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-APPELLEE**
&	
EMPLOYERS INSURANCE COMPANY OF WAUSAU/ LIBERTY MUTUAL INSURANCE COMPANY	**APPELLEE/ CROSS-APPELLEE**

On Appeal from the Circuit Court of Simpson County, Mississippi

---

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Patricia Eve Gable, Esq.
BRYAN NELSON P.A.
P.O. Box 18019
Hattiesburg, MS 39404-8109
Tel: 601-261-4100
Fax: 601-261-4106

Attorney for Appellant/
Cross Appellee
KENNETH MIXON

COURT OF APPEALS
OF THE STATE OF MISSISSIPPI

NO. 2009-WC-01536-COA

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Kenneth Mixon
   Appellant/Cross Appellee

2. Patricia Eve Gable, Esq.
   Bryan Nelson P.A.
   Attorney for Appellant/Cross Appellee

3. Grey Wolf Drilling Company LP
   Appellee/ Cross-Appellant

4. Employers Insurance Company of Wausau\ Liberty Mutual Insurance Company
   Appellee/ Cross-Appellant

5. John S. Gonzalez, Esq.
   Daniel Coker Horton & Bell, P.A
   Attorney for Appellees/Cross Appellants

6. Mississippi Workers' Compensation Commission
   Administrative Judge Deneise Turner Lott

7. Mississippi Workers' Compensation Commission
Chairman Liles Williams, Commissioner John R. Junkin, and Commissioner Augustus L. Collins

8. Simpson County Circuit Judge Robert G. Evans

Respectfully submitted,

Patricia Eve Gable, (MSB [redacted])
Attorney for Appellant, Kenneth Mixon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES

1. Whether the Circuit Court (affirming the Mississippi Workers' Compensation Commission) erred *in the amount of* its award of compensation benefits to claimant, Mixon, particularly including but not necessarily limited to the finding that Mixon sustained only a 25% loss of use of each arm as a result of his work related injury (ies), and whether Mixon's injuries entitle him to permanent total disability benefits under the Act, per Miss. Code Ann. §71-3-17 (c) (1) and (22) and Miss. Code Ann. §71-3-17 (a) of the Act for total occupational loss of both arms and/or in the alternative, an industrial loss of use greater than the 25% loss of use to each arm, as awarded .

2. Whether the Circuit Court (affirming the Full Commission) erred in the amount of its determination of Mixon's average weekly at the time of injury, and more particularly, was there error in the inclusion of weeks that Mixon did not actually work in the divisor of weeks used to calculate Mixon's average weekly wage at the time of injury.

3. Whether the Circuit Court (and Full Commission) Order(s) as to (permanent) benefits awarded and calculation of average weekly wage were supported by substantial evidence, or contrary to substantial and/or undisputed evidence and/or the overwhelming weight of the evidence, based on erroneous application of the law, and/or arbitrary and capricious in result.

4. Liberty Mutual Insurance Company should be added as an additional Party, in conjuction with Employers Insurance Company of Wausau.

STATEMENT OF THE CASE

A. NATURE AND COURSE OF PROCEEDINGS

This is an appeal of a workers' compensation case originating before the Mississippi Workers' Compensation Commission, and coming to this court from the Circuit Court of Simpson County Mississippi.

Kenneth Mixon, Claimant in the matter before the Commission and appellant here, was originally found by the Administrative Judge of the Commission to have sustained compensable injuries to both of his shoulders/ upper extremities and to his heart and found entitled to receive medical benefits, temporary total and temporary partial disability benefits, and permanent partial disability benefits for 70% loss of use of each of his upper extremities (280 weeks of permanent disability compensation) plus a 10% penalty for any untimely paid installments. [R. Vo. I pg. 149, Vo. II, pg. 151, R.E. Tab 4] On appeal by the Employer and Carrier, the Full Commission affirmed the Administrative Judge's finding of compensability for the accident/ injuries received and the entitlement to medical, temporary total (June 4, 2001--August 2002 when he began working for USM) and temporary partial disability benefits (August 2002 – August 23, 2004), and penalty, but reduced the award of permanent partial disability benefits to 25% loss of use of each arm (100 weeks total), cut in half the amount of the average weekly wage found by the Administrative Judge, and amended the rate of temporary partial disability benefits in accord with its reduction in average weekly wage effective at the time of injury. The Full Commission also awarded interest at the legal rate to all installments not timely paid. [Vo. II pg. 183, R.E. Tab 3] The Order of the Full Commission was appealed by Mixon to the Circuit Court of Simpson County (and cross-appealed by employer and carrier) where it was affirmed (without briefing or argument) on August 28, 2009. [R.E. Tab 2]

Mixon has now appealed to this Court in an effort to correct what he considers the mistakes made in the determination of the correct award for the injuries he received.

Mixon asks this Court to reverse and amend/render that part of the Circuit Court's Order (and Commission's Order) regarding **the amount of** (permanent) **disability benefits awarded** and **amount of applicable average weekly wage** (and by implication the rate for payment of temporary partial disability benefits, if found applicable), and **seeks that this Court award to him 100% loss of industrial use of each of his arms** which, per Miss. Code Ann. § **71-3-17 (c) (1) and (22)** [*"Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member"*] and § **71-3-17 (a)** [*71-3-17 (a): " Loss of both hands, or* ***both arms****, or both feet, or both legs, or both eyes, or any two (2) thereof shall constitute permanent total disability."*] of the Act should result in 450 weeks of compensation for the bilateral upper extremity injuries received; or alternatively, only, reassess his entitlement to permanent partial disability benefits to restore to him at least that awarded by the Administrative Judge i.e. 70% loss of industrial use of each arm (if not more). Mixon also asks that this Court reinstate the average weekly wage determined by the Administrative Judge, along with affirmance of compensability for the accident/injuries sustained, penalty on untimely payment of benefits, interest at the legal rate, as awarded by the Full Commission, and if less than an award of 450 weeks of compensation per § 71-3-17 (a), then also reaffirm also that part of the Commission's award regarding temporary total and temporary partial disability benefits (with applicable adjustment to the correct weekly rate for payment, per increased average weekly wage) in addition to any permanent partial disability benefits awarded.

B. FACTS OF THE CASE

Mixon was employed with Greywolf Drilling, LP as a floorheand when on June 4, 2001, and 5 ½ days into a 7 day hitch on a land rig in Simpson County, MS, he was struck by lightening during a rigging down ("nipping down") procedure in a violent and thunderous rain and lightening storm and from which he received multiple injuries, including torn labrums on both his right and left shoulders, rotator cuff injury on one shoulder, and an electrical injury to his heart. (R. Transcript page 19, 23/ Exhibits CL-12, 13, 14), (Exhibit CL-1 pg. 11) The labrum is a soft tissue or cartilage rim around the socket of the shoulder that helps stabilize the shoulder. Mixon sustained 2 separate tears of the labrums, one on the top of each shoulder. In addition to the torn labrums on both his shoulders (most probably due to bilateral dislocation of the shoulders from severe muscle contractions caused by the electrical current), Mixon also sustained some temporary vision problems and electrical injury to his heart.

Greywolf was aware of the injury at the time. Greywolf's toolpusher took Mixon to the Simpson County Hospital where he arrived within an hour after the injury (R. Transcript page 28) and was diagnosed with having sustained a lightening strike injury (the shoulder and heart injuries had not been specifically diagnosed at that time) and hospitalized overnight. He was discharged the following day (June 5th) with instructions initially to stay off work for at least another 7 days and not to return to work until cleared to return to work by a physician, but on the urging of Greywolf's "safety man" and his assurances that Mixon would not work for at least another week, the treating doctor, Dr. Kelli Smith, agreed to release Mixon to light duty with the understanding that Mixon would indeed not be placed back to work for at least a week and not before being examined further by her or another physician for actual release to return to work following the expiration of the week's rest. (R. Exhibit CL-1 pgs. 11-18) Contrary to his

assurances to Dr. Smith, the "safety man" for Greywolf took Mixon from the hospital back to the rig and Mixon was placed back to work cleaning crew trailers for the several hours remaining on his 7 day hitch. (R. Transcript page 27-31) Mixon was off schedule for the following week. When Mixon did not report back to work the week after his scheduled "off" week, Greywolf terminated his employment on June 13, 2001, effective June 5, 2001, for failure to return to work and failure to call (and with it his employer based group medical insurance) and refused to provide him any medical or weekly disability benefits thereafter, under workers' compensation or otherwise. (R. Transcript pg. 17,18) (R. Exhibit CL-9) Mixon testified that he had indeed called the rig toolpusher on duty that week to report his subsequent medical treatment related to the injury and his inability to return to work as scheduled, as was the hospital calling Greywolf for approval of medical treatment. (R. Transcript pg. 87)

Following hospital discharge on June 5th, Mixon awoke on June 6, 2001 with unrelenting pain in his right shoulder and sought medical treatment locally from Immediate Care in Hattiesburg, where he was referred by Dr. Lisa Bushardt to Dr. William Morrison, orthopedic surgeon, for his orthopedic complaints (shoulder) and to an internal medicine doctor for further more comprehensive follow-up of the lightening strike event (a doctor he was never able to see due to lack of personal funds and Greywolf's refusal to approve this or other medical treatment). Mixon began seeing Dr. Morrison on June 11, 2001 for his shoulder complaints (R. Transcript pages 31-33) and sought emergency care from Forrest General Hospital on June 14, 2001 for irregular heart rhythm (R. Transcript pg.35), following which he came under the care of a heart specialist, Dr. Robert Wilkens, for his heart problem. (R. Transcript p.35) Dr. Morrison placed Mixon again "off work" as of June 11, 2001. As Mixon did not receive weekly disability benefits nor medical from Greywolf, and had no income and little money of his own at the time,

Mixon struggled for some extended time to obtain medical treatment necessary to treat the injuries received and return to some type of gainful employment. (R. Transcript pg. 40)

Mixon ultimately had three (3) shoulder surgeries (two (2) by Dr. William Morrison (i.e. one on each shoulder) and one (1) by Dr. Raymond Whitehead (a second surgery to the right shoulder), following which he was released by Dr. Whitehead on August 23, 2004 as having reached maximum medical improvement. (R. Exhibit CL-4 pg. 19-23)

Dr. Whitehead assessed Mixon with a 6% permanent medical impairment to his right upper extremity secondary to the right shoulder injury, and restricted him among other things from lifting more than 10-25 pounds frequently, 20-50 pounds occasionally, one-handed carrying of more than 25 pounds with his right or left hand, and overhead work and/or overhead lifting. Dr. Morrison assessed a like 6% permanent medical impairment to Mixon's left shoulder with work restrictions limited to medium duty work (similar to that of Dr. Whitehead's restrictions). No permanent medical impairment was assessed for the injury to his heart, which ultimately resolved. Per Dr. Morrison:

> "His work restrictions to the left shoulder would be essentially the same as it would be to the right shoulder. That is, overhead work is what he's going to have difficulty doing. Anything --- of course, *any overhead work at all*, he will find it difficult to do. He had a good biceps and triceps. So using his forearms, wrists and hands would not be impaired. But *anything away from the side of the body* would be difficult for him to do. *Anytime you have to put the shoulder into use* is where he would have difficulty. And, especially trying to do anything overhead. "

(R. Exhibit CL-2 pg.26). (emphasis added)

Dr. Whitehead further agreed that the restrictions placed on Mixon would make it impossible for Mixon to return to his former job as a floorhand on oil rigs and would prevent him from employments that were classified as either very heavy labor or heavy labor. (R. Exhibit CL-4, pg. 27).

At the time of the hearing, Mixon was 50 years old with a high school education and one semester of junior college. He served four years in the Air Force as an air craft mechanic on fighter jets. (R. Transcript pg. 8-10,12-17, 48-54) Upon discharge from the Air Force, he worked briefly as a security guard, bank teller, and delivery driver for a beer distributor where he had to also load and unload heavy shipments of beer, and then moved on to work in the oilfield on the Northslope of Alaska. Thereafter, Mixon worked as a heavy manual laborer as an oilfield worker, landscaper/groundskeeper, construction worker, tree cutter, roofer, water well driller, and deck hand on charter fishing boats during season, and for offshore crew ships transporting oilfield crews to rigs off coast. In his oilfield work, he had extensive work as a floorhand, and as a motor man and derrick man on both off-shore and land oil rigs. Prior to his employment with Greywolf at the time of injury, he had also been employed with Greywolf once before.

At the time of injury, his job with Greywolf required him, among other things, to lift and carry 50-90 pound bags of mud, operate heavy tongs to break apart pipe, and push 30 foot long joints of pipe continuously for twelve hours a day. His job also required climbing and overhead work. He worked a total of twelve hours a day, seven days on and seven days off. (R. Transcript pgs 8-12) He stayed on site at the rig in his "off" hours of duty in a trailer provided by the employer. His floorhand position with Greywolf also required swinging 12-20 pound sledgehammers overhead, and some tasks requiring repetitive overhead work. The physical requirements of Mixon's job as a floorhand are attached as Exhibit #2 to Dr. Whitehead's deposition (R. Exhibit CL-4). Per the Employer's First Report of Injury (R. Exhibit CL-12), Greywolf reported Mixon's hourly rate at the time of injury as $12.00 per hour ($13.00 per hour in his personnel records R. Exh. CL-9), but with overtime, Mixon's weekly wage from Greywolf for the weeks he actually worked was, with one weekly exception, $1,290.00 per week. (R.

Exhibit CL-10). Mixon was not subject to call by Greywolf on his "off" weeks. He could have accepted work with another employer during his "off" weeks as he had no responsibilities with Greywolf during those weeks. (R. Transcript pg. 6, 7)

Following his injury at Greywolf, and while still under medical treatment, Mixon sought some kind of return to work as he was financially destitute. (R. Transcript pg. 39) In September 2001, he had a job reading meters for 3 days, worked a few days as a cashier for a local grocery store- but had to quit because he could not physically lift a one-liter Coke bottle, and ultimately in August 2002, began working as a part time deckhand earning $6.50 per hour on the *Tommy Monroe*, a research vessel owned by the University of Southern Mississippi that is docked out of the USM Gulf Coast Research Center in Biloxi. (R. Transcript pg 40-43) The *Tommy Monroe* is a 97 by 25 foot vessel used for scientific research in the Gulf of Mexico. Unlike regular deckhand (and any of Mixon's previous deckhand jobs) jobs, this job was essentially a supervisory job requiring expertise, not muscle. The nets and anchors are operated by automated wenches. Mixon operates them by pushing buttons to activate the automatic wenches, not by his physical labor, and he is allowed to delegate physical tasks to others available on the ship. His primary value to the employer is his knowledge of the boat. Although he started in a part-time position, he was able to move to a full-time position upon the death of another crew member that held that full-time position, in July 2004, at which time he was hired in a full time position at $8.00 per hour (for 40 hours), which increased to approximately $8.50 per hour in August 2005. Mixon testified that he lucked in to a unique job and has worked really hard to keep it as his value on the open labor market to another employer would be a fraction of his current salary, as he is unable to perform any of his past jobs under his current medical restrictions. He testified that he makes less money in his job with USM than he did seven years before as a floorhand with

Greywolf and were he to still be able to work in that job, he estimated that he would make $20,000.00 more a year than he currently earns, a job in which he has to work twice as many weeks a year as his job with Greywolf. (R. Transcript pg. 44, 45) Greywolf offered no contradictory testimony nor offered any evidence of what a floorhand in Mixon's former position would make as of the date of the hearing. Mixon also has to work overtime hours in excess of the restrictions recommended by his doctors for a 40 hour week. (R. Transcript pg. 42, 47) He also sustained a further injury to his left shoulder in rough seas on the job with USM in the fall of 2006 from which he has had to have a fourth shoulder surgery, and that claim is being denied as compensable by USM, their position being that it is the result of his June 2001 injury with Greywolf. However, even before the subsequent injury in 2006, Mixon occasionally took pain medication. (R. Transcript pg. 42, 46)

SUMMARY OF THE ARGUMENT

1. The issues raised by the appellant i.e. amount of appropriate compensation and amount of correct average weekly wage should be considered by this Court *de novo,* there being no controverted facts in regard thereto. The Commission and Circuit Court erred and mis-apprehended and mis-applied the applicable law to the undisputed facts of the correct amount of disability to be awarded and the correct average weekly wage. Compensability of the claim was correctly resolved in Mixon's favor. Mixon sustained two (2) scheduled member injuries i.e. injuries to his upper extremities/ arms from which the Full Commission found he was entitled to medical benefits and disability benefits therefore. The Commission further found that Mixon had proved an entitlement to occupational loss in excess of his medical impairment ratings given by his physicians. Where the Commission erred was in failing to apply the correct test to the undisputed facts of the extent of disability (and average weekly wage), and in finding that Mixon's loss was less than total because he was still able to work in a job that requires use of his arms to some degree. The undisputed facts showed that Mixon was unable, due to his injuries, to return to the job he held at the time of injury and additionally unable to return to the substantial acts of his usual employment which was very heavy and heavy manual labor. Further, the undisputed facts proved that Mixon was unable, due to his injuries, to earn the same wages after the injury as he was earning at the time of injury. Per *Meridian Baseball,* infra, this entitles him to 100% loss of industrial use of each of his injured arms i.e. maximum scheduled benefits, and further, by statute (Miss. Code Ann. § 71-3-17 (a)) permanent total disability benefits (450 weeks of benefits altogether) regardless of whether he can still work in some capacity with another employer in a different, more

physically limited, kind of work and for a lesser wage. As an alternative argument, only, Mixon asks that this Court reassess his permanent disability award to at least the 70% occupational loss of use of each arm awarded by the Administrative Judge, if not finding more than that to be appropriate, and in this alternative, also note adjustment of the rate of his temporary partial disability award in light of recalculation of his average weekly wage as requested of $1,290.00.

2. The Circuit Court and Full Commission erred as a matter of law when they calculated Mixon's average weekly wage at the time of injury using as a divisor of his gross wages weeks that he did not actually work for Greywolf. This is an inaccurate calculation and mis-application of the statute (Miss. Code Ann. § 71-3-31) and controlling law. Per *Dependants of Harris v. Suggs*, infra, weeks in which Mixon did not work should be deducted. Mixon asks this court to reinstate the average weekly wage found by the Administrative Judge, i.e. $1,290.00 per week.

3. The Order of the Circuit Court should be reversed as to the amount of the award and the amount of benefits awarded for Mixon's injury changed to 450 weeks at the maximum weekly rate effective at the time of injury, i.e. from June 4, 2001 at the rate of $316.46 per week, plus all related medical benefits, penalties, and interest, or in the alternative only, the Order of the Administrative Judge reinstated, if not permanent disability benefits increased to an amount in excess of the 70% permanent disability benefits to each arm as assessed therein. In that alternative, interest at the legal rate should also be added to the award for all installments not timely paid, in addition to the 10% penalty per Miss. Code Ann. § 71-3-37 (5).

4. Liberty Mutual Insurance Company should be added as an additional party and carrier for the employer, Greywolf. Before the Commission, it was stipulated by attorneys for the employer and carrier that Employers Insurance Company of Wausau was the correct carrier for Greywolf on the date of injury and the Orders of the Administrative Judge and Full Commission so indicated. Counsel for Greywolf has now entered an appearance in this appeal for Liberty Mutual Insurance Company, as an additional party carrier. This Court's judgment should reflect both Employers Insurance Company of Wausau and Liberty Mutual Insurance Company as parties, and as workers' compensation carriers for Greywolf, and any obligation for payment of any award of compensation to Mixon so assessed to the Employer and both Employers Insurance Company of Wausau and Liberty Mutual Insurance Company, as workers' compensation carriers for this employer on the date of Mixon's injury.

ARGUMENT

A. STANDARD OF REVIEW

For cases originating before the Mississippi Workers' Compensation Commission the factual findings of the Commission are binding on the appellate court only so long as they are supported by substantial evidence, and are not clearly erroneous, contrary to the overwhelming weight of the evidence, or contrary to law. This Court is bound by law and precedent to reverse the findings of the Commission when not supported by substantial evidence, when clearly erroneous or contrary to the overwhelming weight of the evidence, or when the Commission has misapprehended a controlling legal principle. No deference is due if an administrative agency i.e. here, the Commission, has misapprehended a controlling legal principle or rendered a decision contrary to law. When reviewing questions of law, a de novo standard of review is used. *ABC Mfg.Corp. v. Doyle*, No. 97-CT-01376-SCT, 749 So.2d 43, 45 (Miss. 1999). If there are no controverted facts (on the issue in question), the issue is a question of law. *Breland & Whitten and USF&G v. Breland*, 139 So. 2d 365 (Miss. 1962). See also *Meridian Baseball* and *Weatherspoon*, infra.

B. THE EXTENT OF (PERMANENT) DISABLITY

Although there are several issues of dispute and for which Mixon contends the Commission (and Circuit Court) erred, it is the extent of disability i.e the amount of permanent disability determined by the Commission (and affirmed by the Circuit Court) that is the primary focus of this appeal, and thus this issue will be first addressed.

There were no controverted facts on the issue of permanent disability and thus it is an issue of law. *Breland & Whitten and USF&G v. Breland,* 139 So. 2d 365 (Miss. 1962). The Employer and Carrier offered no witnesses or conflicting evidence on the issue of permanent disability, only the issue of whether Mixon had sustained a compensable work related injury (injuries), which Employer and Carrier disputed.

The Commission correctly and on substantial evidence resolved the issue of compensability in favor of Mixon, finding in its Order, as follows:

> "...we agree with, and therefore, affirm the Judge's finding that the Claimant sustained compensable injuries to his right and left shoulder, and heart, or (sic) June 4, 2001, and that he is entitled to all reasonable and necessary medical treatment therefore". [R.E. 3, pg 1]

The Full Commission also found that Mixon had sustained temporary disability (both total and partial) as a result of said injuries, until released by Dr. Whitehead. The Administrative Judge found that Mixon had sustained a 70% loss of use of each of his right and left arms as a result of the accident/injury on June 4, 2001. [R.E. 4, pg. 29] The Commission reversed this finding and reduced the award of permanent disability to the scheduled right and left arms to 25% loss of use of each arm, a finding (i.e. the amount thereof) Mixon contends was contrary both to applicable law and the substantial and overwhelming weight of the evidence.

Clearly, Mixon agrees with and takes no issue with the Commission's findings that he did, in fact, suffer a permanent disability and loss of use of both his right and left arms as a result

of the accident/ injury in question. **It is the *amount of* the loss of use found by the Commission to which Mixon disagrees and upon which he appeals to this Court for modification and correction.**

Mixon suffered **two (2) "scheduled member" injuries** (left arm and right arm) as a result of the accident of June 4, 2001, in addition to an injury to his "body as a whole" i.e. his heart. Mixon does not take issue with the findings of the Commission (and Administrative Judge) that the injury to the heart was of temporary duration, only, and that the evidence of permanent disability related only to the scheduled member injuries from the accident i.e. to each of his arms.

On the issue of the extent of permanent disability and/or the extent of disability, the Commission (and Circuit Court) erred. The Commission's Order, as affirmed by the Circuit Court, was conflicting both in findings of fact and how it applied those findings to the applicable law. Mixon will therefore reference in this brief the findings and Order of the Full Commission. Mixon contends that **the Full Commission initially did not apply the correct test to the facts.** Further, some findings made by the Commission on this issue were not supported by the substantial evidence; although other findings were supported by the substantial evidence and just misapplied. The result was both a misapprehension of the applicable law by the Commission (and Circuit Court) and a result that was arbitrary, capricious, not supported by substantial evidence, and contrary to law. As there were no disputed facts on the issue, it should be considered by this Court *de novo.* *ABC Mfg. Corp v. Doyle,* No. 97-CT-01376-SCT at (P10), 749 So. 2d 43, 45 (Miss. 1999).

The Commission correctly cited as authority *Meridian Baseball* and *Weatherspoon,* infra. Mixon argues that the Commission just failed to properly apply them to the facts of this case.

As in *Meridian Professional Baseball Club v. Jensen*, No. 1999-CT-02093-SCT, 828 So. 2d 740 (Miss. 2002), this is a "permanent-loss, scheduled-member workers' compensation case".

> "This Court has determined through a long line of cases that **maximum scheduled benefits should be awarded where the injury prevents the worker from performing the 'substantial acts of his usual employment'.** In other words, the worker was found to have suffered a **total occupational loss of a member** if a partial functional loss resulted in inability to perform the substantial acts of his usual employment (citations omitted)". *Id.* at (P16), (emphasis added)

Further, the Court held that the job at the time of injury was not necessarily "usual employment" but that a presumption of total occupational loss of the scheduled member arose when the claimant was unable, because of the injury, to return to the job held at the time of injury. **Further, and seemingly ignored by the Commission (and Circuit Court), was that rebuttal of the presumption was proof that claimant was able to "earn the same wages" after, as prior, to the injury i.e. have no loss of wage earning capacity.** *Id.* at (P 21).

> "Therefore, where a permanent partial disability renders a worker unable to continue in the position held at the time of injury, we hold that such inability creates a rebuttable presumption of total occupational loss of the member, subject to other proof of the claimant's **ability to earn THE SAME wages** (emphasis added) which the claimant was receiving at the time of injury. The presumption arises when the claimant establishes that he has made a reasonable effort but his 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. Rebuttal is shown by all the evidence concerning wage-earning capacity, including education and training which the claimant has had, his age, continuance of pain and any other related circumstances. We find support for his holding in the same cases which created the substantial acts doctrine and which indicate that the ultimate determination must be made from the evidence as a whole, considering loss of wage-earning capacity. *See, e.g., **McGowan**, 586 So. 2d at 167.* *Id.* at (P 21) . . .
>
> Application of this opinion's analysis to Jensen's claim indicates that he established, or very nearly established, that he could no longer perform the substantial acts of his actual employment at the time of his injury. **But Jensen's claim for benefits for total occupational loss of his arm must fail,** on these facts, **because** of the Commission's finding, supported by substantial

> evidence, that Jensen suffered only a 25% occupational loss of use of the arm. That finding is supported by Jensen's work history, including his youth, his education, and the jobs held after his injury, which together **demonstrated no loss of wage-earning capacity**."
> *Id.* at (P25) (emphasis added).

Jensen's claim for total occupational loss of use of his arm was found to fail because he had not demonstrated a loss of wage earning capacity i.e. he was found to be able to earn "the same wages" (or more) after the accident as he was earning at the time of his accident. In fact, Jensen was earning MORE in wages at the time of his workers' compensation hearing while continuing also with his further education (in fact, earning 70% more than his average weekly wage at the time of injury). Nevertheless, with no loss of wage earning capacity found and with a 7% medical impairment to his left arm, Jensen was awarded 25% occupational loss of use of the arm. Per the Court, had Jensen demonstrated a loss of wage earning capacity due to his injury, i.e. demonstrated that he was no longer able to earn the same wages as he had been earning at the time of injury, he would have been entitled to 100% scheduled member benefits i.e. "maximum scheduled benefits", even though he may have at the same time still been able to work in some capacity at another type job, and perform work with his injured arm.

Meridian Baseball (sometimes also referred to by the Courts as *Jensen*) also addressed what has sometimes caused an inordinate amount of confusion on this issue and possibly some inconsistent application, that being a confusion of terms used in describing the type of benefits claimed and/or applicable. The Court attempted to clarify some terms. Per that decision, *Meridian Baseball* was not a case concerned with "total loss" (such as an amputation), nor a "total loss of use" (such as a paralyzed arm), but was a claim for the maximum benefit available for a "permanent loss – scheduled member" case and it also referred to the claim of Jensen as one for "total occupational loss" of his arm. *Id.* at (P12), (P21),(P25). *Meridian Baseball* also

framed the issue as "the amount of workers' compensation benefits due an employee for partial loss of use of his arm". *Id.* at (P1). That is also the claim of Mr. Mixon, except that his is a bilateral injury claim, involving injury and loss to both arms, and therefore a further claim under § 71-3-17 (a) for (total) occupational loss of use of both arms.

Shortly after *Meridian Baseball,* the Supreme Court addressed the issue again in *Brenda Weatherspoon v. Croft Metals*, No. 2000-CT-01411-SCT, 853 So. 2d 776 (Miss. 2003). There, the focus was again on the proper analysis of "usual employment" and whether that analysis should be made with regard only to the claimant's job at the time of injury or whether "usual employment" held a broader meaning. The *Weatherspoon* court also reaffirmed the principle that maximum scheduled benefits should be awarded where the injury prevents the worker from performing the "substantial acts" of his "usual employment." *Id.* at (P9), The Court also restated that after the presumption of total occupational loss arose, rebuttal could be shown by proof of claimant's ability to earn *the same wages* that claimant was receiving at the time of the injury. *Id.* at (P12). Weatherspoon's claim for 100% impairment to her upper extremities failed primarily because the Commission found on the evidence that although she could not return to the job she had held at the time of injury, she had been less than diligent in pursuing other work and had failed to prove that she had **any** industrial disability that exceeded her medical disability. *Id.* at (P13).

Through *Meridian Baseball* and *Weatherspoon,* we are left with a test to be applied here which is at least the following: that for permanent loss- scheduled member cases (which is the instant case), "where a permanent partial disability renders a worker unable to continue in the position held at the time of injury (or the ability to perform the substantial acts of claimant's usual employment), there is a rebuttable presumption of total occupational loss of use of the

scheduled member subject to other proof of the claimant's ability to earn the same wages which the claimant was receiving at the time of the injury".

This has been so recognized and previously applied by this Court in various cases. Such cases include *McDonald v. I.C. Isaacs Newton Co.*, No. 2002-WC-02084-COA, 879 So. 2d 486 (Miss. App. 2004), wherein this Court held the following:

> "In the case at bar, the Commission found that the substantial evidence supported that McDonald suffered a permanent partial disability to each of her arms which rendered her unable to continue in the position she held at the time of her injury. On the basis of *Meridian Baseball* such inability created a rebuttable presumption of total occupational loss of the members, subject to other proof of the claimant's ability to earn the same wages which the claimant was receiving at the time of injury. *Id.* at 747 (P 21). The question this Court must answer is whether the Newton Company successfully rebutted the presumption of total occupational loss of the members with proof of McDonald's ability to earn the same wages which she was receiving at the time of injury" *Id.* at (P 16). . .
>
> "The dissent concedes that under the holding of *Meridian Baseball* the presumption arose that McDonald could no longer work at the position she held when she was injured. It claims, however, that the presumption was overcome by evidence that there were other positions available for which McDonald was suitable; therefore, this Court should affirm the Commission's decision. As stated previously in this opinion, the rebuttable presumption of total occupational loss of members created by *Meridian Baseball* must be overcome by proof of the claimant's ability to *earn the same wages* which the claimant was receiving at the time of injury. Neither the Commission, nor the Newton Company, nor the dissenting opinion offered any proof of that. In the absence of any proof that McDonald has the ability to earn the same wages that she was receiving at the time of her injury, she is entitled to permanent and total disability compensation." *Id.* at (P 23).

And, more recently, on January 1, 2010 our Supreme Court affirmed an award of 100% occupational loss to the arm made by the Commission to claimant, Martha Lott in *Lott v. Hudspeth Center,* No. 2007-CT-01525-SCT (Miss. 2010). The only issue in that case was whether Ms. Lott had proved an entitlement to receive benefits beyond the schedule for permanent total disability under the Act, i.e. beyond those for the conceded 100% total

occupational use of the arm, awarded to her by the Commission. Although the Supreme Court found that Lott was not entitled in that case to benefits beyond the schedule, they did affirm the Commission's award of 100% total occupational loss to her arm as a result of her injury. *Id.* at (P8, 9), (P24). Lott sustained a rotator cuff tear to her right shoulder/ arm as a result of lifting a patient from a wheelchair. Prior to her surgery for the injury, her employment was terminated by her employer. She was released without any restrictions by her initial treating physician with a 10% permanent medical impairment to her arm. One functional capacity assessment found she was capable of only sedentary work, and a second found she was able to work with a lifting restriction of 60 pounds. Lott's search for further employment did not produce a further job. The Commission, however, found that Lott retained significant functional abilities and thus retained "some earning capacity" and therefore she did not qualify for permanent total disability benefits based on a claim for total loss of wage earning capacity due to her injury. The Supreme Court agreed that her failed job search did not all stem from matters relating to her injury and that Lott was restricted in finding other work by other factors having nothing to do with her injury. They did agree that the facts warranted benefits for 100% total occupational use of her arm, even though she was found able to return to work by her physicians in some capacity, and work with her injured arm.

The facts of the case at bar case, without contradiction, demonstrated that Mixon was not able to return to his employment with Greywolf after the injury i.e. the job held at the time of injury. The Full Commission agreed. Mixon was further unable to return to any employment in the oil field industry or any of his previous jobs constituting **his "usual employment"** i.e. **the jobs he had held for at least the previous 20 years, and which all involved very heavy or heavy manual labor.** The Commission essentially agreed, but failed to address in their Order the

operative term "usual employment" or what constituted the "substantial acts" of his usual employment.

Regardless, the undisputed facts also unquestionably established that Mixon had in fact sustained a significant loss (although not total) of wage earning capacity as a result of his injury with Greywolf, and there was no proof offered that Mixon could EARN THE SAME WAGES after the injury as he was earning at the time of the injury, thus the Commission could have never made a sustainable finding that he could, and their opinion could not be so interpreted. Mixon is thus entitled to 100% total occupational loss to each of his permanently injured arms, per *Meridian Baseball, Weatherspoon,* and consistent with the award in *Lott.*

For clarification, Mixon has never contended that the injury(ies) resulted in his "total disability" from all gainful employment nor that he has a total loss of wage earning capacity as a result of his injuries. **Mixon has contended that he is neither able to return to his pre-accident job with Greywolf** (as confirmed by the medical testimony, as confirmed by Greywolf in their termination of him after the accident and their failure to rehire him in any capacity thereafter, Greywolf's failure to offer any proof to rebut the restrictions or physical limitations assessed by his physicians or to rebut the documentary evidence that their own company-published job descriptions required substantially more physical capabilities than Mixon had after his injuries), **nor return to the substantial acts of any of his pre-accident jobs with which he had some prior experience** i.e those jobs which could be considered his "usual employment" (which all required, per Mixon's undisputed testimony, heavy lifting and other heavy physical manual labor which exceeded the physical restrictions assessed by Mixon's physicians after his injury); and **is unable, due to his injuries, to return to work earning the same wages as at the time of injury,** as demonstrated by all the evidence of Mixon's wages in his return to work for

several years after being released by his physicians, and in Greywolf's failure to offer any evidence to say that he could earn the same wages as he was earning at the time of injury. These facts together entitle him to the maximum benefit under the schedule (i.e. 200 weeks for each injured arm) for permanent loss- i.e. occupational loss- to his injured arms, regardless of whether he can work at all in work for which he may have some aptitude, but which does not constitute his former "usual employment" nor pay him wages at least equal to that he was earning when injured.

Additionally, as this is a bilateral scheduled member disability case, Mixon argues that per Miss. Code Ann. §71-3-17 (a), he is entitled to receive permanent total disability benefits totaling 450 weeks (vs. 400 weeks or 200 weeks for each arm). See *Union Camp v. Hall*, No. 2005-WC-01528-COA, 955 So. 2d 363 (Miss. App. 2006) at (P 60), "*Hall presented a bilateral injury claim. Hall's evidence created a presumption of occupational loss of use of* both *her knees. . . loss of use of two major scheduled members automatically gives rise to permanent total disability and the 450 weeks of benefits.* " See also, *McDonald*, supra at (P 24), "*This Court finds that McDonald . . . . is entitled to compensation pursuant to Mississippi Code Annotated Section 71-3-17 (a).*"

Having made his argument for what he considers the applicable and correct benefits for his injury, Mixon asks in the alternative, only, that if this Court does not choose to accept that Mixon is correct about the holdings of *Meridian Baseball, Weatherspoon,* and *McDonald,* supra, and accept that he is entitled to maximum available benefits for total industrial loss of use of each of his arms, then and only then Mixon submits that at a minimum, the substantial weight of the evidence supports that Mixon's loss of wage earning capacity and industrial loss of use to his upper extremities far exceeds that found by the Commission in its award of only 25% permanent

impairment to each of his arms and justifies at a minimum, if not more, the 70% permanent impairment assessment to each arm found by the Administrative Judge. Mixon asks that this Court in the alternative modify his award of permanent disability benefits to reflect at least the 70% to each arm as recommended and awarded by the Administrative Judge.

C. FINDINGS OF AND THE INCORRECT TEST USED BY THE COMMISSION

The Commission cited as controlling authority *Meridian Baseball* and *Weatherspoon* and looked to factors for determining "industrial loss of use" as set forth on page 4 of their opinion. However, Mixon submits that the correct test as set forth in *Meridian Baseball,* (as set forth above) was never mentioned nor used. The Full Commission never mentioned nor evaluated Mixon on the basis of the "substantial acts of his prior usual employment" nor did they make any finding that Mixon could still earn the same wages as prior to the injury, as there was no evidence to that effect introduced. The Full Commission totally ignored the correct test to be applied, the presumption of total occupational loss, and whether Mixon's injury(ies) prevented him from earning "the same wages" in his employment, post injury, as those he was earning at the time of injury with Greywolf. Mixon submits that it must be determined, regardless of whether Mixon can return to work in any capacity after his injury(ies), whether his injury(ies) prevent(s) him from also earning THE SAME WAGES in his post injury employment as those being earned at the time of injury. The Commission's analysis and application of the facts merely resulted in a finding that although Mixon's injuries prevented him from returning to work in the job held at the time of injury nor any heavy manual labor, he still retained some earning capacity, not that he was able to "earn the same wages" as being earned at the time of injury. If the injury prevents the claimant from earning "the same wages" i.e. have some loss of wage earning capacity, then Mixon is entitled, per *Meridian Baseball*, to receive 100% industrial loss of each of his injured arms, and the Commission and this Court need go no further, except to assess that his loss is to both arms and therefore constitutes, by statute, an entitlement to 450 weeks versus 400 weeks of (permanent) disability benefits under the Act.

Mixon submits that if the claimant can earn, with injury, at least that being earned at the time of injury, then the factors cited by the Commission can be used, per *Meridian Baseball*, to assess an amount of occupational loss found to exceed the medical impairment rating given by the physician but constituting less than the maximum scheduled benefit (100% occupational loss of use) due as a result of not being able to "earn the same wages" but still having some enhanced "occupational loss", as the Court found applicable in the award to Jensen in *Meridian Baseball.*

Although this issue is a matter of law on undisputed evidence, and the issues raised by Mixon *de novo* before this Court, and although the Commission did not, in Mixon's assessment, use the correct test for determining the extent of his disability nor make specific findings in accord therewith, they did make some findings, that when examined, substantially support Mixon's argument here that his injuries prevent him from both returning to the substantial acts of his prior "usual" employment and that he cannot earn "the same wages" after, as before, the accident, or at least that there was no proof offered that he could. On page 5 of their opinion, the Commission found:

> **"There is no question but 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.** Nonetheless, he is currently employed, and has been actively employed on a full time basis, despite his injuries, in the same job since July 2004. The claimant further admits that, by 2006, he was already earning more than 2/3 of his pre-injury wages. While his **current job is less physically demanding** than many of his previous jobs, the Claimant testified that he is nonetheless, "valuable on that vessel for the work that I do...
>
> In our opinion, based on the evidence as a whole, **the Claimant clearly has demonstrated that the injuries to his left and right upper extremities have caused him to lose some use of those members for wage earning purposes which is greater than the medical impairments alone.** Just as clearly, however, **this loss is not total because he has returned to work** on a full time basis performing work for which he is qualified by training and experience and work which still **requires the use of his arms to some degree...** and for this work he **earns more than 2/3 of the wages he**

> **earned prior to his injury**. Based on the evidence as a whole, we find the Claimant has suffered a 25% loss of use of each arm for wage earning purposes, and is entitled to permanent disability benefits accordingly. This equates to benefits... for a total of 100 weeks, beginning August 24, 2004. . ." [R.E. 3, p.5, 6]

Let us examine what these findings by the Commission actually mean in light of *Meridian Baseball* and *Weatherspoon*:

1. The Commission found that due to his injuries Mixon could not return to the job he held with Greywolf at the time of the injury nor any of the heavier manual labor pursuits for which he was qualified by training and past experience (i.e. undoubtedly in light of the undisputed evidence, the substantial acts of his usual employment). This finding also set up the rebuttable presumption of total occupational loss of use of each arm, subject to other proof that Mixon could "earn the same wages" after the accident as he was earning at the time of the accident. That presumption was never rebutted because there was no evidence introduced on which the Commission could rely to find that Mixon was in fact able to earn "the same wages" after as at the time of injury. All evidence on the subject was to the contrary, and substantially to the contrary.
2. The Commission found that the injuries to the left and right upper extremities have caused Mixon to sustain a loss of use for wage earning purposes (i.e. "industrial or occupational" loss of use) that exceeds the medical impairments alone, but also results in an inability to earn the same wages i.e. loss of wage earning capacity (i.e. they found he had **sustained a loss for wage earning purposes** and that he **earned post injury only 2/3 of the wages he was earning at the time of the injury).** [Actually, Mixon takes issue with the latter finding of what appears to be merely a loss of 1/3 of his pre-accident wage earning capacity; however, this will be addressed further later in

the brief. This finding by the Commission was also not based on the evidence as a whole, but was undoubtably taken out of context and did not also consider the undisputed testimony and evidence of Mixon of his further diminished wage earning capacity in the "open" labor market (merely $7.00/ $8.00 per hour) and the fact that Mixon was having to work twice as many weeks a year as compared those he worked with Greywolf to earn what he earned there, work overtime hours beyond the bounds of that prescribed in restrictions by his physicians, estimated that he had lost approximately $20,000.00 per year over that he would be able to earn if still able to work as a floorhand in the oilfield (testimony that was unrebutted by Greywolf), and further that the Commission was comparing pre and post accident wages several years apart, the latter of which are presumably further diminished in true value by inflation, as well as the wage increases to which Mixon testified).

Under *Meridian Baseball,* the findings of the Commission, although inartfully drawn, should nevertheless entitle Mixon to maximum scheduled member benefits for each of his arms i.e. 200 weeks for each arm, not the 25% or 50 weeks for each arm (100 weeks total) awarded by the Commission.

The Commission's finding that Mixon's "loss" was not "total" because he had returned to work full-time with some use of his injured arms is an error of law. It is further not probative nor dispositive of whether Mixon is able to return to the "substantial acts of his usual employment", and/or whether he is able to "EARN THE SAME WAGES" in the subsequent employment, regardless of whether he is qualified by training and/or experience and/or transferrable skills. Jobs for which Mixon might qualify by "training and experience", even if available, are not necessarily the same as Mixon's "usual employment". The Commission further

omitted any reference to an evaluation of the "substantial acts" requirement, other than their finding that he was precluded from returning to any of the heavier manual labor pursuits for which he was qualified by training and experience, such as the work being performed when injured. The undisputed evidence showed that prior to the accident with Greywolf, Mixon **had never worked** in the type of job he acquired post injury with USM. His post-injury job with USM on the *Tommy Monroe* could not under any reasonable evaluation be considered his "usual employment" as he had never done it prior to his injury with Greywolf and the "substantial acts" required of that job do not in any manner equate to the "substantial acts" of his pre-injury jobs. Prior to the accident Mixon had not only been physically able to perform work classified as very heavy and heavy manual labor but that was the type of work he did. The ability to perform very heavy and heavy manual labor constituted the very basis of the "substantial acts" necessary to perform any of the jobs that constituted his prior "usual employment", whether that employment happened to be in the oilfield, as a seasonal deck hand on sports fishing vessels, in construction, a water well driller, or any other. Without the ability to engage in heavy and very heavy physical manual labor, he could have not held any of the pre-accident jobs he had held for at least 20 years before his injury with Greywolf. That was the evidence. It was undisputed. Therefore, under any reasonable interpretation thereof, such constituted the "substantial acts of his prior usual employment".

As the Court in *Meridian Baseball,* supra, cited with approval *McGowan v. Orleans Furniture*, 586 So. 2d 163,168 (Miss. 1991) to determine what constitutes "substantial acts", let us review *McGowan.* There, claimant worked at the furniture plant before his injury. He worked at various jobs there and was not assigned a particular job. He filled in for others around the plant. He injured his ankle when a pallet fell on his leg. He had a ligament reconstruction and a

subsequent tissue removal and a 40% permanent impairment assigned to his left leg by his physician. He was thereafter limited in climbing, standing for long periods, and carrying over 20-25 pounds. The Commission found him entitled to 40% loss of the leg. As in the Mixon case now before this Court, the only testimony was that of McGowan and his physician. McGowan was 43 years old with a 10th grade education. He had worked in construction and had done carpentry work. He also delivered furniture at one point. After his injury, he could do some of the jobs he had previously performed at the furniture factory (i.e. could sand edges and use a table saw), but could not stand for long periods. He could also no longer do carpentry work. His doctor said he could work in sedentary type positions where he could sit to do the work. The *McGowan* Court found:

> "The whole of this evidence indicates that McGowan is certainly limited in the jobs he will be able to perform in the future. The jobs which he has performed in the past, such as construction and carpentry work and delivering furniture, will no longer be alternatives. McGowan will be forced to look for jobs that allow him to sit down and with his limited education and training, such jobs will be difficult to find.
>
> McGowan has not attempted to return to work nor does he offer testimony from anyone else as to the effect his injury has had on his ability to perform his work. McGowan says that he can operate a table saw. However, operation of those tools is not proof that he can perform the substantial acts required of him in the performance of his job. McGowan was employed by Orleans Furniture to fill in wherever needed. In that capacity, McGowan was required to do more than operate a sander and table saw.
>
> The evidence as a whole indicates that the finding of the Commission that McGowan suffered only a 40% industrial loss of this leg was not supported by substantial evidence. The testimony of Dr. Conn together with McGowan's testimony supports a finding of 100% industrial loss of use of his left leg, a scheduled member. Since the holding of the Commission on this issue is clearly erroneous and contrary to the overwhelming weight of the evidence, we reverse. . .and hold that McGowan has suffered a 100% industrial loss of use of his leg."

McGowan also cited with approval a passage from *Vardaman Dunn* on the issue:

> "...a partial loss of use may result in total disability, and to reach this result it is not necessary that the employee be wholly incapacitated to perform any duty incident to his usual employment or business". *McGowan, supra,* at pg. 166.

This Court likewise found in *McDonald*, supra, that claimant was entitled to permanent total disability under § 71-3-17 (a) of the Code for bilateral total occupational loss of use of her arms. She had been a seamstress when injured. She was unable to return to the job she held at the time of injury nor any other with that employer. All of her prior jobs were assembly line/ production type jobs from which her injury prevented her return. She did hold a part-time job as a church custodian at the time of the hearing that paid far less than what she earned in her previous job. The fact that McDonald was working in some capacity (as a custodian) and obviously working with her injured arms at the time of hearing did not rebut the presumption of total occupational loss of use of her arms, nor did it seem to qualify as the "substantial acts of her usual employment". The employer's argument that she had transferrable skills did not, per the Court, rebut the presumption of total occupational loss of the arms. Per this Court, there was no evidence offered that claimant possessed the ability to earn the same wages as prior to the injury and that was held critical to rebuttal of the presumption of total occupational loss of use.

The Commission clearly erred as a matter of law. They found that because Mixon was able to work (at all) and work with some use of his arms, his occupational loss to the arms was not "total". They were wrong as a matter of law. The test to be used is not the test used by the Commission. The test is whether the injury prevents one from performing the "substantial acts" of the former usual employment, [and whether the employee is able to earn post injury "the same wages" as prior to the injury] not whether one can work at all or work in another type of job at some level with any portion or part of the injured member and at a lesser rate of pay. If one cannot work at all, the injury results in total permanent disability under § 71-3-17 (a) of the Act

(i.e. a different part of that statute than that under which Mixon claims for his bilateral injuries), providing benefits greater than those more limited benefits in the schedule i.e. maximum benefits under the Act, not maximum benefits under the schedule. *Smith v. Jackson,* 607 So. 2d 1119 (Miss. 1992).

As found by the Administrative Judge in her Order (which accurately reflects the undisputed evidence) and speaks to Mixon's post-accident job with USM on the *Tommy Monroe*:

> "Claimant testified that, unlike regular deck-hand jobs" (to which Mixon had some prior experience) "this job was essentially a supervisory position requiring expertise, not muscle. He also testified that the anchor and nets were equipped with wenches that he operated by pushing buttons, and that he was allowed to delegate the physically strenuous tasks to others because his primary value to the employer was his knowledge of the boat. . . . if he lost his job on the *Tommy Monroe*, his value on the open labor market would be a fraction of his current salary because he cannot perform any of his past jobs under his current restrictions. He also testified he cannot work on any other boat because he cannot throw ropes in rough seas, lift heavy fish, or lift any heavy objects above shoulder level. . . . he estimated that he could not earn more than $7.00 or $8.00 an hour on the open labor market because he is 50 years old, he is "damaged goods," and he is just "one more accident away from total disability". . . he testified he makes less money now than he earned seven years ago as a floor hand, and that, if he were still employed in the oil field industry he would make $20,000 more a year than he currently earns. . particularly considering wage increases and the rise in crude oil prices. " [R.E.4, pgs. 8, 9]

This was the undisputed evidence. The Employer and Carrier offered nothing in rebuttal. They knew there was nothing they could offer to rebut these facts. Clearly, Mixon is actually a $7.00 or $8.00 an hour employee in the open labor market. In his job with USM, he is in a very unique job that is not replaceable were he to lose it. There is no other ship like it in the area of Mississippi. There are very few in the entire country. Mixon knew of only 2 and they were much larger ships. His ship and its availability in this area to him to provide some form of employment is unique in this instance. The diminishment of his "capacity" far exceeds that represented by the wages in his current job on the *Tommy Monroe,* which without further adjustment for actual

capacity in the open labor market alone, demonstrates a significant loss of capacity from that earned at the time of injury (regardless of whether viewed in the light of the average weekly wage determined by the Administrative Judge or more than half of that as found by the Commission). The Administrative Judge came closest to awarding what Mixon contends are the correct benefits, but the Full Commission, although correct in its finding of compensability for this work related injury, and in its award of medical treatment therefore, and in awarding benefits in the initial instance for his disability was just in error on the amount of the award and in its own application of rulings from our Courts on how to evaluate and consider what is in this case undisputed evidence relating to the extent of disability.

The Administrative Judge correctly appreciated that the undisputed evidence reflected that Mixon has been able to find a very special and unique job (which the Administrative Judge correctly found was "modified if not sheltered employment"). [R.E. 4, pg.29] The Administrative Judge correctly found that Mixon was a "heavy manual laborer" and that he had post injury an "incapacity to perform the vast majority of the substantial acts of his former occupation as a heavy manual laborer", a finding with which the Full Commission agreed. Mixon did not return to nor did he have the capacity to return to the substantial acts of his former "usual employment". Mixon instead had some "transferrable skills" that allowed him to find "other work", but that "other work" did not constitute his "usual employment" and thus the Commission erred as a matter of law in mis-apprehending and mis-applying the law to the undisputed facts of this case to determine whether his loss was "total" or a "partial" "occupational loss" to the scheduled members (arms).

Mixon now uses his arms to punch buttons to operate wenches that do the heavy manual labor he used to do, and instructs others to do other of the physical manual labor he used to be

able to do, but now cannot, and he uses his mind and knowledge of the sea and some knowledge of motors to perform his current work—and he works twice as many weeks of the year as before his injury and works substantial overtime hours that exceed the medical restrictions of 40 hours per week imposed by his physicians **(and with all of that still cannot earn or even approach earning some 7 years later THE SAME WAGES he was able to earn at the time of his accident)** –all in an effort to be and remain employed in a unique and "sheltered" type job with a different employer, but none of that involves being able to perform nor performing the "substantial acts" of his prior "usual" employment nor the ability to "earn the same wages" as before his accident.

D. AVERAGE WEEKLY WAGE

Claimant's average weekly wage is governed by § 71-3-31 of the Act, which states:

> "Except as otherwise specifically provided, the basis for compensation under this chapter shall be the average weekly wages earned by the employee at the time of the injury, such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two; but if the injured employee lost more than seven days during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. When the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided that results just and fair to both parties will thereby be obtained. Where, by reason of the shortness of time during which the employee has been in the employment of his employer, it is impracticable to compute the average weekly wages by the above, method of computation, regard shall be had to the average weekly amount which during the first fifty-two (52) weeks, prior to the injury or death, was being earned by a person in the same grade, employed at the same or similar work in the community. Wherever allowances of any character are made to an employee in lieu of wages or specified as part of the wage contract, they shall be deemed a part of his earnings."

Mixon asserts that the correct average weekly wage at the time of his injury was that found by the Administrative Judge i.e. $1,290.00 per week, not less than half of that or the $607.88 per week as found by the Commission. The crux of the issue is whether calculation of claimant's "average weekly wage" at the time of injury should include weeks that claimant did not actually work. The Commission cited no authorities in support of its determination that the calculation should include weeks that claimant did not actually work. Contrarily, Mixon asserts that the weeks during which he did not actually work should be deducted from the computation, thus resulting in the computation made by the Administrative Judge. Mixon was hired to work 7 days on followed by 7 days off. He was paid only for the weeks he actually worked. He was not

on salary and had no duties for the employer during his scheduled "off" weeks. He did not "earn wages" during his "off weeks".

A similar situation was addressed in *Dependants of Harris v. Suggs*, 102 So. 2d 696 (Miss. 1958), and Mixon argues that such controls here. There, claimant was hired on an eight hour per day 5 day week at $1.00 per hour. He was a logger. He was not paid when he did not work. During the 52 weeks prior to his death, he lost 66 days from work. For four weeks during this period he did no work and drew no wages. Some of the days lost were of his own volition, but others were due to rain, breakdowns in the mill, oversupply of logs, etc. The Supreme Court found that the correct method of calculation was to deduct not only the four weeks during which he did no work and received no wages, but to deduct all days lost (66), divide those into weeks i.e. by 5 days in his work week, and deduct that number of lost weeks i.e. 13.2 from the 52 weeks in the year, thus dividing his gross earnings by 38.8, i.e. the weeks he actually worked, not the 52 weeks immediately preceding the injury.

By analogy, Mixon argues that the weeks that he did not actually work should also be deducted from the weeks that he was actually employed before the injury by Greywolf, and the average weekly wage calculated using only those weeks that he actually did work and for which he was actually paid for work he performed. Per *Harris*, supra, the Administrative Judge was imminently correct in finding the correct average weekly wage at the time of injury to be $1,290.00, and the Commission erred in its determination and should be reversed and the calculation of the Administrative Judge reinstated. For reference, the Court may look to Exhibit CL-10 of the Record which is a computer print-out from Greywolf of it's payments to Mixon, in his prior work with them (1998) and in the period of his second employment during which the

injury occurred (2001). It shows the first week as a partial week ($ 624.00 for period ending 2-27-01 i.e. he was hired on 2-22-01, R. Exhibit CL-9). He was paid thereafter the following:

1) $1,290.00 for the week ending 3-13-01;
2) $1,290.00 for the week ending 3-27-01;
3) $1,290.00 for the week ending 4-10-01;
4) $1,290.00 for the week ending 4-24-01;
5) $1,290.00 for the week ending 5-8-01;
6) $1,362.00 for the week ending 5-22-01;
7) $1,290.00 for the week ending 6-5-01.

Mixon would also point out that even with its computation, the Commission erred further by its own method as it had him charged with becoming hired on February 13, 2001 versus February 22, 2001 (see R. Exhibit CL-9 pg. 3, Mixon's personnel file documents with Greywolf for confirmation of the correct date of hire), and failed to take into account that he only worked part of his first week of hire, and thus diluted his average weekly wage further than it would have been otherwise by the formula they used. However, it is not the correct formula and must be disregarded in any event.

E. ADDITION OF LIBERTY MUTUAL

For the reason that Liberty Mutual Insurance Company has entered an appearance with this Court as a party of record by its Notice of Cross Appeal in conjunction with Employers Insurance of Wausau, their appearance should be noted and so added as an additional party carrier for Greywolf in this cause. Mixon raises the issue only as a precaution and procedural matter as Liberty Mutual Insurance Company was not a party before the Commission, but was listed as a party (i.e. the Carrier) in the Order of the Circuit Court, apparently by virtue of its having filed a notice of Cross appeal to the Circuit Court along with Greywolf and apparently having substituting itself, without Order, as the party carrier for Greywolf before the Circuit Court in lieu of Employers Insurance Company of Wausau. Mixon notes there has been no request for nor authorization to date for substitution of parties. On the Employer and Carrier's Notice of Cross appeal to this Court, both companies were listed, in addition to Greywolf. Mixon merely asks the Court to add Liberty Mutual as a joint party carrier for any order judgment this Court may render.

CONCLUSION

For the reasons set forth above, 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. 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 asks this Court to find that his correct average weekly wage at the time of the injury was that awarded by the Administrative Judge, i.e. $1,290.00 per week, and 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 11th day of February, 2010.

Respectfully submitted,

KENNETH MIXON,
Appellant and Cross –Appellee

BY: Patricia Eve Gable
Patricia Eve Gable (MSB [redacted]
Attorney for Appellant/ Cross-Appellee

Of Counsel:
Bryan Nelson P.A.
Post Office Box 18109
Hattiesburg, MS 39404-8109

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 Brief of Appellant;

2) A copy of said Brief on electronic disk; and

3) Four (4) copies of Appellants Record Excerpts,

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 Express Mail. True and correct copies of the aforesaid 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:

John S. Gonzalez, Esq.
Daniel Coker Horton & Bell
1712 15th Street Suite 400
Post Office Box 416
Gulfport, MS 39502-0416
Counsel for Appellees/ Cross-Appellants

Mississippi Workers' Compensation Commission
Post Office Box 5300
Jackson, MS 39296-5300

Dated, this the 11th day of February, 2010.

Patricia Eve Gable