IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

MICHAEL KUKOR	CLAIMANT/APPELLANT
V.	NO. 2010-WC-01280-COA
NORTHEAST TREE SERVICE, INC.	EMPLOYER/APPELLEE
AND	
LIBERTY MUTUAL INSURANCE COMPANY	CARRIER/APPELLEE
AND	
JAY'S SERVICE COMPANY	EMPLOYER/APPELLEE
AND	
FIRSTCOMP INSURANCE COMPANY	CARRIER/APPELLEE

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF MADISON COUNTY,
MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellant, Michael Kukor, certifies the following parties have an interest in the outcome of this case. These representatives are made in order that the Court may evaluate possible disqualifications or recusal.

1. Michael Kukor, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Northeast Tree Service, Inc., Appellee;
4. Liberty Mutual Insurance Company, Appellee;
5. W. Bienville Skipper, Esq., Counsel for Appellees No. 3 & 4 above;
6. Jay's Service Company, Appellee;
7. FirstComp Insurance Company, Appellee; and,
8. Ashley Pradel, Esq., Counsel for Appellees No. 6 & 7 above.

THIS the 21st day of September, 2010.

JOHN HUNTER STEVENS

TABLE OF CONTENTS

PAGE

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE ISSUES

1. Whether or not the Commission erred in not finding that the Claimant's employment for Jim Albritton was one (or joint employer) and the same for the purpose of workers' compensation even though he had tried to establish an illegal unincorporated company solely for purposes of illegally circumventing requirements of the workers' compensation Act.

2. Claimant submits that the issue of joint employment involves a question of law pursuant to statute, and does not involve solely a question of fact since the facts are not disputed. As a result a question of law IS to be reviewed *de novo* by this Court.

3. Whether the Commission erred in reversing the findings of the Administrative Judge dated June 26, 2006

4. Whether or not there was any evidence whatsoever to refute that the Claimant was permanently totally disabled.

I. STATEMENT OF THE CASE AND HISTORY

This matter is before the Court of Appeal of the Order of Administrative Law Judge dated June 26, 2006. The Administrative Judge rightfully found that, despite possibly fraudulent attempts by the Claimant's employer and his insurance carriers to circumvent the requirements of the Workers' Compensation Act, the Judge correctly found that the Claimant's employment with Jim Albritton , through Northeast Tree Service and the illegal entity identified as Jay's Service Company were really one and the same for purposes of an employer under the Workers' Compensation Act, following the precedent set in Liberty Mutual vs. Holliman. (Discussed *infra.*)

The Administrative Judge correctly found that Northeast Tree Service and the non-legal company identified as Jay's Service Company on a business card were one employer pursuant to law and correctly found that each were jointly liable for the claims of workers' compensation injuries. Further, the Administrative Judge found that, as a result of the severe multiple injuries, high impairment ratings, illiteracy of the Claimant, past job experience, taken with the fact that he had made considerable job search efforts was unable to find any employment, the Judge found him permanently and totally disabled. These are findings from which the insurance companies for Jim Albritton, D/B/A Northeast Tree Service and Jay's Service Company appealed.

The Commission ignoring the findings of the learned and experienced Administrative Law Judge, instead found that the Claimant's employer was two separate legal entities, and amazingly found that the Claimant was not totally disabled. The Commission's findings were affirmed by the Circuit Court. The Claimant herein, aggrieved by the injustice in the findings of the Commission appealed to this Court urging the Court of Appeal to consider ramifications of these findings and to reverse and reinstate the Administrative Law Judge's findings on the initial approval COA Reversal.

On the initial appeal, the Court of Appeals did not address the issues on the appeal, instead found that the case was not ripe because of the issue with regard to the average weekly wage of the employment with Northeast Tree Service. As a result, it was remanded by to the Commission for such a determination. Subsequently, the Administrative Law Judge issued a finding that the Claimant had an average weekly wage of $221.24 of the employment with Northeast Tree Service. This would make the total income with the Employer, if you include the evidence from the illegal company, Jay's Service Company, with Northeast to be $629.24 per week. Subsequently, the Claimant filed an appeal to the Commission which affirmed the findings as to the average weekly wage. Claimant again followed the appeal process through the Circuit Court and now at this Court again seeking a review of the initial issues in the prior appeal.

II. STATEMENT OF THE FACTS

The Claimant, on or about May 20, 2003, sustained severe multiple injuries as a result of a fall from a tree he was trimming, sustaining significant fractures of his right and left upper extremities and a severe back injury which will necessitate continued treatment for the rest of his lifetime.

Claimant is 37 years of age and resides in rural Covington County, Mississippi. He completed the tenth grade in school, with a special education curriculum. Claimant is illiterate and has to have assistance with reading and writing. (T-10) He must have assistance to fill out a job application. (T-11)

After leaving school, Claimant worked in fast food restaurants, which required lifting more than 40 pounds, stooping, bending, and standing. Claimant then worked in construction as a manual laborer. He lifted more than 50 pounds daily, climbed ladders, stooped, and twisted. Claimant assembled metal buildings, with heavy steel and tin.

After he left the construction industry, Claimant began his profession trimming trees. He climbed trees, removed limbs with hand-held chainsaws, rappelled up and down from the trees using climbing spurs and rappeling-type equipment, placed limbs into chipping machines, and cleaned around the area. Claimant removed trees from residential and commercial areas. He said he lifted heavy limbs and chainsaws and had to bend, stoop, and walk every day. The job description requires heavy lifting, and is considered very strenuous.

Claimant testified that he climbed to the tops of trees with climbing spurs, then cut limbs one by one with a saw as he descended the tree. He used ropes to lower limbs to the ground. The job is classified as heavy. He testified that he was always required to clean the debris after cutting down the tree. Claimant earned $12.00 per hour with his experience and worked long hours.

Claimant worked in the tree service industry for years before starting with Northeast around April 2003. He saw a yellow pages advertisement for Northeast and called for a position. Claimant completed an application for Northeast. He was interviewed and hired by Jim Albritton.

Claimant testified that he performed tree cutting services for Northeast, which included climbing trees, using power saws, removing limbs, cleaning debris on the ground, and cutting limbs on the ground to feed them into the chipper. When he climbed down from the tree, Claimant removed his equipment and started helping other workers to clean the area. He said he threw limbs into a dump truck, raked leaves, and fed limbs into the chipping machines.

Claimant did not know Albritton had a business named Jay's Service Company until he got a check with that name on it about three weeks after he started working for Albritton. Claimant said he received two separate checks (both signed by Albritton), but did not understand why (nor was an explanation ever given to Claimant). He was paid $12.00 per hour, no matter which company issued the paycheck. Claimant said he never filled out an application for Jay's Service Company.

While working for Albritton, Claimant drove to Allbritton's home in Madison, where the office and equipment were located. All employees met there, and Albritton made the work assignments every morning. He was required to work 40 hours a week.

Claimant testified that he used the same equipment for every job, and he got the equipment from Albritton's. He understood that Albritton was the owner, with the authority to hire and fire all employees.

Claimant occasionally accompanied Albritton when an estimate was quoted. He recalled that one price was given and one check paid for the tree cutting and cleaning work. Claimant said that the only business cards he saw had Northeast on them. He never saw any separate cards, bills, or invoices with Jay's name.

On May 20, 2003, Claimant was working for Albritton when he rappelled down a tree and fell. He sustained fractures to his wrists and back. Crew members removed his equipment and took him to the Baptist Hospital emergency room. Albritton was present.

After prolonged treatment, Dr. Vohra gave Mr. Kukor a 5% impairment rating to the body as a whole for the back and provided restrictions on November 3, 2003, sedentary only work with no lifting over 10 pounds and no climbing. Subsequently, on March 4, 2004, he placed him at light-medium level of work with lifting restrictions and no repetitive bending, twisting or stooping and frequent position change. (Gen. Ex. 3) Dr. Ramsey treated the Claimant for his bilateral distal fractures on his right and left upper extremities and assigned him a 15% impairment to the right upper extremity and a 18% impairment to the left upper extremity and deferred to Dr. Davis for restrictions. (Gen. Ex. 14)

After his accident, Claimant was treated for broken wrists by Dr. Randall Ramsey. Dr. John Davis, IV and Dr. Rahul Vohra treated Claimant for his back injury. Claimant received a $40 check

from Liberty Mutual. He got a letter from Albritton about paying the difference between the workers' compensation payment and his salary. Afterward, Claimant began receiving a check from Albritton.

Claimant was released to light duty work on April 2004. On April 2, 2004, Albritton sent Claimant a letter offering a light-duty job with Northeast to do work on the ground only. (emphasis added) On May 3, 2004, Albritton sent a letter to Claimant confirming that Claimant was not able to work due to a license suspension. Claimant testified that his driver's license was suspended for failure to pay child support, which he was unable to do since he was not working due to his injury.

Eventually, Claimant returned to work for Northeast driving a dump truck. He said that driving the truck over rough terrain caused his back to hurt. Claimant tried to rake leaves, but he could not bend or stoop. He received a paycheck from Jay's in May 2004.

Claimant searched for work within his restrictions. If requested, he provided the list of physical restrictions to employers. Claimant also met with the Employer-Carrier's vocational expert, Pete Mills. He said he contacted every one of the employers listed in Mill's report. Claimant also registered with the state employment agency. He estimated that he contacted over 118 employers looking for work. (T.28-29) Claimant did not receive any job offers from his efforts or the efforts of Mills for over a year and a half. (Emphasis added.)(T- 29-31)

Claimant testified that he currently has difficulty lifting over ten pounds with his left wrist, since his left wrist is weaker than his right. His back hurts everyday and is worse with activity. Claimant said he cannot walk for long distances, and he sits in a recliner to relive his back pain. (T-32-33)

Claimant stated that he tried to return to Dr. Vohra for additional medical treatment, but the Carrier would not authorize it. He said the Carrier would not pay for pain medication or additional

medical treatment. Claimant testified that he wanted to return to work in the tree removal industry, since he had done that for so many years; however, he said his injuries prevented him from doing so. Claimant had no prior physical injuries and was able to work with no problems until this accident. (T-35)

The most recent treatment after Dr. Vohra, Mr. Kukor was seen at the University Medical Center. These records indicate continued chronic pain and state that the Claimant is "unable to work" as a result of his back pain. (Gen. Ex. 15)

Mr. Pete Mills, vocational expert, testified for Northeast/Liberty. He interviewed Claimant and issued a vocational evaluation and vocational reports. Mills testified that he thought the Claimant was employable even with the restrictions set forth by the physicians; however, he did not test to measure his education or ability to read, write or his aptitude. (T-67) He could not dispute the illiteracy of the Claimant. (T-57)

Mills performed a labor market survey on December 22, 2004, and identified potential employment within Claimant's restrictions, work skills, and vocational profile. Mills continued to send lists of employers to Claimant, and the Claimant continued to attempt job searches.

Mills located employment opportunities for Claimant with an hourly wage of $5.15 up to $7.85. Mills testified that most of the positions he found were in the $6.00 to $7.00 per hour range. He did not feel that informing employers of restrictions prior to an interview was the best way to find employment. Mills agreed that Claimant could not return to work in his pre-injury position. He acknowledges that there were no offers made. (T-69)

Mr. Jim Albritton testified for the Employer. He bought Northeast in 1983 from another individual. Albritton said Northeast is a tree cutting and trimming company. His business card he gave to the Claimant before his injury advertises stump removal. (Gen. Ex. 18)

Albritton confirmed that Northeast and Jay's each issue separate payroll checks. This is the only difference in the supposed companies.

Albritton testified that he formed the two companies only because of workers' compensation insurance rates. He said that the Northeast workers' compensation insurance company has special, higher rates for climbers. Albritton has a separate workers' compensation carrier for Jay's due to lower rates for ground workers. He wanted the separate company for the climbers so he would not have to pay higher rates for all of his employees. Albritton testified that Jay's is not a registered or legally incorporated company, although he wrongfully identified it as a company, and Northeast is a limited liability company. It is apparent that this was done with the full knowledge and acceptance of Liberty Mutual and First Comp.

Albritton conducts all of his business from one location. Albritton owns all of the equipment, which is used by both supposed companies. He has a yellow page advertisement for Northeast, but not one for Jay's. For Jay's, he has no telephone listing in the white or yellow pages. The telephone number on a card for Jay's is the same phone number of Northeast. (Gen. Ex. 18) No other listings in the yellow pages of similar businesses are separated into two entities. *Id.*

Albritton agreed that his Northeast business cards do not differentiate between tree cutting and debris removal. He described Jay's as a "subcontractor" to Northeast. He described Jay's business as an "integral part" of Northeast. (T-84-85)

Albritton witnessed Claimant's fall from the tree on May 20, 2003. After Claimant's accident, Albritton voluntarily paid Claimant $271.00 per week to supplement the workers' compensation checks. This would equal to 2/3 of what he thought was Claimant's average weekly wage, which he was required to pay per the Act. Admittedly, Albritton said he wrote letters to Claimant about returning to work on Northeast letterhead, but these positions would have been with

Jay's.

Albritton testified his business does not have a light-duty position, and he pulled all of the light work from other employees just for Claimant to see if he could do it with his restrictions. Albritton thought Claimant could operate the stump grinder, run errands, or drive the dump truck. Claimant attempted to do this work, but was unable. (T-26)

III. SUMMARY OF THE ARGUMENT

ARGUMENT

The basic fact issues with regard to the joint employment and employment status of the Claimant are not in dispute. Basically, what is in dispute is the legal affect of the facts as applied to the conclusion of law taken by the workers' compensation Commission. The Full Commission apparently saw no problem with the fraudulent actions of the employer in creating a sham company solely for the purpose of saving insurance premiums, even though that meant cutting benefits in violation of law. The Appellant recognizes that this Court is bound to affirm the findings of the Commission if there is substantial evidence to support their findings; however, this is in absence of an error of law. On the other hand, where the Commission as in the instant case has misapprehended the controlling legal principals, this Court should not hesitate to review those findings *de novo* as is required by state law. See *Smith vs. Jackson Construction Co.*, 607 So.2d 1119, 1128 (Miss. 1992)

The Claimant submits that regardless of a finding of whether or not Mr. Albritton had two separate legitimate businesses (which he admittedly did not), at a minimum, Mr. Kukor had an undisputable average weekly wage of at least $470.81, and it is undisputed that he worked full time for Mr. Jim Albritton and his supposed companies. All parties agree that Mr. Kukor had an admitted on the job injury. The claimant submits that regardless of which or both insurance companies

ultimately pays for his significant loss of wage earning capacity, that issue should be based on the total average weekly wage of his employment with Albritton.

Notwithstanding any argument based on the undisputed facts, either under the issue of alter-ego, piercing the corporate veil or dual or joint employment, there is no question that Northeast Tree Service, LLC, Jay's Service Company and Jim Albritton were all one in the same. The evidence unequivocally established both companies were operated out of the same physical address, served the same purpose, both companies worked together, solely for the benefit and enrichment of Jim Albritton. Mr. Albritton hired and fired and was in complete control of all workers and work performance. Mr. Albritton was the owner of all tools and equipment utilized in the service of both companies. These tools were used by all employees. Mr. Kukor reported to work everyday at the same time for the purpose of both companies. In short, these companies were Jim Albritton in that his business was a tree service which dealt with cutting, removing trees and stumps in residential and commercial areas. (T-85)

With regard to piercing the corporate veil issue, it has rendered moot, and as acknowledged in its brief, Jay's Service Company, despite representing such as a legal entity to both the workers' compensation Commission and in pleadings in this case, was not a legal corporation and was not incorporated. As such, there is no veil to pierce despite the argument set forth by Liberty Mutual and First Comp. On the contrary, Mr. Albritton admitted on the stand as much, which further substantiates that the companies were one in the same, but that at a minimum, they were alter-egos of each other. (T-88)(T-90) Mr. Albritton further admitted that the illegal company he identified as Jay's Service Company, he attempted to establish to save workers' compensation premiums, and in fact, the attempt was solely for that purpose. Mr. Albritton admitted that Jay's Service Company did not even have a listing in the phone book nor any type of advertisement whatsoever, although

Northeast Tree Service had an ad in the yellow pages that included all services (including those allegedly undertaken by Jay's Service Company) but did not mention Jay's Service Company. He certainly could not argue that Northeast Tree Service was advertised as the same as Jay's Service Company, since even his business card acknowledged as much, that Northeast Tree Service specifically advertised itself for removal of the debris and stumps which allegedly was the purpose of the non-legal Jay's Service Company. See Northeast business card admitted into evidence at the hearing. (See Ex. 17)

In short, Jay's Service Company was a sham, wrongfully created in an attempt to violate the requirements of the workers' compensation Act to save premiums and cut employee benefits legally obligated by the Employer. However, it became obvious at the hearing that this feeble attempt which would have resulted in cheating Mr. Kukor out of legitimate workers' compensation benefits; also basically would, if taken to be true, as Mr. Albritton's insurance companies would argue leaving Mr. Albritton with violation of the Mississippi Workers' Compensation Laws by not providing full coverage as required by statute. Mr. Albritton, even his insurance carriers, admit that he is subject to the provisions of the Act which is to provide full and complete workers' compensation coverage under the Act. Instead, Mr. Albritton, in a thinly veiled attempt, created a sham company which in reality is one and the same, that being Northeast Tree Service and Jim Albritton.

There is additional evidence supporting that Jay's Service Company and Northeast Tree Service were one in the same. Pursuant to Miss. Code Ann.§ 79-4-2.04 which deals with liabilities created by a non-corporation states, "all persons purporting to act as or on behalf of a corporation knowing that there was no incorporation under § 74-4-1.01 et seq., are jointly and severally liable for all liabilities while so acting." This statue provides that Northeast Tree Service by and on behalf of the actions of its President, Jim Albritton is jointly and severally liable for the actions of the non-

legal Jay's Service Company. It is simply not a company. Mr. Albritton admitted under oath that his actions violated this statute PER SE.

Additional evidence that Jay's Service Company was a sham and was one and the same as Northeast Tree Service; and not only the advertising of the company on the business card, but also specific acts undertaken in Mr. Kukor's case. The first being two instances of offers of employment of light duty which amazingly Liberty Mutual's counsel attempted to use those to refute Mr. Kukor's significant disability where Mr. Albritton offered light duty, accommodations for his restrictions on letterhead from Northeast Tree Service which admittedly were for jobs on the ground or with the sham entity, Jay's Service Company. Amazingly, Liberty Mutual and Northeast Tree Services' attempt to, on the one hand argue that these are separate companies, yet on the other hand, argue that they made attempts to bring him back to light duty work, which would have been as Mr. Albritton described it, driving a truck and other ground work involved with removing the stumps and debris which was allegedly Jay's Service Company. Work definitely not light duty.

However, what is even more illogical, is the argument made on behalf of Northeast Tree Service and apparently Liberty Mutual, as well, with regard to the average weekly wage is the fact that Jim Albritton, through Northeast Tree Service, apparently seeing the injustice served by the sham company to save him workers' compensation premiums, realizing that Liberty Mutual had no problem starving Mr. Kukor by paying him $49.00 a week agreed to attempt to satisfy his obligations under the Mississippi Workers' Compensation Act to provide the appropriate percentage at his average weekly wage. This is most telling that alleged Jay's Service Company and Northeast Tree Service were the same. It bears repeating exactly what Mr. Albritton's admissions were on letterhead of Northeast:

You have been employed for about 15 weeks. Your average pay per week is about

> $371.00 [1] total for both Northeast Tree Service and Jay's Service. Most of your pay has come from Jay's and because of this the workers' compensation for Northeast would not pay very much. Workers' compensation will pay 60% of your average pay normally so I will supplement the workers' compensation with a check from Jay's Service Co. Until you can return to work at least for light duty and ground work. $400.00 x 60% = $240.00 per week. Jim Albriton (signed).
>
> (See as **Exhibit "13"**(As labeled in the record).)

When faced with this most damaging evidence that Mr. Kukor's true average weekly wage is much higher than the $72.00, Liberty Mutual alleged, apparently Liberty Mutual and First Comp is arguing that Mr. Albritton paid this out of the goodness of his heart. In fact, First Comp apparently argued in their brief that he paid this out of his own pocket, when specifically there was no dispute but that he was paid that difference from the checking account identified as Jay's Service Company with checks signed by Albritton acting on behalf of Northeast.

Again, significant evidence which prove unequivocally that these businesses were not separate, but instead one and the same. If anything, the only issue that separate the companies was the fact of Mr. Albritton's attempt to separate solely for the purpose of saving workers' compensation premiums. A fact which was known and should have been known by at least Liberty Mutual to be in violation of the Act.

As such, the claimant submits that at a minimum, the admitted finding that he was an employee of Northeast Tree Service that Liberty Mutual should pay benefits in accordance with the law, that is, based on his <u>true</u> average weekly wage of at least $470.81 per week (the sum of wages from Jay's and Northeast). This argument has apparently been adopted by First Comp now apparently realizing the futility in denying there is

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[1] All parties would not dispute that the total wages based on the wage statements was not accurate.

no corporate veil to pierce or that Mr. Kukor was at a minimum dually or jointly employed or the alter-ego of Northeast Tree Service. At least First Comp is acknowledging the unreasonableness and the facts in this case do not significantly substantiate and are not supported by the Mississippi Supreme Court's holdings with regard to joint employment and/or alter-ego or the provisions of Miss.Code Ann. § 79-4-1.01.

The insurance companies' apparent attempt to deny coverage to the claimant Kukor would create a slippery slope under the Workers' Compensation Act. What if, based on these identical facts, other employers attempted to segregate jobs based on the dangerous nature of those jobs in an attempt to save workers' compensation premiums? What happens? It is exactly what happened here. An apparent attempt to cheat the claimant out of legitimate owing benefits required by law in the amounts and percentages required by law, this would be a travesty of justice if employers were allowed to circumvent obligations under the Act solely for the purpose of saving premiums, and that is exactly what this employer with the help of his insurance companies is unwittingly attempting in this case. However, the only evidence of two separate companies here is ONLY separate paychecks.

Mr. Kukor's employment benefitted Jim Albritton, it benefitted Northeast Tree Service and it benefitted the non-legal entity known as Jay's Service Company. As discussed in *Liberty Mutual Ins. Co. vs. Holliman*, these facts satisfy each and every principal set forth in that case which dealt with the dual employment of two legitimate companies and discuss the alter-ego theory finding that when two entities in reality are one entity having the same business, same owner, same equipment, same purpose, it should be considered one for purposes of workers' compensation. Amazingly, Liberty Mutual (the carrier in Holliman) is arguing the exact opposite in Mr. Kukor's claim. Liberty Mutual cannot in good faith attempt to argue that Mr. Kukor's case is distinguishable from *Liberty*

Mutual vs. Holliman, 765 So.2d 564 (Miss.Ct.App.2000).

The facts in the instant case were substantiately stronger than those discussed in Holliman. It is apparent in *Holliman* there were separate payroll checks made to the claimant. However, when looking at the underlying facts, the Commission's findings were affirmed that the arrangement between the two employers could be one of dual employment and "joint service"...*Id.* at 574. The Court of Appeals affirming the Commission further found "Tri-State and Resource were jointly and severely liable to Holliman for compensation benefits." *Id.*

Based on the foregoing, Mr. Kukor's full wages earned from these entities, regardless of whether each are alter-egos, joint employers or sub-contractor should be considered for purposes of determining his loss of wage earning capacity. This has apparently even been acknowledged by First Comp, although it denies it should pay any part of the award. The claimant submits that whether it is divided by First Comp or Liberty Mutual, or paid completely by Liberty Mutual, Mr. Kukor is entitled to these benefits as required by law.

The Employer, Jim Albritton acknowledge that the illegal company, Jay's Service Company was an 'integral part' and 'sub-contractor' of Northeast. The law in Mississippi concerning general contractors and sub-contractors regarding workers' compensation, the hierarchy of workers' compensation responsibility would go up from the sub to the general. It cannot reasonably be argued that the sub-contractor and the contractor, even if that is the case, would be one employer with one general purpose. Pursuant to Mississippi law, these admissions clearly substantiate a joint employment status as found in the statute and by the Mississippi Supreme Court. All wages from this joint Employer must be combined to show true average weekly wage.

Finally, with regard to any facts concerning the claimant's loss of wage earning capacity, these are not legitimately in dispute, by either carrier, as there was no disagreement that he underwent

significant job search efforts, in excess of 100, without finding re-employment. The undisputed evidence further revealed that Mr. Kukor is functionally illiterate and is probably incapable of finding any type of job, even remotely paying him what he was making before his accident. Specifically, claimant submits that he is entitled to the maximum benefits under the Act, when looking at his true average weekly wage. Especially when looking at the severe multiple injuries to his arms and body as a whole.

By way of illustration, the Claimant would also make reference to another state's interpretation wherein similar issues were discussed finding joint employment relying on *Larson, Workman's Compensation Law* § 48.40 (1982). *Liberty Northwest Insurance Corporation vs. McDonald*, 187 Or. App.40, 66 P.3d 528. This supports what is fundamentally fair to the injured worker.

The Employer and Carrier have argued in their Brief that joint and several liability has been done away with. However, this is misplaced. This statute has nothing to do with the Workers' Compensation Act and instead deals with negligence. As such, it is not applicable and this statute was not even in existence at the time of the Claimant's injury. Therefore, that is another reason why it is not applicable. Furthermore, the Employer's violation of §79-4-2.04 is a violation PER SE and unequivocally states that all persons acting on behalf of an illegal corporation are jointly and severally liable. This would include both Jim Allbritton in his position as president of Northeast Tree Service, LLC. As such, the insurance companies for this Employer should be estopped from even making the argument that this is nothing other than the same employer or at a minimum, joint employment.

The Employer now, after having assumed the issue of joint employment; must now make the argument that the Claimant is not totally disabled. The evidence to refute the permanent total

disability of the Claimant is nothing more than rank speculation. The only evidence to refute that the Claimant is not totally and permanently disabled, is the speculative testimony of Mr. Pete Mills. The Employer attempted to manufacture or create a potential light-duty job which involved driving a truck and significant bending and stooping, all of which were outside the restrictions of Dr. Vohra. Despite this, the Claimant made an effort to attempt to do this job and was unable. This is unrefuted. The only evidence is that Mr. Mills testified that he believes that the Claimant might be employable. This is despite the fact that, after having worked and been retained and worked on the Claimant's case from October 2004 to May 2006 at the time of the Claimant's hearing, he found not one single job offer in his alleged job assessment on behalf of the Claimant. NOT ONE SINGLE JOB OFFER. (T-69) The evidence was unequivocal there was no way the Claimant could do his prior occupations. (T-64) What additionally makes Mr. Mills' testimony rank speculation, is that he did no testing regarding or relating to the aptitude or the literacy of the Claimant, other than the fact that he knew that the Claimant did not get a high school degree and was in special education throughout his whole grade school education. You cannot refute the testimony of the Claimant that the Claimant has trouble with basic reading and writing and that the Claimant can not even fill out a job application without help. (T-31)

Additionally, out of the few job prospects that Mr. Mills did find throughout his 18-month search, not one single job was in the Claimant's home county, Covington County, known to be a rural county with a high unemployment rate. (T-68) It defies logic that it would justify the Claimant driving nearly 100 miles one way from his home in Covington County to Madison or Jackson, Mississippi to undertake a minimum wage-type job such as those identified as possible job prospects for Mr. Kukor. Mr. Mills' testimony is not credible. He offered no testimony that the more than 100 job searches undertaken by Mr. Kukor were not legitimate. His only testimony related to those jobs

was that it was his opinion was that Mr. Kukor should have withheld truthful information about his multiple injuries and restrictions and essentially try to defraud an employer into hiring him. Mr. Mills' testimony is not credible inasmuch as he was paid more than $2,300.00 and after 30 hours of work, was not able to find the Claimant one single job offer and not even one single job opportunity in the Claimant's county of residence after working on his case for 1 ½ years.

The testimony is unrefutable that the Claimant is permanently and totally disabled. The testimony was not refuted that he can not read or write. Every job that he had had before this injury is outside the restrictions of his physicians. He has multiple injuries, multiple permanent impairments, and undertook Herculean job search efforts with not one single offer.

The records substantiate the Claimant's job search efforts were legitimate in his inability to find any re-employment and taken along with the uncontradicted facts aforesaid, justify the Administrative Judge's finding of total disability. *McNeese vs. Cooper Tire and Rubber*, 627 So.2d 321 (Miss. 1993). See also *Smith vs. Jackson Construction Co.*, 607 So.2d 1119 (Miss. 1992). Employer and Carrier did not contradict this evidence and the Claimant's testimony in any manner, way, shape or form. According to Mississippi precedent, there is a rebuttable presumption of total occupational loss when the Claimant can not return to his prior occupation or his unable to go to his prior job. It must be overcome by proof of the Claimant's ability to earn the same wages which the Claimant was receiving at the time of the injury. Employer and Carrier have offered no proof of such and any reliance on the Mr. Mills' testimony is pure speculation. As such, the Administrative Law Judge's findings with regard to extended disability should be affirmed.

There is no question, but that at a minimum, the facts illustrate Mr. Kukor is entitled to full workers' compensation benefits as all wages were to the benefit of Northeast Tree Service, or at a minimum, he was a joint employee thus the employers were jointly responsible by and through their

insurance carriers for paying him full benefits. This is supported by the facts, the law and the liberal interpretation in favor of compensation.

The findings of the Administrative Law Judge with regard to disability and the joint employment are further supported by the Court of Appeals of the State of Mississippi's holding in *Piney Woods Country Life School vs. Judy Ann Young*, 947 So. 2d 960 (Miss. 2007), affirmed in part, reversed and remanded in part, August 8, 2006. Petition for rehearing denied, petition for cert. denied. (The Court held the Commission properly disregarded the speculative opinions of the vocational expert when applied to the actual facts and further found combining all wages even for different jobs for the same employer is required.) The Commission erred in reversing the findings of the Administrative Law Judge in the Order dated June 26, 2006. The Commission Order is against the substantial weight of evidence and legally incorrect as a matter of law.

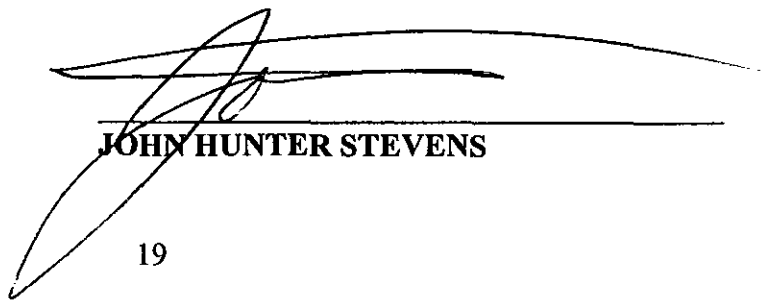
The Commission clearly has ignored the statutes, the well settled authorities of this Court, especially in determining the joint employment status and the question of law dealing with the determination of average weekly wage of the Claimant in this case. We believe this Commission revealed a skewed interpretation of the provisions of the Act. The objective of the workers' compensation Commission is to perpetuate results just and fair. To penalize the Claimant, Michael Kukor, in this situation because he was involved in an occupation that was more dangerous than usual by penalizing him with a low average weekly wage is not only a serious miscarriage of justice, but is a direct contradiction to the purpose and intent of the Mississippi Workers' Compensation Act. To uphold these findings by this Court would amount to an overruling of the Workers' Compensation Act itself. It would be an affront to the purpose and intent of providing workers' compensation benefits. No doubt the workers' compensation system is flawed as it attempts to provide benefits to an injured employee in the state of Mississippi. The facts in this case clearly and unequivocally show

that an employer can and will manipulate the system to defeat benefits to an employee. To affirm the findings of the Circuit Court and Commission in this case would perpetuate manipulation of the system to the detriment of injured workers in the state of Mississippi.

CONCLUSION

The Mississippi Worker's Compensation Statute should be "fairly construed according to the law and evidence". Miss. Code Ann. § 71-3-1. Further and most importantly, the Act is to be given broad and liberal construction and where there is doubt, cases are to be resolved in favor of compensation. *Charles & Clark Associates. Ltd. vs. Robinson's Dependents*, 357 So.2d 924 (Miss. 1978). When looking at the issue with regard to multiple employers, taken with the definition of liberal construction under the Act, along with the findings in the Mississippi Supreme Court, the Claimant should be entitled to full compensation according to the Act and based on the fact that, at a minimum, these employers are joint as found by the Administrative Law Judge, as such, the findings of the Administrative Law Judge should be affirmed in full. Therefore, the Commission's action in reversing the Administrative Law Judge and the affirmance of said Order by the Madison County Circuit Court were in error and should be reversed. At a minimum the wages through all of the Claimant's employment with Albritton should be combined to show true appropriate and accurate average weekly wage in accordance with the findings of the Mississippi Supreme Court. To do otherwise would be an overrule of law and standing president and a overrule of significant statutes within the provisions of the Workers' Compensation Act.

Respectfully submitted,



JOHN HUNTER STEVENS

CERTIFICATE OF SERVICE

I, John Hunter Stevens, attorney for claimant, hereby certifies that I have this day served by First Class United States Mail, postage fully prepaid, the above and foregoing Brief of Claimant upon the following:

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THIS the 21st day of September, 2010.

JOHN HUNTER STEVENS