulders . . . **As I envisioned this, he was thrown**. He was kneeling forward when this occurred and that he was thrown back. **I presume just from this description and from what he said people told him, that his arms would have been thrown backwards** and that's certainly a way that he could have injured the labrum of his shoulders by that mechanism.

(Exhibit CL-1, pg. 29).

The above testimony is very significant, in that it completely contradicts the Claimant's own personal account of the accident. Firstly, Claimant's account that a witness described him as "shot out of a cannon," was not testified to under oath at the hearing. In fact, Claimant's only recollection of any conversation that he had with another employee was that someone asked him if the lighting had scared him. (Tr. pg. 28). Furthermore, nothing in Claimant's description of the incident at the hearing or in his deposition vaguely resemble the violent incident completely fabricated by Dr. Morrison.

When establishing a critical element such as causation in a workers' compensation case, "recovery . . . must rest upon reasonable probabilities, not upon mere possibilities." *Harrell v. Time Warner/Capitol Cablevision and Travelers Cas. and Sur. Co.*, 856 So.2d 503, 511 (Miss. Ct. App. 2003)(citing *Burnley Shirt Corp. v. Simmons,* 204 So.2d 451, 454 (Miss.1967)). With this principle in mind, it is abundantly clear that Dr. Morrison's causation theory is not based on a foundation even as sturdy as possibility. Rather, Dr. Morrison's causal analysis is pure fantasy.

An expert's opinion on the issue of causation should never include language such as "I envisioned" or "I presumed," especially when discussing the factual basis for the causal connection. Nevertheless, Dr. Morrison "presumes" and "envisions" circumstances that were never testified to or otherwise established within the record. **Claimant explicitly stated that he**

was never "thrown" as Dr. Morrison understood the term, and certainly never stated that his arms were forced into a violent, external rotation. Further, Claimant agreed that he was neither "jolted" nor "thrown" backward by the alleged electrical charge, but rather abruptly stood up and ran away. (Tr. pg. 71). There is simply no factual basis for Dr. Morrison's version of events, and therefore his opinion is too speculative to constitute a medical opinion grounded in reasonable medical probabilities, and clearly insufficient to be considered substantial evidence on the issue of causation.

Dr. Morrison eventually performed a subacromial decompression on both Claimant's right and left shoulder, and referred Claimant's followup treatment to be performed by Dr. Raymond Whitehead. Claimant was initially examined by Dr. Whitehead on January 20, 2003. (Exhibit CL - 4, pg. 8). Thereafter, Dr. Whitehead diagnosed Claimant as suffering from a residual superior labral tear, or SLAP tear, or the right shoulder. Moreover, Dr. Whitehead casually related Claimant's SLAP tear to the lightning strike which Claimant allegedly suffered while working for the Employer. (Exhibit CL - 4, pg. 30).

In finding that Claimant's SLAP tear was casually related to his alleged workplace accident, Dr. Whitehead testified that such an injury could result from "jerking" injury to the shoulder, such as when a person falls off a ladder and catches his or herself. (Exhibit CL - 4, pg. 30). Dr. Whitehead noted that Claimant's injury may have been caused by being "jerked" while holding onto a fixed object. (Exhibit CL - 4, pg. 31). Specifically, Dr. Whitehead stated:

> **I guess I was – I'm picturing him holding a metal pipe and getting knocked back. You know, you're right. Surrounding this – I wasn't there. It was two years before I saw him. That's the best I can see.** But if he's holding onto something and then he gets knocked back, to me that's a jerking motion to the arms.

(Exhibit CL - 4, pg. 32). Dr. Whitehead specifically opined that, "standing up from a seated position" could not cause a SLAP tear. (Exhibit CL - 4, pg. 33). Rather, Dr. Whitehead concluded that Claimant would have to be holding onto something of substantial mass to suffer the injury he alleged. (Exhibit CL - 4, pg. 32).

As with Dr. Morrison's opinion *supra*, Dr. Whitehead's testimony concerning causation assumes far too many facts which that were never testified to or otherwise proven. **Claimant never testified that he "jerked" while holding onto anything, much less an object of sufficient weight to tear his superior labrum.** (Tr. pg. 28). Rather, Claimant simply noted that he felt the electricity surge through his body and **he let go of the rig immediately**. (Tr. pg. 62). There is simply no indication that Claimant's response to the electrical charge was of the same mechanism that Dr. Whitehead envisioned.

The Administrative Judge concluded that although there were variances between the histories that Claimant provided to his physicians, these inconsistencies were mostly the result of being recorded over a period of several years by several different medical providers. However, **the Judge's error was in failing to compare the physician's testimony concerning the precise mechanisms of causation with Claimant's own testimony concerning the incident**. If such a comparison had been conducted, it would be obvious that Dr. Whitehead and Dr. Morrison were simply assuming facts into the record. In reality, Claimant's testimony clearly refuted the mechanisms of injury proposed by his treating physicians. There is simply no evidence in the record to support the conclusion that Claimant's arms were either "thrown" back violently or "jerked" while clutching a fixed object. Claimant clearly never testified to this effect. It is well established that proof of causation must rise above mere speculation, conjecture or possibility, as

where the medical testimony is that it could have been caused one way just as well as the other. *See Southern Brick & Tile Co. v. Clark*, 247 So.2d 692 (Miss. 1971).

On March 20, 2002, Claimant was examined by orthopedic surgeon Dr. Ronald Graham at the behest of the Employer and Carrier. The primary purpose of Dr. Graham's evaluation was to determine whether there was objective, medical evidence of a causal connection between Claimant's injuries and the alleged lightning incident.

At the time of the examination, it was Dr. Graham's opinion that Claimant suffered from internal impingement of the rotator cuff, otherwise known as a SLAP tear or lesion. (Exhibit E/C - 17, pg. 9). Dr. Graham noted that internal impingement of the rotator cuff was not the type of injury that one would suffer from contact with a high-voltage charge, as SLAP lesions are ordinarily the result of repetitive motion injuries. (Exhibit E/C - 17, pg. 12). Dr. Graham testified that a high-voltage current could potentially cause an injury to the rotator cuff if the upper extremity were "thrown" violently by the charge, much like the situation "envisioned" by Dr. Morrison in his causal analysis. However, **Dr. Graham clearly testified that such an event would result in external rather than internal impingement** (Exhibit E/C - 17, pg. 15). Furthermore, Dr. Graham noted that **an electrical shock of that magnitude would have resulted in severe thermal burns at the point of entry, as well as much higher BUN and CPK numbers than exhibited by Claimant at Magee General Hospital.** (Exhibit E/C - 17, pg. 15).

The Administrative Judge discredited Dr. Graham's testimony based upon his statement that isoenzymes are normally subject to serial testing, and that the numbers go up from the initial count, and Claimant only underwent one round of isoenzyme analysis. However, Dr. Graham clearly stated that a serial study is not necessary if the initial study does not reveal any evidence

of damage to skeletal muscle. (Exhibit E/C - 17, pg. 67). Dr. Graham testified that Claimant's CPKs and BUNs were not indicative of muscular damage or breakdown due to electrical shock, and that he was discharged from Magee General by Dr. Kelli Smith for this very reason (Exhibit E/C - 17, pg. 68).

The Administrative Judge further disregarded Dr. Graham's opinion because he did not inquire as to whether Claimant suffered a direct or indirect lightning strike, and because he did not attempt to clarify the inconsistencies in Claimant's medical records regarding his circumstances at the time of the alleged injury.[1] However, Dr. Graham clearly stated that these particular inquiries were unnecessary, because an electrical charge, in itself, cannot produce impingement. (Exhibit E/C - 17, pg. 22). Rather, Dr. Graham was concerned in determining Claimant's particular reaction to the alleged charge. *Id.* **Dr. Graham clearly testified that Claimant's description of his reaction to the charge was incapable of producing internal impingement.** *Id.*

The Administrative Judge noted that, although Dr. Graham had previously treated five or six victims of indirect lightning strike in the past, he was unable to recollect the exact circumstances of these strikes. This is not wholly true, as Dr. Graham clearly testified that most indirect strikes involved individuals that sought shelter under trees. (Exhibit E/C - 17, pg. 25).

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[1] It should be noted that Claimant's treating physician, Dr. Morrison, did not inquire as to whether Claimant suffered a direct or indirect strike, and further did not question Claimant regarding the inconsistencies in his treatment records of how he came to be injured. (Exhibit C - 2, pg. 28, 30). How Dr. Graham's opinion is rendered less credible by his failure to inquire into these exact same areas is anyone's guess. However, the most important distinction between Dr. Graham's opinion and that issued by Dr. Morrison is that the former does not rely on a hypothetical fact situation or "presumed" body mechanics not reflected elsewhere in the record.

Additionally, Dr. Graham stated that these victims suffered serious thermal burns, kidney damage, and compartment syndrom *Id.*

Furthermore, Dr. Graham clearly stated that any question as to the circumstances of the strike itself was irrelevant, because **electricity is incapable of producing impingement**. (Exhibit E/C - 17, pg. 22). This opinion was shared Dr. Kelli Smith, who treated Claimant at Magee General following the alleged incident. (Exhibit C - 1, pg. 22, 33). What is incontrovertible is the fact that both Dr. Graham and Dr. Kelli had prior experience treating victims of lightning strikes, and neither physician was of the opinion that lightning is capable of producing impingement or rotator cuff damage. While Dr. Morrison and Dr. Whitehead both disagreed, their opinions were based upon factual situations that Claimant himself denied - specifically that he was somehow violently "thrown" by the current or suffered a violent "jerking" of his upper extremity.

In conclusion, there is simply no substantial evidence that Claimant's shoulder injuries, specifically superior labral tears, were caused by the alleged lightning incident. To the extent the Administrative Judge and Commission found otherwise, their opinions were clearly erroneous. The only evidence that is even remotely suggestive that Claimant's shoulder injuries were caused by an electrical charge is the testimony of Dr. Morrison and Dr. Whitehead. However, neither physician had extensive experience treating the victims of electrical shock, and therefore their opinions are immediately suspect as being the product of guess-work. Most importantly, **Dr. Morrison and Dr. Whitehead did not provide credible mechanisms for Claimant to have suffered the injuries alleged.**

Firstly, Dr. Morrison's testimony was replete with speculative testimony and blind

assumptions. Dr. Morrison's only basis for concluding the existence of a causal connection was that he "envisioned" Claimant being violently thrown backwards by the force of the electrical charge. However, **Claimant testified repeatedly throughout the hearing that he was not thrown backwards by the event.** Accordingly, there is no factual basis for Dr. Morrison's opinion of causation, and any finding based upon his opinion is clearly not based on substantial evidence.

Likewise, Dr. Whitehead's opinion regarding causation was equally without a factual basis. Dr. Whitehead concluded that it was possible for Claimant to suffer an internal impingement of his shoulder if he was gripping a fixed object and suffered a violent "jerk" as a result of the electrical charge. However, **Claimant clearly testified that he did not suffer any violent jerking as a result of the shock, and further testified that he immediately let go of the rig when he felt the shock**. Finally, Dr. Whitehead's opinion fails to account for the injuries to both of Claimant's shoulders, as it is simply absurd to find that Claimant was holding the rig tightly with both hands at the time of the alleged lightning strike. Claimant never testified to such an occurrence, and any opinion regarding the same is unsubstantiated.

In light of the above analysis, Dr. Kelli Smith and Dr. Ronald Graham were the only physicians to offer non-speculative opinions grounded in actual science and supported by the objective evidence. As noted previously, Dr. Smith first examined Claimant immediately following his alleged shock, and she clearly testified that the voltage that Claimant encountered would have been insufficient to account of the injuries to his shoulders.

Furthermore, Dr. Graham testified that based upon his experience with lighting victims, as well as his knowledge as an orthopedic surgeon, there was simply no evidence upon which to

base a causal connection between Claimant's shoulder injuries and the alleged lightning incident. Dr. Graham clearly stated that the lighting strike, as described by Claimant during his examination and later confirmed by his testimony at the hearing, was incapable of producing an internal impingement of the shoulder. Furthermore, Dr. Graham made clear that a victim of a lightning strike, either direct or indirect, would have suffered far greater injuries to the body as a whole, including thermal burns and massive destruction of skeletal muscle. Claimant exhibited none of these symptoms.

The Commission was charged with the duty to weigh the medical evidence and determine what evidence is the most credible. In this matter, Dr. Graham is the only physician that offered an opinion as to the cause of Claimant's shoulder injuries without presupposing or fabricating details into the circumstances surrounding the accident. Accordingly, his testimony is the most credible with regard to causation in this matter. Dr. Whitehead and Dr. Morrison were unable to explain a mechanism of injury that was consistent with Claimant's testimony at the hearing, and therefore their opinions are simply too speculative to constitute substantial evidence on the issue of causation. It was error for the Administrative Judge, and by extension, the Commission, to find that Claimant suffered a compensable injury to his shoulders as a result of the alleged lightning incident. Accordingly, the Court should reverse the decision and find that Claimant has failed to meet his burden of proof on the issue of causation.

II. THE COMMISSION DID NOT COMMIT ERROR IN CALCULATING THE CLAIMANT'S AVERAGE WEEKLY WAGE:

The Commission did not err in reversing the Administrative Judge's determination that Claimant's average weekly wage should be calculated by counting only the number of weeks he

worked, rather than the total number of weeks he was employed.

At the time of his alleged injury, Claimant served in the capacity of motorman for the Employer, and he worked in a shift format which is standard throughout the oilfield industry. As opposed to the traditional, forty-hour work week, the shift system effectively combines two standard work weeks into one, seven-day period, followed by a seven-day period of rest. Pursuant to the system, Claimant worked seven, twelve-hour days while on shift, and then received seven days of down time. The end result was that Claimant earned $1290.00 during the weeks he worked and $0.00 during the weeks he did not work.

In calculating Claimant's average weekly wage, the Administrative Judge reasoned that Claimant was free to seek employment elsewhere during his seven-day down time. Accordingly, the Judge excluded these weeks of work from the period of Claimant's employment, and determined that Claimant's average weekly wage was $1,290.00.

In reversing the Administrative Judge, the Mississippi Workers' Compensation Commission correctly found that Claimant's average weekly wage should include the weeks that he was off work. In so holding, the Commission determined that Claimant earned approximately $9,726.00 in total wages for the sixteen week period that he was with the Employer. Further, Claimant was paid every two weeks, as though he worked two traditional forty-hour weeks with no down time. Accordingly, the Commission reasoned that Claimant's total earnings should be divided by the total number of weeks employed, not "worked," to arrive at the correct average weekly wage. By the Commission's calculation, Claimant's average weekly wage was determined to be $607.88.

The Commission correctly found that the Administrative Judge erred in excluding

Claimant's "down time" from the period of his employment. As noted by the Commission, the mere fact that Claimant was free to pursue secondary employment during his time off is insignificant for the purpose of calculating his average weekly wage with this Employer. The Mississippi Supreme Court has previously rejected the argument that a claimant's average weekly wage should include wages earned in secondary employment. *See Sullivan v. City of Okolona,* 370 So.2d 921, 924 (Miss. 1979). In so holding, the Court reasoned that the Mississippi Workers' Compensation Act expressly provides that "the basis for compensation . . . shall be the average weekly wages earned by the employee at the time of the injury . . . **in the employment in which he was working at the time of the injury** . . . ." *Id.* (*quoting* Miss. Code Ann. § 71-3-31(1972)) (emphasis added). Accordingly, any hypothetical secondary employment is irrelevant to the determination of Claimant's average weekly wage.

It is undisputed that Claimant was working as a motorman with the Employer as the time of his alleged injury. Thus, the Act expressly mandates that only those wages Claimant earned as a motorman shall be considered in determining the basis of his compensation. As previously noted, Claimant earned a total of $9,726.00 in wages during the sixteen week period of his employment, which the Commission determined to yield an average weekly wage of $607.88. Because the Commission correctly applied the formula set forth at § 71-2-31, the Commission's decision should be affirmed.

III. THE COMMISSION'S DETERMINATION THAT CLAIMANT SUFFERED A TWENTY-FIVE PERCENT INDUSTRIAL LOSS OF USE OF HIS UPPER EXTREMITIES IS SUPPORTED BY SUBSTANTIAL EVIDENCE:

Before expounding upon the merits of the Employer's argument, it is necessary to address the correct standard of review to be applied by the Court. Claimant erroneously, and quite

frankly, inexplicably, asserts that there are no controverted facts on the issue of permanent disability, and thus the Commission's determination should be reviewed *de novo* as an issue of law.[2] In support of this untenable position, Claimant argues that the Employer and Carrier did not put forth witnesses to contest the issue of disability.

Firstly, Claimant was gainfully employed on the date of the hearing, and had been for quite some time. Thus, it was unnecessary for the Employer to present witnesses to testify to a fact that was clearly admitted by the party-opponent. Furthermore, as the transcript of the hearing clearly illustrates, a significant portion of the Claimant's testimony on cross-examination was dedicated to the issue of his employment history, his current employment, and the particulars thereof. It is clear that this testimony was elicited to establish a record of Claimant's "usual employment" as the term pertains to a determination of occupational disability. Accordingly, the Claimant's contention is erroneous, and the Commission's decision should stand as it is supported by substantial evidence.

As a result of the surgical operations to Claimant's upper extremities, Dr. Raymond Whitehead assigned Claimant a 6% medical impairment to his right arm, and Dr. William A. Morrison assigned Claimant a 6% impairment to his left shoulder. These impairment ratings carried permanent restrictions which included: no lifting more than 10 to 25 pounds frequently, no lifting more than 25 to 50 pounds occasionally, no one-handed carrying of more than 25 pound, and limited overhead working or lifting.

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[2] In support of this position, Claimant cites *Breland & Whitten v. Breland,* 139 So.2d 365 (Miss. 1962). However, a brief review of the proceedings in *Breland* illustrates that the parties had stipulated to the facts in that case. The same was not done in the instant matter.

Based upon the preceding restrictions, in conjunction with Claimant's inability to return to his former position as a motorman with the Employer, the Administrative Judge found that Claimant suffered a 70% industrial loss to both arms. However, in so doing, the Administrative Judge completely disregarded substantial evidence in the record concerning the Claimant's vast and varied employment history. Most importantly, the Judge's ruling ignored the fact that Claimant was presently under steady employment and earning significant wages.

The Employer and Carrier contend that substantial evidence supports the Commission's reversal of the Administrative Judge's determination that Claimant suffered 280 weeks of industrial loss of use to both upper extremities as a result of his alleged injury. The Administrative Judge's finding that Claimant suffered a seventy percent (70%) industrial impairment to both arms was in error, as **it focused exclusively on the job performed by Claimant at the time of injury, and excluded jobs for which the worker was otherwise suited by virtue of his age, education, experience, and any other relevant factual criteria**. *See Meridian Professional Baseball Club v. Jensen,* 828 So.2d 740, 747 (Miss. 2002).

Claimant passionately argues that both the Commission and the Administrative Judge erred in not finding Claimant suffered a total occupational loss of both his arms as a result of the alleged lightning incident. In support of this proposition, Claimant expounds repeatedly on the issue that the Employer and Carrier were unable to rebut the presumption of total occupational disability because no evidence was introduced to show Claimant was able to "earn the same wages" following his workplace injury. See *id* at 747-48.

Claimant's argument must fail because it *ignores the fact that the Commission found that Claimant's injury did not prevent him from performing the substantial acts of his* ***usual***

employment. Id. As set forth, *infra*, Claimant was able to secure and maintain employment almost immediately following his release to return to work. Furthermore, Claimant's newly acquired position was one which he was qualified by way of his previous experience and transferable skills. Accordingly, a presumption of total occupational loss of use was never warranted, and thus there was nothing for the Employer and Carrier to rebut.

The Claimant is correct in arguing that, traditionally, a worker is presumed to have suffered a total occupational loss of a scheduled member if a partial functional loss resulted in inability to perform the substantial acts of his usual employment. *See McGowan v. Orleans Furniture Co.*, 586 So.2d 166 -168 (Miss.1991). However, Claimant cites *Jensen* in support of the proposition that he is entitled to a finding of total occupational loss of his arms because the Employer and Carrier have failed to put forth evidence that he was able to earn the same wages which he was earning at the time of injury. Perhaps Claimant should have read the language of *Jensen* more closely, because the case clearly states that, "[t]he presumption [of total occupational loss] arises *when the claimant establishes that he has made a reasonable effort but has been unable to find work in his USUAL employment*, or makes other proof of his inability to perform the substantial acts of his usual employment." *Jensen*, 828 So.2d at 747-48 (emphasis added). The devil is in the details, as *Jensen* clearly states that proof of similar wage-earning capacity should only come into play when the claimant has failed to return to his "usual" employment.

However, the greater folly of Claimant's position is the erroneous conclusion that his "usual employment" is synonymous with "employment at the time of injury." However, this argument has been effectively foreclosed by the Mississippi Supreme Court's holdings in *Jensen*

and *Weatherspoon v. Croft Metals, Inc.*, 853 So.2d 776 (2003). The Commission correctly applied the controlling case law to the instant facts and circumstances, and determined that Claimant's "usual employment" is not simply oil field work, but rather considered Claimant's entire employment history, and focused on the factors used to determine "usual" employment set forth in *Jensen* - namely occupations that Claimant was otherwise suited by way of his knowledge, experience and transferable job skills. *See Jensen*, 828 So.2d at 747.

As indicated, the Claimant's past employment history is extensive and varied, and includes stints working construction, roofing houses, **charter fishing boats**, manning oil fields and offshore oil platforms, building circuit boards, mowing grass, and delivering liquor. (Tr. pg. 49-54). Furthermore, these jobs have run the spectrum of physical requirements from light duty building circuit boards to heavy duty working in the oil fields. As one would expect with such an eclectic work history, Claimant has never stayed at any one occupation for very long before moving on to another. **Most of Claimant's jobs have only lasted a few months**. (Id).

In fact, the longest job Claimant ever kept is his current position with the *Tommy Monroe,* a research vessel owned by the USM Gulf Coast Research Center. As of the date of the hearing in this matter, Claimant had been working full-time with the *Tommy Monroe* for over five years.(Tr. pg. 54). Claimant began working part-time as a deck hand on the *Tommy Monroe* in August of 2002. (Tr. pg. 41). In 2004, after being released to return to work, Claimant began working full-time on the *Tommy Monroe*. (Tr. pg. 55). In his brief, Claimant argues that his current position is more supervisory than physically demanding. However, **Claimant only qualified for this position due to his extensive knowledge of boats, which he gained during**

his previous stints as a deck hand for chartered fishing boats. (Tr. pg. 54). Therefore, Claimant's position is one in which he is otherwise **qualified by reason of his experience and transferable skill.**

The evidence clearly demonstrates that Claimant is primarily a career manual laborer, and Claimant's job as a full-time deck hand for the *Tommy Monroe* satisfies precisely that skill set. Furthermore, Claimant indicated that he considered his position with the *Tommy Monroe* to be "a really neat job," and he intended to maintain his position with the ship indefinitely. (Tr. pg. 42). In fact, Claimant contended that his supervisory role was superior to his previous employment as a deck hand, and felt that his work was valuable to the vessel and its crew. (Tr. pg. 42-43). Finally, Claimant's tenure with the *Tommy Monroe* - approximately five years as of the date of the hearing - is the longest period that Claimant has ever kept a job, and **he fully acknowledges that he has neither plans nor desires to ever leave the job.** (Tr. pg 54).

As of October 2006, Claimant's average weekly wage with the *Tommy Monroe* was $486.02 - wages equal to over 70% of his *correct* average wages with the Employer, Grey Wolf Drilling. At this point, Claimant is certainly earning even higher wages, and in all likelihood has equaled or exceeded his average weekly wage at the time of his workplace accident. Furthermore, any argument that Claimant would have earned greater wages had he remained with Grey Wolf Drilling are completely speculative when viewed in conjunction with his transient job history. In light of his past employment history, there is little if any evidence to indicate that Claimant would have remained with the Employer for an appreciable period of time. Accordingly, the Commission did not commit error in finding that the Claimant only suffered a

twenty-five (25%) occupational loss of use of his upper extremities.

The Court's analysis in *Weatherspoon* effectively forecloses Claimant's argument that he suffered a total loss of occupational use as a result of his inability to return to his pre-injury employment.[3] In *Weatherspoon*, the claimant was hired as an assembly worker for Croft Metals, where her job consisted of constructing metal screens. *Weatherspoon*, 853 So.2d at 777. After approximately four months on the job, the claimant began to suffer from carpal tunnel syndrome which prevented her from returning to her employment at Croft. *Id.* Although the claimant was only assessed a 10% medical impairment to her arms, the Court of Appeals ultimately determined that Claimant suffered a total occupational loss of use of her arms because she was unable to return to her employment at the time of injury. *Id.* at 777-78.

The Mississippi Supreme Court reversed the Court of Appeals decision due to an error in determining the claimant's "usual" employment. In support of its holding, the Court reasoned as follows:

> **Brenda Weatherspoon had been working at Croft Metals for only four months before developing carpal tunnel syndrome.** Prior to her employment with Croft Metals, **she held a variety of other jobs** and, at the time of the workers' compensation hearings, she held a commercial driver's license. She testified that she intended to find work as a truck driver, and **the record before this**

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[3] Claimant cites *Weatherspoon*, but argues that the Mississippi Supreme Court ultimately denied Weatherspoon's claim for 100% occupational loss because she had been less than diligent in pursuing other work. A cursory glance over the opinion will clearly show this to be false. As noted below, the Court denied Weatherspoon's claim because it wholly rejected her argument that she suffered a total occupational loss due to her inability to return to her pre-injury employment. In so holding, the Court noted that Weatherspoon had held a variety of job, only been employed for a short time before her workplace injury, and had since secured alternate employment. *Weatherspoon*, 853 So.2d 779.

> **Court indicates that she has since found employment as a truck driver**. In light of the foregoing analysis, Weatherspoon's claim for benefits for total occupational loss of use of her arms fails.

Id. at 779 (emphasis added). Based on the above evidence, the Court concluded that the Commission's decision denying the claimant total occupational disability was supported by substantial evidence and reinstated the award for partial disability. *Id.*

The circumstances in the present case are virtually identical to those presented before the Commission in *Weatherspoon, supra*. Like the employee in *Weatherspoon*, **Claimant had only been working for the Employer for a matter of months before suffering his alleged injury**. Additionally, **Claimant's previous employment history was lengthy and varied**. However, and perhaps most compelling, Claimant secured part-time employment less than a year after his injury, maintained that position during treatment, and ultimately switched over to full-time employment after reaching maximum medical improvement. **Furthermore, Claimant qualified for his position on the *Tommy Monroe* due to the experience and expertise he gained working on charter fishing boats.** Finally, as of the date of the hearing, Claimant had been continuously employed for over five years and was earning approximately 70% of his former average weekly wage. In sum, to find that Claimant suffered a total occupational loss of his arms based upon the above facts would essentially require that *Weatherspoon* be overturned.

Claimant cites a variety of case law to bolster the argument that he is entitled to total occupational use of his arms. However, a careful review of the facts of these cases clearly make them inapplicable to the instant situation. For instance, Claimant cites *McDonald v. I.C. Isaacs Newton Co.*, 879 So.2d 486 (Miss. Ct. App. 2004), for the proposition that the Employer and

Carrier must show that Claimant is capable of earning the same wages he was earning at the time of his injury. However, **the claimant in *McDonald* failed to secure alternate employment following her release from the employer, and thereby triggered the presumption of total occupational loss of use of her arms.** *Id.* at 490. In the instant case, Claimant had secured alternate, part-time employment before even being released to return to work by his treating physician. Furthermore, Claimant has maintained full-time employment with his current job since 2004. Accordingly, the presumption of total occupational loss was never triggered.[4]

In summation, it is undeniable that Claimant's permanent restrictions have impacted his use of both arms to a greater extent than the medical impairments assigned by his treating physicians. However, there is substantial evidence to support the Commission's determination that Claimant suffered only a twenty-five percent (25%) occupational loss of use to his arms. As noted previously, Claimant was able to use his previous employment experience as a deck hand to secure a position within his work restrictions aboard the *Tommy Monroe*, and has remained in that position for five years as of the date of his hearing before the Commission. Furthermore, Claimant's tenure with the *Tommy Monroe* constitutes the longest period he has ever remained with one employer, and he evinced no desire to leave his position. Finally, Claimant was earning approximately seventy percent (70%) of his former average weekly wage in 2006, and in all

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[4] Claimant additionally cites *Lott v. Hudspeth Center*, 2007 - CT -01525 - SCT (Miss. 2010), for the proposition that the Employer and Carrier must produce evidence that Claimant can earn the same wages as he did prior to his workplace injury. However, like the claimant in *McDonald,* Lott was unable to secure alternate employment following her injury, while Claimant was employed full-time following his release to return to work. This factual distinction makes both McDonald and Lott completely inapplicable and of no precedential value to the instant case.

likelihood has equaled or exceeded his previous wages at this point. Conversely, there is absolutely no evidence to support the Claimant's position that he suffered a total occupational loss of use of his upper extremities. Accordingly, the Commission's determination should be affirmed.

CONCLUSION

Based upon the foregoing discussion, this Court should find that the Commission's determination of a causal relationship is not supported by substantial evidence, and therefore reverse the finding that Claimant suffered a compensable injury to his shoulders by virtue of the alleged lightning incident on June 4, 2001. However, should the Commission's determination of a compensable injury be upheld, this Court should also uphold the Commission's findings regarding Claimant's average weekly wage and percentage of occupational loss of use of his upper extremities, as the same are supported by substantial evidence.

RESPECTFULLY SUBMITTED, this the 19th day of March, 2010.

GREY WOLF DRILLING COMPANY AND BRIDGEFIELD CASUALTY INSURANCE COMPANY, APPELLEES-CROSS APPELLANTS

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CERTIFICATE OF FILING

We, John S. Gonzalez and Nathan L. Burrow, of counsel for Grey Wolf Drilling and Bridgefield Casualty Insurance Company, Employer and Carrier/Appellees/Cross-Appellants, do hereby certify that we have on this date filed with the Clerk of the Court of Appeals in the State of Mississippi, the following:

1. The original and three (3) copies of the Brief of Appellees-Cross Appellants;

2. A copy of said Memorandum Brief on electronic disk; and

3. Four (4) copies of the Appellees-Cross Appellants' Record Excerpts.

THIS, the 19th day of March, 2010.

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CERTIFICATE OF SERVICE

We, John S. Gonzalez and Nathan L. Burrow, of counsel for Grey Wolf Drilling and Bridgefield Casualty Insurance Company, Employer and Carrier/Appellees/Cross-Appellants, do hereby certify that we have on this date mailed, via First Class U.S. mail, a copy of the above and foregoing to:

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