COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 2009-WC-01536-COA

KENNETH MIXON	**APPELLANT/ CROSS-APPELLEE**
VS.	
GREYWOLF DRILLING COMPANY, LP	**APPELLEE/ CROSS-APPELLANT**
&	
EMPLOYERS INSURANCE COMPANY OF WAUSAU/ LIBERTY MUTUAL INSURANCE COMPANY	**APPELLEE/ CROSS-APPELLANTS**

On Appeal from the Circuit Court of Simpson County, Mississippi

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RESPONSIVE BRIEF OF APPELLANT/ CROSS APPELLEE

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

I. STANDARD OF REVIEW

Mixon disagrees with the Standard of Review set forth by Employer and Carrier. Employer and Carrier are partially correct in stating that "a Commission decision can (only) be reversed if it is found to be clearly erroneous and contrary to the overwhelming weight of the evidence". However, that is not the entire standard. A Commission decision can and should be reversed if the Commission has misapplied the law to the facts i.e. is based on an error of law or erroneous application of the law, is not supported by some "substantial evidence", or is arbitrary and capricious in result.

> "This Court will overturn the Workers' Compensation Commission decision only for an error of law or an unsupported finding of fact. ***Georgia Pac. Corp. v. Taplin,*** 586 So 2d 823 , 826 (Miss. 1991). Reversal is proper only when a Commission order is not based on substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. ***Smith v. Jackson Constr. Co.***, 607 So 2d 1119, 1124 (Miss. 1992)." ***Meridian Professional Baseball Club v. Jensen***, *No. 1999-CT-02093-SCT, 828 So. 2d 740 (Miss. 2002).*

II. COMPENSABILITY OF THE INJURY

Clearly, resolution of the issue of compensability of the injury(ies) is a matter for the Commission, Employer and Carrier's argument notwithstanding. The existence of a compensable injury involved resolution of some, however relatively little, conflicting medical testimony and no conflicting lay testimony and was resolved in claimant's favor. It was a matter for the finder of fact, i.e. the Commission. Substantial evidence (including the substantial medical evidence) supported the decision resolved in Mixon's favor by both the Administrative Judge and Full Commission, and affirmed by the Circuit Court. The conflicting aspects of the medical evidence was more a resolution of evidence of the treating physicians versus that of Dr. Ronald Graham,

who interviewed Mixon for 45 minutes on behalf of the employer and carrier and then expressed opinions on causation that in some respects assumed facts either not in evidence or contrary to the evidence put forth by the treating physicians. Employer and Carrier's argument on causation also employs several inaccuracies in the recitation of evidence, and is an argument which furnishes no evidenciary basis upon which this Court (or the Commission, as fact finder) could conclude a believable and/ or supportable alternative explanation in the evidence for the injuries that Mixon suffered. Employer and Carrier's argument is that "it just did not happen" or that Mixon's shoulder injuries "happened spontaneously after the lightening strike with no causal connection thereto" or that Mixon's shoulder injuries "must have pre-existed the lightening event of June 4, 2001 and he was able to work fine as a heavy manual laborer before but not after the lightening strike but there was no event of aggravation of the presumed pre-existing shoulder injuries by virtue of the lightening strike". Employer and Carrier never offered any evidence that Mixon had experienced symptoms of the labral tears in his shoulders before the lightening strike, nor that he had ever been diagnosed with the same or sought treatment for the same prior to the lightening strike or that his work, especially the ability to engage in overhead work, was ever adversely affected prior to the lightening strike or was known to Mixon or the employer or anyone else prior to the lightening strike. There was just no evidence of any pre-existing shoulder injury prior to the lightening strike and overwhelming evidence after the strike of shoulder injuries and need for medical treatment immediately after. Dr. Graham even agreed that Mixon had the conditions and needed the treatment. He even reluctantly agreed that an electrocution could cause the shoulders to dislocate and tear the labrums, just as happened to Mixon. He just stated that he did not believe the shoulder injuries occurred from the lightening strike. In addition to the shoulder injuries, Mixon sustained other injuries which were never addressed in Employer and Carrier's argument or by Dr. Graham as to causation. No evidence,

proposal, or argument was offered by employer and carrier for the causation for the vision problems from which Mr. Mixon suffered immediately after the lightening strike, nor any proposal, argument, or evidence of explanation for the heart irregularities that began shortly after the strike and for which he was treated by Dr. Wilkens. Dr. Ronald Graham did testify that if the injuries/ conditions had pre-existed June 4, 2001 Mixon would have had the same symptoms and need for medical treatment prior to as after the lightening strike, which would be obvious even to a lay person, however, employer and carrier were never able to find any evidence that Mixon had ever injured his shoulders previously nor had he sought medical treatment for the same prior to the accident Dr. Graham referenced in support thereof a finding in the records a history of a prior motorcycle accident where Mixon had broken his collar bone, however there was no reference of any recorded complaint of or treatment for any "shoulder complaints" related thereto. Graham just presumably assumed that the collar bone was in the same general area of the body as the shoulder and may have been involved. Graham had absolutely no information about the extent of that injury and failed to question Mixon as to the extent thereof. He was just looking for something to try and support his opinion. Unknown to Dr. Graham, and apparently unimportant to Dr. Graham, was the fact that the motorcycle accident was a number of years before Mixon's employment with Greywolf, and per Mixon, he suffered no shoulder problems from that accident, however, when the motorcycle accident may have occurred did not seem to matter to Dr. Graham nor matter to him that Mixon was quite capable of working at Greywolf and working in heavy manual labor with a number of other intervening employers since that accident and before the lightening strike from which he sought his first treatment for any shoulder complaints. Neither did Dr. Graham know that Mixon had cleared Greywolf's own employment physical some months before the lightening strike, and for the five and ½ days prior to the lightening strike had been continuously working on the rig, had never left the rig during

that week, and was and had been able to perform without dispute his very strenuous job on the rig for the entire time prior to the lightening strike -which immediately after the strike he was not. After the strike and before his corrective shoulder surgeries, Mixon testified that he could not even pick up a 2 liter Coke bottle.

Employer and Carrier's argument on the issue of compensability of the injuries is further perplexing in light of the undisputed facts of the medical treatment sought and obtained by Mixon and of Greywolf's own accident reports made contemporaneously with the strike. Greywolf prepared at least three (3) reports of this injury, i.e. at least the three produced in discovery, and which are in evidence (Claimant's exhibits 12, 13, 14). Exhibits 13 and 14 were prepared on the date of the injury i.e. June 4, 2001. Exhibit 13 is the Toolpusher's Report. The Toolpusher recorded that Mixon had received an injury to his chest from lightening, that "while holding onto bolt & nut heard loud boom felt electrical charge" while "working BOP bolt "ratchet style" by hand in the "cellar" of the rig during a "hard rain" and during a "nipping down" procedure, and that he was transported to the medical facility by the toolpusher. Exhibit 14, prepared on the same day, was the Accident/ Incident Evaluation Summary, prepared by the Safety Man for Greywolf (Todd Floyd), the Toolpusher (Johnny Roberts), the driller (Bryan Draughn) and with input from Mixon. It reported to Greywolf that Mixon had been injured when he and the driller and two other hands were nipping down B.O.P.s. "Kenny backing off B.O.P. bolt, lightening struck at an estimated 75-100 yards out. Employee felt electricity heard boom." "Lightening" was listed as the direct cause of the injury with contributing causes listed as "rain & lightening. Sudden storm". The third report (Exhibit 12) was prepared on June 11, 2001. It was the (Mississippi Workers' Compensation Commission's) Employer's First Report of Injury which should have been filed with the Commission by the Employer/Carrier but which was never filed. It likewise reflected that Mr. Mixon had been hospitalized overnight for the claimed

injury, had an injury affecting his chest, had not returned to work, and that the workers' compensation carrier for the injury was Employers Insurance of Wausau. Graham also did not have these reports.

Employer and Carrier have argued that "the overwhelming evidence" presented in the case does not support the conclusion that a casual connection existed "between Claimant's shoulder injuries and his alleged electrical shock incident at work". Employer and Carrier are not seen to mention the injury to the heart or other non-permanently disabling conditions, which were present in the evidence and the findings of the Commission and which are also all a part of the constellation of symptoms and injuries that are the result of the lightening strike injury Mixon suffered. Although there is absolutely no actual evidence that Mixon's shoulder injuries pre-existed the strike,. the shoulder injuries should not be viewed in a vacuum. Mixon had multiple injuries from this accident. The injuries involved various parts of his body.

Probably some of the most enlightening testimony on causation is the agreement of the physicians that electricity will cause muscle (i.e. all of the affected muscles) to depolarize and thus suddenly clamp down hard in a severe muscle contraction. It is supported by the employer's own contemporaneous reports that confirmed Mixon was initially complaining that his chest was hurting him severely. The chest muscles, arm and shoulder muscles, and heart (also a large muscle) were all inevitably affected by the electricity of the strike. The evidence as a whole substantially supports the opinion of the Commission that there was a causal connection between the strike and the heart and shoulder injuries. Even Dr. Graham admitted that this was a potential mechanism of injury. He just presumed by virtue of the few and more serious strike cases he had seen, that any shoulder dislocation by that mechanism would cause the shoulders to be permanently, not partially/ temporarily dislocated, such that it would require surgery to put the balls back in the sockets afterwards. He is a surgeon. It makes sense that the only cases he

may have seen in his past practice of this nature involved cases in which surgical correction of the dislocation was required. The labrum (cartiledge rim which holds the shoulder bones together in the socket of the shoulder) tears nevertheless upon the dislocation, i.e. when the ball is forced out of the socket of the shoulder. It matters not if it is a partial or complete dislocation. The labrum tears either way. The electricity applied to the muscle causes the muscles attached to the labrum to contract suddenly and with force. That in turn, should result in the exact injuries Mixon received. There are of course other mechanisms of injury also consistent with the facts, such as those mentioned by Drs. Morrison and Whitehead.

Reviewing some of the medical testimony we see:

1. **Dr. Robert Wilkens** (the treating physician for the heart injury):

> "Well, I think the timing is a big issue. But, the fact that he did complain of other symptoms, which would be chest pain, I think that certainly would suggest the possibility that there could have been some type of cardiac injury or cardiac contusion or cardiac even a low level something some low level something, some low subtle type of injury that could have caused chest pain. It could have possibly increased the likelihood of an arrhythmia. It is not necessarily that that would have been detectable by enzyme determinations or an abnormal EKG. Although it is very common to have electrical abnormalities of the myocardium with a lightening strike. If you survive the main problem, then there can be transient problems. . . . But I think the fact that he did complain of chest pain and chronologically there was a relationship to the lightening strike, I think, you know, there can be a reasonable assumption that there is a relationship." { Exhibit CL-3 pgs. 28, 29}. " Well, I do know that lightening strikes cause disruptions of the electrical activity of the heart. It generally causes asystole. Generally there is a resumption of the heartbeat afterwards. If the patient doesn't start breathing right after that, there can be hypoxia which can result in ventricular fibrillation and death. So I know that lightening strikes can disrupt the electrical activity of the heart and not necessarily cause a myocardial infarction or elevation of enzymes. We shock people's hearts with controlled electrical activity all the time to re-regulate the heart rhythm. We stop the heartbeat momentarily for a few seconds and resume it in a controlled environment on purpose and we don't necessarily see enzyme elevations or things like that. But that doesn't mean we didn't get the desired result, which is to restore a normal heartbeat That's done all the time. So I don't know that it takes a whole lot of energy to interrupt the heartbeat and cause a disruption of the electrical activity of the heart. So I guess when you consider electrical cardioverson, which we do all

the time in the hospital, low level energy stops the heartbeat. I would think that any type of lightening injury would be a higher degree of energy than we utilize and there could be rhythm disturbances." { pgs.31-32} Well, death is the most absolute finding and again, that's caused by --- not getting too in depth, in detail, but **the electrical activity causes a complete sudden depolarization of the cardiac muscle. It's one big heart contraction I guess**, so to speak, and it interrupts the normal electrical activity of the heart." { pg.42}.

2. **Dr. William Morrison** (initial treating orthopaedic surgeon):

The history recorded by Dr. Morrison when he first saw Mr. Mixon on June 11, 2001 reflects that Mixon reported that he was holding on to a very large nut and bolt at the time of the lightening strike, that lightening was apparently transmitted to his upper extremities, that following the accident he started having tightness in his chest and pain involving his right shoulder, right arm, and hand. That he had numbness that was present that would tend to come and go. And, that he complained of his right shoulder popping presently, and found it difficult to utilize his right shoulder. He recorded that Mixon had told him that witnesses to the event had said he was thrown as if he was shot out of a "canon", but that Mixon was now (sic i.e. "not") quite sure whether there was a loss of consciousness. Examination on that date was positive for several objective findings of injury consistent with what was diagnosed as a tear of the rotator cuff of the right shoulder as a result of the lightening strike and neurological complications from the strike. Further diagnostic studies were ordered that ultimately revealed the labral tear of the right shoulder.

Per Dr. Morrison: "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. . . . But the 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, that he was thrown. He was kneeling forward when this occurred and that he was thrown back. I presume just from his 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. And/or then him falling backwards and the arms very violently going into external rotation. . . . {Exhibit CL-2, pgs. 29-30} (and looking at the Magee Hospital records and history there), "I don't think --- they didn't take any history about his shoulders at all. I think they are primarily working with the lightening strike and the potential neurological findings here.. . As far as I can see, they didn't even examine his shoulders. And I don't think that was their main concern. I think their main concern was they had a guy who got struck by lightening and is he going to survive or not, not whether he has a torn labrum or not. I think the important thing here is that he was struck by lightening. I think that is the important thing here. And the path that it took through the body. But you know immediately after someone has been hit with lightening, you would go to your—you want to be concerned with your major organ systems first and not with whether you have a torn labrum in your shoulder or not.. . I don't think they really care whether he has a torn labrum or not. That's not important at this point in time. They want to know whether this guy has a pulse or not, whether they have a blood pressure or not, whether the guy is breathing, and his neurological status." (pgs. 34-35)

3. **Dr. Raymond Whitehead** (second treating orthopaedic surgeon):

In discussing various mechanisms of injury consistent with the facts, including a pulling or jerking consistent with a sudden forceful standing while holding onto a heavy metal object (which is also exactly what Mixon described i.e. the very large nut and bolt and tools being held at the time and his immediate running away from the metal of the rig as soon as he felt the current), Dr. Whitehead also agreed that application of electricity to a muscle causes the muscle to contract.

> "Yes, It depolarizes the muscle, causing involuntary contraction" ... and agreed that if severe enough, could partially dislocate that shoulder enough to tear the labrum." (Exhibit CL-4, pages 47-49, 30-33).

4. **Dr. Ronald Graham** (non-treating physician, Employer and carrier's retained expert):

Although Dr. Graham was predisposed to find that the shoulder injuries were not caused by the event, he also did not have the benefit of the initial toolpusher's report or safety report of

Greywolf nor did he know that Mixon had passed an employment physical with Greywolf before the accident. (Exhibit E/C-17 pg.50). Nor had he had the benefit of reviewing the testimony of Dr. Kelli Smith (wherein she clarified that she had in fact diagnosed Mr. Mixon as having sustained a lightening strike injury) nor of the benefit of having claimant's sworn deposition wherein he described in some detail his injury and what had occurred. Further, Dr. Graham had not spoken to any of claimant's treating physicians and just did not have all of the correct facts. (Exhibit pg. 55). Without the benefit of obviously all of the available information that arguably should have been considered, Dr. Graham presumably jumped quickly to the opinion that "no injury" was found at Magee Hospital and that "the medical records" did not support any injury at all (Exhibit pg. 56). It was upon this basis that he failed to see the obvious and stubbornly stuck to his opinion although conceding that it was medically theoretically possible for Mixon to have sustained these injuries: [Exhibit EC-17].

> "Q. You stated that you could produce internal impingement of the type that Mr. Mixon had by applying high voltage into the upper extremities; is that correct?
>
> A. I said it was theoretically possible to shear the labrum from the glenoid by forcefully dislocating the shoulder, and that does occur with application of high voltage power to the chest and/or upper extremities. "

He then went on to say that this would cause skeletal muscle damage from edema that would result in elevated CPKs and myoglobin. Although he stated that Mixon did not demonstrate significant elevations of those tests at the hospital, there was only one of those tests that was performed and the blood was drawn within an hour after the lightening strike and per Dr. Smith, the treating physician, the CPK test was elevated consistent with lightening strike injury and skeletal muscle damage. Graham agreed in other portions of his deposition that significant elevations would not occur until 24-36 hours from the event, and the initial results are lower and expected to be lower than those in later performed tests. He, of course, had to also

agree that if you did not have the results you would not know what they would have shown. And here, we did not have further tests, so we do not know what they could have been, had they been performed, as ordered by Dr. Smith. Graham inappropriately assumed that if the tests had been performed the result would have been negative. Thus, he took the absence of a test being performed as a negative result and as a basis of his negative opinion on causation to the event. {Exhibit pg. 35, 36, 63, 66, 67}. This Court should not give credibility to this testimony.

5. **Dr. Kelli Smith** (initial treating physician at Magee Hospital/ June 4 & June 5, 2001):

Dr. Smith testified (Exhibit CL-1) that Mixon presented to the emergency room of Magee Hospital at 1:36 p.m. on June 4, 2001 with a history of being struck by lightening at 1:15 p.m. (just 20 minutes earlier). He was light-headed, had hazy vision, and his chest felt tight (all symptoms medically expected from a lightening injury, per Dr. Smith.) He was found to have mildly elevated CPK and BUN levels on tests given at that time which she clarified were an indication of muscle breakdown. Dr. Smith further testified that the results indicated some skeletal muscle injury (CL-1 pg. 6-8) and that he was kept overnight. Dr. Smith ordered these tests to be repeated several times during the night but found out later that they had not been performed. Had they been, they would have in all probability shown the progression of elevation of the numbers on these tests to quantify the skeletal muscle damage, an absence employer and carrier have sought to exploit in the argument that there was allegedly no skeletal muscle injury from the electrocution. However, Dr. Smith clearly testified that the initial tests performed just after the event nevertheless demonstrated some skeletal muscle injury from the event. Mr. Mixon was discharged the following day still complaining of muscle soreness generally throughout his body and she found this was all consistent with a lightening strike injury (Exhibit pg. 11). Skeletal muscles are those used for motion, including the arms, shoulders, chest, and legs

(Exhibit pg. 14). Dr. Smith disagreed with the statement (made by Dr. Graham) that at the emergency room no particular injuries were discovered (Exhibit pg. 17). Per Dr. Smith, the CPK enzyme test, chest tightness, chest tenderness, vision haziness, and Mixon's complaints at the ER were all consistent with objective evidence of injury from an electrocution lightening strike injury as described by Mixon (Exhibit pg. 12). In the ER, Mixon had tenderness over his chest wall, muscle tenseness of the muscle anteriorly, and some tenseness in general of his extremities (both arms). She did not test the range of motion of his extremities. (Exhibit, pg. 26,29). Per Dr. Smith, one would not find elevated CPK enzymes from a muscle injury 2 years earlier (Exhibit, pg. 29). The injury would have had to have been within hours to a few days of the test (Exhibit, pg. 30). Also, the elevated BUN number would not be from a high protein diet (as employer/carrier attempted to suggest) (Exhibit, pg. 30). Dr. Smith agreed that electrical voltage causes muscles to clamp down and can injure various parts of the body even though you might not be able to establish the exact path of the current (Exhibit, pg. 31). Dr. Smith never said that Mixon's shoulder injuries from the lightening strike were "impossible" as represented to this Court by Employer and Carrier in their brief. She said, "there is no way I can say I'm a hundred percent sure that lightening did not injure his rotator cuffs (Exhibit, pg. 32). She said there was obviously mention of upper extremity soreness and tightness at the ER and that the orthopaedic surgeon(s) who treated him were in a better position to answer the question of whether his shoulder injuries were caused by the lightening strike. (Exhibit, pg. 33). All Dr. Smith said was that she thought it would be unusual for the "muscle to tear" as a result of a lightening injury (Exhibit, pg. 33). This is similar to what Dr. Morrison said. He likewise did not think it likely that lightening "tore" muscle. It was his opinion that Mixon's body's reaction to the lightening/ electricity caused the labral tears in the shoulders. The labrum is not muscle. It is a round cartiledge rim around the shoulder socket. It keeps the arm bone in the socket of the shoulder. It

is attached to muscles comprising the rotator cuff. Although Dr. Smith had not followed Mixon after his discharge and had no prior knowledge of the shoulder injuries for which he received treatment and surgery, she agreed that something could have happened to his shoulders as a result of the event if he had not had prior demonstrated shoulder problems (Exhibit pg. 34). She also agreed that lightening injuries can be a cascade of symptoms after the event, and not all show up at the same time, but usually within hours to days thereafter (Exhibit pg. 36). Dr. Smith's opinion was that Mixon suffered an indirect lightening strike (i.e. direct strikes usually kill) from which he received injury. (Exhibit pg. 36). She left it up to the other treating physicians to quantify the extent of those injuries.

Nothing in Dr. Smith's testimony refutes the testimony of the treating physicians as to causation for the various injuries from the lightening strike. Dr. Smith's testimony supports that Mixon had a lightening strike injury and was complaining of pain and soreness of his chest and arms immediately after the event. Mixon implores the members of this Court to read the testimony of Dr. Smith for themselves and not rely on the representations of employer and carrier as to what she said. In like vein, Mixon disputes emphatically the assertion by employer and carrier that Dr. Morrison engaged in "fabrication" of facts or details or circumstances of the event in his opinions on causal connection of the shoulder injuries. Dr. Morrison merely put forth in his opinions that based on what Mixon had told him and what he envisioned as having happened more than one mechanism of injury fit the facts. There is no doubt that this accident happened quickly, Mixon's reaction happened quickly, and per Dr. Morrison and Dr. Whitehead, more than one "mechanism of injury" is plausible. What is not the case is the scenario that Dr. Graham presumed i.e. that Mixon was standing on a piece of wood over an open (dry) pit. This accident occurred in a driving rain storm with lightening all around. All the contemporaneous documents and Mixon's testimony confirm that. The pump was broken and water backed up into

the cellar of the rig. Mixon was covered in water, out in the open, and standing over/in a rig "cellar" or pit filled with water and holding onto heavy metal bolts and nuts and carrying a heavy tool when lightening struck nearby. Dr. Smith indicated that she felt the electricity was conducted into Mixon by an indirect strike. There would be no thermal burn as argued by employer and carrier. Dr. Morrison stated that it could have very well been Mixon's reaction to the electrical shock in suddenly and forcefully pulling away from the source of the electrical shock that caused the labral tears in his shoulders or it could well have been the severe muscular contractions of his chest muscles that caused a partial dislocation of the shoulders.

What we do know from undisputed factual evidence is that Mixon did not have these shoulder injuries or any of the other injuries before he received the indirect lightening strike on June 4, 2001 on Greywolf's rig. Further, we know that he had a cascade of various symptoms and injuries thereafter within minutes, hours, and days following the lightening strike. The substantial and overwhelming evidence supports the Commission's finding that the injuries were caused by the lightening strike Mixon received. Any other conclusion is just not substantiated in the record. The resolution of this issue in Mixon's favor was a proper exercise of authority by the Commission and should be affirmed.

III. AVERAGE WEEKLY WAGE:

Mixon notes that the Employer and Carrier cited no authorities on point for their argument that the Commission, not the Administrative Judge, correctly determined the correct average weekly wage of Mixon at the time of injury. Mixon never argued that he claimed nor did the Administrative Judge find or reference that she considered wages Mixon could have earned in any secondary employment. The Administrative Judge considered only those wages earned with Greywolf and only the weeks Mixon actually worked to earn them. Reference to the fact that in

other weeks he was free to engage in additional work with some other employer is merely confirmation of the fact that Mixon was not a salaried employee. He was not on duty nor on call for Greywolf in his "off" weeks. He was paid by the hour and by the week for the weeks he actually worked.

Mixon has previously presented to this Court the formula he believes is applicable in the premises. It is that set forth in ***Dependants of Harris v. Suggs***, 102 So. 2d 696 (Miss. 1958). It affirms the formula used by the Administrative Judge and not that used by the Full Commission. Employer and Carrier do not seek to distinguish ***Harris*** nor challenge its' authority, nor do they even mention it. However, Mixon argues that the correct formula was used only by the Administrative Judge and it is the formula consistent with ***Harris.***

Mixon reaffirms his request that this Court find the Commission's determination of the average weekly wage at the time of injury to be an incorrect application and error of the law and erroneous application of law to fact, not supported by substantial evidence, and reverse the Commission this issue and reinstate the average weekly wage determined by the Administrative Judge.

IV. AMOUNT OF PERMANENT DISABILITY:

Employer and Carrier begin their argument on this issue by contending that there are disputed facts on this issue. Mixon rejects this argument. There are no disputed facts upon which the Commission could rely in their determinations on this issue. There was only one witness on this issue and it was Mr. Mixon. There were documents of Greywolf that supported but did not dispute Mr. Mixon's testimony. There were medical impairment ratings and restrictions to be applied, but there were no disputed facts. There may be arguments to be made on how these facts should be applied to the law and the correct application of the law to be

applied but the facts are not in dispute. The evidence elicited from Mr. Mixon about his work history, whether in direct or in cross-examination, is undisputed. There may be and are differences of opinion between the parties as to just what constituted Mixon's "usual employment", but his usual employment is a matter for resolution by application of the correct legal standard. There obviously are differences of opinion between the parties on what constitutes the applicable law to these facts, and correct application thereof.

There is assuredly a difference of opinion between these parties on whether and when the applicable law requires being able to earn, post accident, "the same wages" as prior to the accident. Employer and Carrier argue that if claimant can return post accident to any employment he has had in the past or anything for which he is otherwise qualified by age, education, experience, and training, it matters not whether he can "earn the same wages" as prior to his accident. Mixon disagrees. Mixon argues that this argument is incorrect and "misses the mark" on what our Supreme Court and this Court have said in the past as being the applicable law. Mixon argues that the test is actually whether claimant is prohibited by the results of the injury from (A) returning to the job he held at the time of injury (which clearly Mixon was and is), and/or is further precluded from being able to perform the (B) "substantial acts" required of his (C) former "usual employment" and in doing so, (D) earn the same wages as prior to the injury. If not, claimant is considered to have 100% permanent vocational impairment to his scheduled member arm. If the proof does indeed show that he is capable of earning the same wages i.e. by returning to his job held at the time of injury or otherwise, then he has no wage earning capacity loss but can still obtain benefits for an increased vocational impairment over his medical impairment, consistent with the findings in ***Meridian Baseball***; however, the compensation is less than 100% vocational impairment to the arm. This appears to be the only way to reconcile any conflict in the interpretation of various authorities.

Employer and Carrier focus only on what should constitute claimant's "usual employment", not what constitutes the "substantial acts" thereof, and argue that "usual employment" should encompass everything he has ever done in his lifetime and even if he has not done it before then as long as it is somehow related in some respects to something he may have done in the past and as long as he is not permanently disabled from all gainful employment with a complete inability to earn any wages whatsoever, and has any ability at all to use any skill or knowledge he may have to transition into some other kind of employment, then that subsequent employment, must by definition constitute his "usual employment". That is just incorrect. Claimant here may have had a somewhat varied employment history, however, **the "SUBSTANTIAL ACTS" required of all of those jobs** (with the exception of maybe 2 of short duration and which would not in any respect be considered his "usual employment") **required the ability to engage in heavy manual labor and/or very heavy manual labor.** This conclusion in obvious from all the substantial and overwhelming evidence. Claimant does not argue that his "usual employment" was only the job he had at the time of injury. He does argue that he is prevented by all medical restrictions from returning to that job or any of his former jobs as a deckhand on a charter fishing boat, other oilfield jobs which he has had in the past, his former job as a groundskeeper for a golf course, his former jobs as a construction laborer, and others and is in fact just what the administrative judge said, a **heavy manual laborer** who now has a physical incapacity because of the injuries sustained with Greywolf to "return to and earn wages in his **past relevant jobs** as a laborer" and an incapacity to perform the **vast majority of the substantial acts of his former occupation** as a heavy manual laborer.

The Full Commission also found that **"there is no question that the Claimant is precluded from returning to any of the heavier manual labor pursuits for which he is qualified by training and past experience, such as the work he was doing when injured."**

Contrary to the argument of Employer and Carrier that "the Commission found that Claimant's injury did not prevent him from performing the substantial acts of his "usual employment", Mixon argues that **the Commission made no such finding in their Order** and made no finding of what constituted the "substantial acts" of claimant's usual employment. Although there is a dispute over what constituted claimant's "usual employment" and thus the "substantial acts" thereof required, Mixon feels compelled to "call out" the employer and carrier in their reference to his "usual employment" as including building circuit boards and "mowing grass". The evidence was that he had a brief job learning to build circuit boards at one time years before his employment in the oilfield and many of his other jobs and it lasted only a couple of weeks because he found out he was allergic to fiberglass and could no longer attempt to learn the trade. That hardly qualifies as "usual employment". Further, his job as a grounds keeper for a golf course consisted of a lot more than "mowing grass". The ***undisputed testimony*** from Mixon is that his medical restrictions prevented him from returning to any of his prior employment that could be considered relevant and an inability to perform the substantial acts of any of the same. Further he testified to a substantial loss of wage earning capacity as a result thereof. Had the employer and carrier wanted to dispute these facts, they could have offered a witness to say something in an effort to do so. They could have tried to challenge what Mixon said were the substantial acts required of his jobs prior to Greywolf. They could have offered a vocational witness to testify that Mixon retained the ability to earn wages consistent with those being earned at the time of injury. They did neither. Obviously, they were unable to find any such witnesses for any such testimony.

A real question for this appeal is, "did the Commission's finding that Mixon had returned to work for which he was 'qualified by training and experience' comport with the substantial evidence and constitute a finding both that this was also his "usual employment" and

additionally, that his current work also equated to having physical requirements equivalent to the 'substantial acts necessary for claimant's former usual employment? Mixon argues that it does not and if it is interpreted that way, the finding is against the overwhelming weight of the evidence, not supported by substantial evidence, and an erroneous application of the law. And then, there is whether, for such other work, there is evidence that Mixon can now "earn the same wages" as prior to his accident, and clearly there is absolutely no evidence that he can. The substantial and undisputed evidence is that he cannot. The Commission's Order reflected such. Reading ***Meridian Baseball*** carefully, it is clear that our Supreme Court has defined "comparable" to be used in determining whether one has the ability to return to "comparable work" after an injury, as "comparable" in terms of wage earning capacity. ""Comparable" here would mean comparable in terms of what workers' compensation is principally intended to remedy, the loss of wage-earning capacity"'. ***Meridian Baseball***, supra, (P23). Clearly Mixon has demonstrated a loss of wage earning capacity. There is no evidence that he has the capacity to return to the average weekly wage he was making at the time of injury. How could it then be that Mixon would be entitled to the same benefits awarded to Jensen (Meridian Baseball) who had no loss of capacity and whose claim for "total occupational loss of his arm" failed "because" he was found to have no loss of wage earning capacity?

Mixon has previously quoted extensively from applicable case law in his original brief. He will not seek to repeat it all here. However, he should and will say that the test used by the Commission did not fully comply with ***Meridian Baseball*** and others from this Court that are applicable here. The test to be applied has been accurately previously stated by this Court in ***McDonald v. Isaacs***, infra.

Additionally, Mixon would point out that the Commission Order failed to note the importance of the fact that the job held by Mixon at present and for which he has held since his

accident with Greywolf is substantially a "sheltered" type job. He makes more in this job than he would in the open labor market with the same physical restrictions. His loss of wage earning capacity is substantially more than that reflected by merely just comparing his pre-accident wages with Greywolf to his wages 5 years later with his current employer. Assuredly, if Mixon could make more with another employer than he is making with the current employer he would seek that other employment. Mixon's testimony reflected why he has sought hard to keep this job and no longer has the flexibility to move to other jobs. The testimony was undisputed. The Commission just failed to but should have considered it, as did the Administrative Judge. The undisputed testimony in the record is that Mixon's true post accident earning capacity is a mere $7.00 or $8.00 per hour and he is now over 50 years old. Should this Court fail to find that he is entitled to receive maximum benefits as claimed, Mixon respectfully asks the Court in the alternative to reinstate the Order of the Administrative Judge.

Mixon also disputes employer and carrier's contention that his case is like or governed in result by the result in ***Weatherspoon v. Croft Metals, 853 So 2d 776 (Miss. 2003).*** Mixon argues that ***Weatherspoon*** must be read in context with ***Meridian Baseball*** and ***Lott v. Hudspeth Center***, No 2007-CT-01525-SCT (Miss. 2010). The Supreme Court in ***Lott***, affirmed the Commission's award of 100% loss of industrial use to claimant's arm although claimant was found able to return to work in some capacity with the injured arm. This is not unlike Mixon. The Commission noted that Mixon was able to return to work in some capacity (although not his former job with Greywolf or in any of his jobs of heavy manual labor) and work somewhat with his injured arms.

Mixon also disagrees with the employer and carrier's attempt to distinguish ***McDonald v. Isaacs Newton, Inc.***, No., 2002-WC-02084-COA, 879 So 2d 486 (Miss. App. 2004). The issue there was whether the proof demonstrated that claimant retained the ability to "earn the same

wages" after as prior to the accident, not whether she had actually obtained a job. Whether a claimant has actually found employment is not the issue and never has been. The issue is whether and to what extent the claimant retains the capacity to do so. "In the absence of proof that Claimant is able to earn the same wages that she was receiving at the time of injury, she is entitled to permanent total disability compensation." Id. @ (P23).

CONCLUSION

The Commission's award and the Circuit Court's Order affirming that award should be affirmed in part (compensability) and reversed in part as it pertains to the amount of the award to Mixon and a judgment rendered in favor of Mixon for maximum benefits available for his injuries sustained. Mixon argues that the judgment of this Court should be for benefits of 450 weeks at the maximum weekly rate of $316.46 from June 4, 2001, plus all reasonable and necessary medical treatment therefore, plus all penalties and interest, as previously awarded by the Full Commission for installments not timely paid. Mixon also asks this Court to reverse the Commission on the finding of the correct average weekly wage at the time of injury i.e. and reinstate that ordered by the Administrative Judge $1,290.00 per week. In the alternative, only, Mixon, asks the Court to reinstate the Order of the Administrative Judge, including all penalties and interest, as assessed by the Full Commission, and also consider an award to Mixon for permanent disability to each of his arms in excess of the 70% for permanent disability benefits for occupational loss of use awarded by the Administrative Judge.

Mixon also renews his request for the party carriers in this cause to be listed jointly as Employers Insurance of Wausau and Liberty Mutual Insurance Company, for clarification of any award, judgment, or Order that may be entered.

DATED this the 10th day of May, 2010.

Respectfully submitted,

KENNETH MIXON,
Appellant and Cross–Appellee

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CERTIFICATE OF FILING AND SERVICE

I, PATRICIA EVE GABLE, counsel for Kenneth Mixon, do hereby certify that I have this date filed with the Clerk of the Supreme Court:

1) The original and three (3) copies of the foregoing Responsive Brief of Appellant/Cross-Appellee; and

2) A copy of said Brief on electronic disk,

said filing accomplished by mail, pursuant to Rule 25 M.R.A.P., accomplished through deposit this date in the United States mail addressed to the Clerk, postage prepaid for first class delivery. True and correct copies of the aforesaid Responsive Brief of Appellant have been also this date mailed via United State mail, postage pre-paid, to the following counsel of record at his last known mailing address, and to the Mississippi Workers' Compensation Commission as follows:

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Dated, this the 10th day of May, 2010.

Patricia Eve Gable