IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

MICHAEL KUKOR — APPELLANT

VS. — NO. 2010-WC-01280-COA

NORTHEAST TREE SERVICE, INC. AND LIBERTY MUTUAL INSURANCE COMPANY — APPELLEES

AND

JAY'S SERVICE COMPANY AND FIRST COMP INSURANCE COMPANY — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES NORTHEAST TREE SERVICE, INC. AND LIBERTY MUTUAL INSURANCE COMPANY

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COMPANY — APPELLEES

AND

JAY'S SERVICE COMPANY AND
FIRST COMP INSURANCE COMPANY
MUTUAL INSURANCE COMPANY — APPELLEES

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 Circuit Court Judge may evaluate possible disqualification or recusal.

1. Michael A. Kukor, *Appellant*;

2. Northeast Tree Services, LLC, *Appellee*;

3. Liberty Mutual Insurance Company, *Appellee*;

4. Honorable Liles Williams, *Chairman*
   Honorable John R. Junkin, *Commissioner*
   Mississippi Workers' Compensation Commission
   1428 Lakeland Drive
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   Jackson, MS 39296-5300

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THIS, the 21 day of October, 2010.

W. Bienville Skipper, Attorney for Appellees Northeast Tree Service, LLC and Liberty Mutual Insurance Company

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A. WHETHER THE COMMISSION'S FINDING KUKOR WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH NORTHEAST IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

B. WHETHER THE COMMISSION'S FINDING KUKOR SUSTAINED A 75% LOSS OF WAGE EARNING CAPACITY IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

STATEMENT OF THE CASE

This appeal involves a review of the Order of the Mississippi Workers' Compensation Commission ("Commission"), which found Northeast Tree Service ("Northeast") and its workers' compensation carrier, Liberty Mutual Insurance Company ("Liberty Mutual"), liable to Appellant for temporary total disability benefits from May 20, 2003, through March 5, 2004, and permanent partial disability benefits for a 75% loss of wage earning capacity commencing March 6, 2004. The Commission also determined claimant's average weekly wage was $221.24[1]. The Claimant appealed to the Circuit Court of Madison County which affirmed the decision by the Commission. Northeast and Liberty Mutual submit the Commission's decisions are supported by substantial evidence and should be affirmed by this Court.

A. Nature of the Case and Course of Proceedings

This particular appeal arises out of injuries sustained while Michael A. Kukor ("Kukor"), was employed as a tree trimmer for Northeast. As a consequence of his injuries, Kukor claims to have sustained a permanent disability.

Following a hearing on the merits, the Administrative Judge entered an order on June 26, 2006, finding that Northeast and its carrier, Liberty Mutual, and Jay's Service Company ("Jay's") and its carrier, First Comp Insurance Company ("First Comp"), should jointly and severally pay and provide permanent and total disability benefits to Kukor at the rate of $314.03. (R. 26)[2]

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The Employer and Carrier submit that the Commissions determination of the average weekly wage is supported by substantial evidence. However, the claimant did not address the Commission's determination of the claimant's average weekly wage of $221.24 in his brief, therefore it is not an issue on appeal. Claimant states he is only seeking review of the initial issues in the prior appeal.

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Citations to the transcript and Commission record are abbreviated "Tr. __" and "R. __", respectively.

Aggrieved by the Administrative Judge's decision, Northeast and Liberty Mutual and Jay's and First Comp all appealed to the Full Commission. (R. 35). On April 18, 2007, the Commission entered its Order reversing the Order of the Administrative Judge and remanding the claim to the Administrative Judge for a further determination of Kukor's average weekly wage. (R. 42).

On May 16, 2007, Kukor filed his Notice of Appeal to the Circuit Court of Madison County, Mississippi. (R. 55). On September 14, 2007, the Circuit Court of Madison County, Mississippi, entered its Order, affirming the Commission's decision. (R. 57). The claimant attempted an appeal to the Mississippi Court of Appeals, which dismissed his appeal, since the issue of the average weekly wage had not been adjudicated. (R. 60). On February 2, 2009, the administrative law judge issued a ruling on the claimant's average weekly wage, leading the claimant to once again appeal to the Full Commission. (R. 78.). On June 12, 2009, the Commission affirmed the Administrative Law Judge's February 2, 2009 order. (R. 98). On or about June 24, 2009, the claimant filed his Notice of Appeal to the Madison County Circuit Court. (R. 99). The Madison County Circuit Court affirmed the decision by the Mississippi Workers' Compensation Commission. Claimant has now appealed to the Mississippi Supreme Court.

B. Statement of Relevant Facts

On or about March 20, 2003, Kukor sustained injuries to his back and right and left arms during the course and scope of his employment with Northeast when he fell while trimming a tree. (R. 42). Northeast and its workers' compensation carrier, Liberty Mutual, admitted compensability of his injuries and paid indemnity and medical benefits accordingly. (R. 22).

After his fall, Kukor treated at the emergency room and was thereafter referred to Dr. James Ramsey. (R. E. 1; E. 14). Dr. Ramsey diagnosed Kukor with bilateral distal radius

fractures of the right and left upper extremities and performed surgical pinning and fixation of those fractures. (*Id.*) On October 10, 2003, Dr. Ramsey opined Kukor had reached maximum medical improvement and subsequently assigned him a 15% impairment to the right upper extremity and a 18% impairment to the left upper extremity. (*Id.*).

While treating with Dr. Ramsey, Kukor began complaining of lower back pain, and Dr. Ramsey referred him to Dr. John Davis, a neurosurgeon, who diagnosed an old anterior wedge fracture at T11 and an anterior osteophyte at T12. (R.E. 2; E. 1). Dr. Davis did not recommend surgery but referred Kukor to Dr. Rahul Vohra for conservative treatment. (R.E. 1).

On November 3, 2003, Kukor presented to Dr. Vohra, who diagnosed a subtle compression fracture. (R.E. 3; E. 3). Dr. Vohra recommended physical therapy and released Kukor to sedentary duty. (*Id.*). Following an functional capacity examination, Dr. Vohra assigned Kukor a 5% impairment to the body as a whole and restricted him to lifting thirty pounds occasionally and no repetitive bending, twisting or stooping. (*Id.*). Once Kukor was released to return to work, he never returned to work for Northeast. Mr. Jim Albritton ("Albritton") owns both Northeast and Jay's. (R. 42). Although Albritton offered to accommodate Kukor's light duty status, Kukor only returned to work for one day and never discussed his decision with Albritton. (R. 42).

At the hearing before the Administrative Judge, Mr. Pete Mills, a vocational rehabilitation expert, testified on behalf of Northeast and Liberty Mutual. (R. 22 & 42). Mr. Mills opined Kukor remains employable in the light to medium employment categories and that he has acquired certain job skills that will allow him to perform such jobs. (Tr. at 62). Mr. Mills provided three labor market surveys to Kukor. (E. 6). Mr. Mills located available jobs within Kukor's

vocational abilities that would pay $6.00 to $8.00 an hour and even up to $10.00 per hour. (R.E. 5; Tr. at 58-60; E. 6). Although Kukor claimed to have applied for every job Mr. Mills recommended, when Mr. Mills contacted those prospective employers, most did not have any record of Kukor's supposed application. (Tr. at 44; E. 6). Further, Kukor testified he contacted over 118 employers, but did not receive any job offers. (R.E. 4; Tr. at 30). However, Kukor testified that he attached his medical records to his job applications. (R.E. 4; Tr. at 45). Mr. Mills testified that, by attaching medical documents and reports to his applications, Kukor damaged his own chances of finding employment. (R.E. 5; Tr. at 60-61).

Albritton testified at the hearing that he owns two companies, Northeast and Jay's. He testified Northeast provides tree cutting and trimming services whereas Jay's provides debris removal and stump grinding services. (R.E. 7; Tr. at 74). Although the two businesses frequently worked together; often, the businesses provide these services separately. (R.E. 7; Tr. at 74-75). Albritton explained that Northeast employed four or five employees that climb trees. (R.E. 7; Tr. at 77). The sixteen employees that work for Jay's never work for Northeast. (*Id.*).

Albritton utilizes separate payroll companies and separate insurance companies for Northeast and Jay's. (R.E. 7; Tr. at 75). If a Northeast employee works for both Northeast and Jay's within a pay period, that employee receives two separate payroll checks, one from each business. (*Id.*). Further, the payroll companies require separate withholding documents, and Mr. Albritton requires potential employees to complete separate job applications. (*Id.*). Due to recurrent business and word of mouth, Albritton does not advertise for Jay's but has business cards for both Jay's and Northeast. (R.E. 7; Tr. at 84 & 85).

Aside from Albritton separation of the two businesses due to the different services they provide, Albritton also separates the companies due to the cost and availability of workers' compensation insurance. (R.E. 7; Tr. at 76). Due to the dangerous nature of Northeast's employees' work, many insurance companies will not insure Northeast. Therefore, Albritton utilizes an assigned risk pool offered by Liberty Mutual for workers' compensation coverage. (R.E. 7; Tr. at 76-77). For Northeast, Liberty Mutual requires Mr. Albritton to pay a premium of $35 for every $100 in salary paid whereas for Jay's, First Comp requires Albritton to pay a premium of $7 for every $100 in salary paid. (*Id.*).

The Commission, after considering all the facts and evidence, determined, in its role as statutory fact finder, that Kukor's theories of alter-egos, loaned servants and the like were all "red herrings." (R. 42). Looking at all the evidence, the Commission determined Kukor had been injured while working for Northeast, not Jay's. (*Id.*). Further, the Commission found Kukor was not permanently totally disabled, based upon the expert testimony of Mr. Mills and the Kukor's own questionable efforts to secure other employment. (*Id.*) The Commission noted Kukor was only 36 years old at the time of its decision and retained the ability and experience to return to a variety of jobs. (*Id.*). Therefore, the Commission found Kukor's permanent disability is not total, but assessed his loss of wage earning capacity at 75%. (*Id.*).

SUMMARY OF THE ARGUMENT

The parties dispute neither the fact that Kukor was working for Northeast as a tree trimmer at the time of the accident, nor that Kukor had worked for both Northeast and Jay's at various times. However, the evidence is clear the two companies cannot be held jointly and severally liable for one injury. Kukor received separate checks for the work he performed for the different

companies. Further, the Commission relied upon Mr. Mill's and the claimant's own testimony to determine Kukor had a 75% loss of wage earning capacity and actual earning records to determine average weekly wage. Thus, the Commission's decision is supported by substantial evidence and should be affirmed.

ARGUMENT

A. Standard of Review

Time and time again, the Mississippi Supreme Court has reiterated the narrow and limited standard of review in workers' compensation appeals:

> The Workers' Compensation Commission is the trier and finder of facts in a compensation claim, the findings of the Administrative Law Judge to the contrary notwithstanding.
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> * * *
>
> [An appellate court may] reverse the Commission's order only if it finds that order clearly erroneous and contrary to the overwhelming weight of the evidence.

Smith v. Container General Corp., 559 So. 2d 1019, 1021 (Miss.1990) [quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss.1988)]. Thus, despite Kukor's repeated reference to the findings of the Administrative Judge, it is the Commission's decision with which this Court must concern itself, and, as is well-settled, "[t]he Commission is the finder of facts. And if those facts are based on substantial evidence [an appellate court lacks] the power to disturb them, even though that evidence would not convince [the court] were [it] the fact finders." *Olen Burrage Trucking Co. v. Chandler*, 475 So. 2d 437, 439 (Miss. 1985).

Simply stated, in workers' compensation cases, the Mississippi Workers' Compensation Commission is the ultimate finder of fact. *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270, 273

(Miss. 1993); *R.C. Petroleum, Inc. v. Hernandez*, 555 So. 2d 1017, 1021 (Miss. 1990). On appeal to both the Circuit Court and Supreme Court of the State of Mississippi, as to factual matters, the Commission's findings are entitled to great weight and deference. *Natchez Equip. Co.*, 623 So. 2d at 273. As long as the Commission's decision contains no error of law and is based on substantial evidence, both the Circuit Court, sitting as an intermediate appellate court, and the Supreme Court must not disturb the Commission's findings, and the Commission's Order must be affirmed. *Id.; KLLM, Inc. v. Fowler,* 589 So. 2d 670, 675 (Miss. 1991); *Strickland v. M. H. McMath Gin, Inc.* 457 So. 2d 925, 928 (Miss. 1984). An appeals court cannot substitute its judgment for the judgment of the trier of fact on factual questions. See *R. C. Petroleum v. Hernandez*, 555 So. 2d 1017 (Miss. 1990). It is with these standards in mind that the Court must consider the instant case.

B. The Commission's Finding Kukor was in the Course and Scope of His Employment with Northeast is Supported by Substantial Evidence

The Commission found the Administrative Judge erred by finding Northeast and Jay's were "one and the same" in order to justify a more substantial award and instead found the central issue was whether Kukor was in the course and scope of his employment with Northeast or with Jay's at the time of the work accident. The Commission's decision he was in the course and scope of his employment with Northeast is supported by overwhelming and substantial evidence. The parties do not dispute that Kukor was working for Northeast as a tree trimmer at the time of the accident. Instead, Kukor wishes to impute liability to a second company, simply because it is owned by the same individual. The reason he seeks to do so should be apparent: by bringing in a second employer, Kukor wishes to artificially increase his average weekly wage and, thereby, his indemnity benefits.

The Mississippi Workers' Compensation Act "does not provide for contribution between insurance carriers, or for any method by which the Commission may adjust equities between carriers." *Mid-South Packers Inc. v. Hanson*, 178 So. 2d 689, 691 (Miss. 1965). Further, not only does the Act not allow joint and several liability in workers' compensation cases, Mississippi jurisprudence no longer recognizes joint and several liability. Notably, the Administrative Judge cited no authority to support her finding that "[c]laimant really worked for one employer"and that "both Northeast/Liberty and Jay's/First Comp are jointly and severally liable for [c]laimant's workers' compensation injuries." Yet it is that unsupported conclusion Kukor wishes this Court to adopt.

In reversing the Administrative Judge's decision, the Commission correctly found the issue to be whether Kukor was in the course and scope of his employment with Northeast or with Jay's at the time of the work accident. The Commission's decision he was in the course and scope of his employment with Northeast is supported by substantial evidence. Though Albritton owns both companies, he testified each provides different services; Northeast provides tree cutting and trimming services whereas Jay's provides debris removal and stump grinding services. Although the two businesses frequently worked together for one customers; often, the businesses provide these services separately. Albritton explained that Northeast employed four or five employees that climbed trees and sometimes, when tree trimming was slow, worked for Jay's. However, the sixteen employees that worked for Jay's never worked for Northeast. Kukor was hired as a tree trimmer to work for Northeast.

Further separating the companies, Albritton utilized separate payroll companies and insurance companies for Northeast and Jay's and requires potential employees to complete separate

job applications. Aside from separating the two businesses because they perform different services, Albritton also separated the companies due to the cost and availability of workers' compensation insurance. Due to the dangerous nature of Northeast's employees' work, many insurance companies would not insure Northeast, so Mr. Albritton utilized an assigned risk pool offered by Liberty Mutual for workers' compensation coverage.

Kukor's brief categorizes the provision of separate workers' compensation coverage for each business as somehow constituting a "sham." Yet, Kukor provides absolutely no basis for this inflammatory and highly improper accusation, at all. As the Commission correctly found, there is no prohibition against an employer utilizing two separate workers' compensation carriers for two separate businesses, especially when the work one business performs is more dangerous, and thus more costly to insure, than the other. The Commission's order even went as far to state, "the owner was compelled to form two separate entities" in order to obtain the required workers' compensation coverage. Kukor's invective simply highlights the fact that he lacks any legal basis to assign the Commission's finding as error.

In support of his contention, Kukor attempts to liken the facts of his case to that of *Liberty Mutual Ins. Co. v. Holliman*, 765 So. 2d 564 (Miss. 2000). His rationale fails, however, because the Commission correctly determined that, in Kukor's case, Northeast and Jay's do not offer "joint services." Rather, Northeast only employs tree trimmers, whereas Jay's does not. No employee of Jay's offers the services provided by those of Northeast, and Jay's employees do not work for Northeast. As such, there can be no finding of "joint service" as advanced by Kukor and, as found by the Commission, no law prohibits one owner from operating two businesses. Truly,

Kukor's argument is the "red herring" the Commission found it to be, and should hold no merit here.

C. The Commission's Award of 75% Loss of Wage Earning Capacity is Supported by Substantial Evidence

Kukor's brief goes to great lengths to argue he should be found permanently totally disabled. That contention, however, is not proper upon appellate review. As the statutory finder of fact, the Commission is entitled to determine the degree of a claimant's disability. The only review permitted on appeal is whether the Commission's determination that Kukor sustained a 75% loss of wage earning capacity is supported by substantial evidence. If it is, the Commission's decision stands. Kukor's advocacy for a appellate finding of permanent total disability is improper under the standard of review.

As defined by Miss. Code Ann. §71-3-3 (I) (Rev. 2000), "'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings." To determine disability, one must compare the employee's pre-injury wages with the employee's post-injury capacity to earn wages in the open labor market. *Karr v. Armstrong Tire & Rubber Co.*, 61 So. 2d 789, 792 (Miss. 1953). The Commission must evaluate the evidence as a whole to determine loss of wage earning capacity. *Guardian Fiberglass, Inc. v. LaSueur*, 751 So. 2d 1201, 1204-05 (Miss. Ct. App. 2005). Also, besides the medical evidence, the Commission must evaluate claimant's age, education, work experience, and any other relevant factual criteria to determine the extent of disability, if any. *Meridian Professional Baseball Club v. Jensen*, 828 So. 2d 740, 747 (Miss. Ct. App. 2000).

In this case, Dr. Ramsey noted Kukor had reached maximum medical improvement and assigned him a 15% impairment to the right upper extremity and a 18% impairment to the left upper extremity. Dr. Vohra assigned Kukor a 5% impairment to the body as a whole and restricted him to lifting thirty pounds occasionally and no repetitive bending, twisting or stooping. Dr. Vohra also noted Kukor could return to work at a light to medium level.[3]

Further, Northeast and Liberty Mutual presented expert vocational testimony from Mr. Mills that Kukor retains employability in the light to medium categories and that he has acquired certain job skills that would allow him to perform such jobs. Mr. Mills provided three labor market surveys which found employers that would pay Kukor as much as $10.00 per hour. Kukor claimed to have applied for every job Mr. Mills recommended, but most employers had no record of him applying for a job. Kukor also offered that he had contacted over 118 employers, but received no job offers. Upon further inquiry, however, Kukor admitted he attached his medical records to his job applications. Clearly, the Commission had a substantial basis to believe Mr. Mill's expert testimony that Kukor has jobs available to him and to question the legitimacy of Kukor "bona fide" efforts to secure other employment.

In addition to the job opportunities Mr. Mills located, the Commission noted Albritton offered Kukor a light duty job once he was released to return to work. Kukor returned to work for only one day. Based on these facts, the Commission properly determined Kukor was not permanently and totally disabled. Kukors protestations to the contrary are without merit. The record contains able substantial evidence to support the Commission's finding that Kukor sustained

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The Commission properly treated this claim as one involving disability to the body as a whole due to the array of injuries claimant suffered.

a 75% loss of wage earning capacity as the result of his injuries and, therefore, the Commission's decision should be affirmed.

CONCLUSION

Northeast and Liberty Mutual urge this Court to affirm the Orders of the Mississippi Workers' Compensation Commission, which are supported by substantial evidence.

Respectfully submitted,

NORTHEAST TREE SERVICE, LLC and LIBERTY MUTUAL INSURANCE COMPANY

BY: _____
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CERTIFICATE

I, W. Bienville Skipper, of counsel for Northeast Tree Service, Inc. and Liberty Mutual Insurance Company, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

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