IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2005-WC-01951-COA

TOTAL TRANSPORTATION, INC. OF MISSISSIPPI AND PROTECTIVE INSURANCE COMPANY — **APPELLANTS**

v.

GERRY LYNN SHORES, WIDOW AND DEPENDENT OF PHILLIP SHORES, DECEASED — **APPELLEE**

DATE OF JUDGMENT:	9/19/2005
TRIAL JUDGE:	HON. SAMAC S. RICHARDSON
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	JEREMY LLOYD CARLSON EVE GABLE JEFFREY A. WALKER
ATTORNEY FOR APPELLEE:	TINA LORRAINE NICHOLSON
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	TRIAL COURT AFFIRMED COMMISSION'S DECISION TO AWARD DEATH BENEFITS TO WIFE OF DECEDENT.
DISPOSITION:	REVERSED AND RENDERED - 11/21/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, P.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

¶1. Phillip Shores and his wife, Lynn, were employed by Total Transportation, Inc., of Mississippi (Total) as an over-the-road trucking team. On January 16, 2003, the couple picked up a load in Sunnyside, Washington, and headed towards Jackson, Mississippi, to deliver the load. While on the road, the Shores began having trouble with their truck and located a Petro station in Laramie, Wyoming, to have the truck repaired. Prior to reaching the Petro station, Mrs. Shores

dropped Mr. Shores off at a Sinclair Fuel Center because he wanted to get away from the truck and get something to eat. Mr. Shores had received approximately two hours of sleep in the preceding forty-eight hours and had not had anything to eat in almost twenty-four hours. He told her to go back to the Petro station, repair the truck, and then return to get him. Although they did not specifically discuss where to meet after Mrs. Shores dropped him off, Mrs. Shores testified that it was their custom to meet back wherever they separated. Mr. Shores logged off duty and entered the convenience store. Mrs. Shores also testified that they had been arguing and needed some time apart.

¶2. Mrs. Shores drove the truck back to the Petro station for the needed repairs. She returned to the Sinclair Fuel Station about an hour and half later around 6 p.m., went into the convenience store, but did not see her husband. The Sinclair fuel center was a U-shaped complex consisting of a convenience store, a motel, a liquor store, and Foster's Bar. There was no sign on the outside of the complex indicating that there was a bar inside, so Mrs. Shores never looked for her husband there. She did call the motel to see if he was there, but he was not. She proceeded to drive back to the Petro station to see if her husband had possibly received a ride over there. She saw no sign of him there or at a nearby Pilot fuel station. Mrs. Shores returned to the Sinclair station and drove around it several times trying to locate Mr. Shores. Mrs. Shores drove back to the Petro and Pilot stations two times before parking the truck around 10:00 p.m. in the emergency lane on the exit ramp where she originally dropped off Mr. Shores. She had a clear view of the Sinclair Fuel Station from that position. She stayed in the truck throughout the night, but never made contact with her husband. She left Laramie the next day around 6:00 a.m. and headed for Jackson, Mississippi. While waiting for her husband, Mrs. Shores checked to see if he had made an airline or bus reservation and called Total's dispatcher to see if he had checked in with them. Mrs. Shores testified that, while waiting

for Mr. Shores, she thought he might have been angry enough with Total to quit. Mr. Shores had anger management problems and had quit prior trucking jobs after only short employment periods.

¶3. Mr. Shores entered Foster's Bar around 3:00 p.m. on January 17 and stayed until 2:00 a.m. when the bar closed. During that time Shores ate a meal, consumed several beers, and shot pool with several other patrons. The bartender told the local police that Shores "did buy a large amount of alcohol for himself and others." According to several witnesses, he appeared intoxicated while at the bar. Electronic records showed that he withdrew almost all of his weekly paycheck of over $400 from an ATM.

¶4. In his guilty plea, Christopher Shandy testified to the following. Shandy arrived at the bar around 11:00 p.m. and, at some point, played pool with Mr. Shores. After the bar closed at 2:00 a.m. Shores asked Shandy for a ride to the Petro station. In the parking lot, Shandy pulled a gun on Shores, ordered him to get in the car, and drove towards the Petro station. Shores offered Shandy all of his money, but Shandy told him to put it back in his wallet. He wanted to drop Shores off a considerable distance away from the Petro station in order to have plenty of time to flee the scene before Shores could call the police. Shores became nervous when they passed the Petro station and attempted to jump from the moving vehicle. Shandy shot him in the back as he exited the vehicle. Shores bled to death after jumping a fence and landing in a ditch a few hundred feet from the Petro station. Shores's autopsy revealed that his blood alcohol content was 0.137 grams per deciliter. He had $170 in his wallet and less than $20 in his pocket.

¶5. Mrs. Shores filed suit against Total and its insurance carrier, seeking workers' compensation benefits for the death of her husband. On September 7, 2004, the Administrative Law Judge entered an order awarding death benefits to Mrs. Shores. Total appealed the ALJ's ruling to the

Commission, which affirmed without comment. Upon judicial review, the Circuit Court of Rankin County affirmed the decision of the Commission. Total perfected its appeal to this Court raising the following issues: (1) whether the Commission erred in holding that Mr. Shores was acting in the course and scope of his employment when he was killed; and (2) whether the Commission erred in holding that the third party assault on Mr. Shores was directed against him because of his employment. We find reversible error in regards to both issues.

STANDARD OF REVIEW

¶6. The standard of review in workers' compensation cases is well established. A decision of the Commission will be reversed only if it is not supported by substantial evidence, is arbitrary or capricious, or is based on an erroneous application of the law. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (¶6) (Miss. 2003) (citing *Smith v. Jackson Constr. Co.*, 607 So. 2d 1119, 1124 (Miss. 1992)). If the Commission's decision and findings of fact are supported by substantial evidence, then we are bound by them even if we as fact finder would have been convinced otherwise. *Spann v. Wal-Mart Stores,* 700 So. 2d 308, 311 (¶12) (Miss. 1997) (citing *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). We will exercise *de novo* review on matters of law. *KLLM, Inc. v. Fowler*, 589 So. 2d 670, 675 (Miss. 1991).

DISCUSSION

I. DID THE COMMISSION ERR IN HOLDING THAT MR. SHORES WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WHEN HE WAS KILLED?

¶7. In its first issue on appeal, Total argues that the Commission erred in holding that Mr. Shores was acting in the course and scope of his employment when he was killed. Mississippi's workers' compensation statutes compensate injuries "arising out of and in the course of employment without

regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner." Miss. Code Ann. § 71-3-3(b) (Rev. 2000). The term "arising out of employment" simply means there is a causal connection between the employment and the injury. *Singley v. Smith*, 844 So. 2d 448, 453 (¶20) (Miss. 2003). One is injured in the course of employment when an injury results from activity actuated partly by a duty to serve the employer or reasonably incident to the employment. *Id.*

¶8. If the employee is considered a traveling employee, the employee remains in the course of his employment from the time he leaves home until he returns unless the employee deviates from his employment. *Bryan Bros. Packing Co. v. Dependents of Murrah*, 234 Miss. 494, 500, 106 So. 2d 675, 677 (1958). If the traveling employee is on a "personal mission or errand of his own" then he will not be compensated for his injuries. *Id.* Furthermore, in order to find a death or injury noncompensable on the ground that an employee deviated from his duties, the testimony must be sufficient to constitute an abandonment. *Estate of Brown by Brown v. Pearl River Valley Opportunity,* 627 So. 2d 308, 311 (Miss. 1993); *Webb v. Hunter*, 431 So. 2d 1131, 1133 (Miss. 1983). A mere deviation or departure by an employee from employment duties does not in and of itself constitute such a departure as to relieve an employer from liability for the employee's act on the ground that the employee has deviated from his service. *Brown*, 627 So. 2d at 311. However, the supreme court has also held that unsanctioned recreational activities wholly unrelated to employment duties do not arise out of and in the course of employment. *Id.* at 313; *Collier v. Texas Constr. Co.*, 228 Miss. 824, 828, 89 So. 2d 855, 857-58 (1956).

¶9. Mr. Shores entered the bar around 3:00 p.m. and stayed there for over ten hours. Although he did eat, Mr. Shores stayed at the bar in order to drink and play pool. He withdrew his weekly

paycheck of over $400, which Mrs. Shores usually put into a joint bank account, to buy drinks for himself and other patrons. According to the deposition of John Beeston, a deputy with the local sheriff's department in Laramie, two witnesses described Mr. Shores as intoxicated that evening. Furthermore, Mrs. Shores was worried that he may have quit since his employment history in previous years was spotty at best. Mrs. Shores testified that they had worked for six trucking companies from October 2000 until they began working for Total in mid-2002. The reasons for termination from these prior trucking jobs all stemmed from Mr. Shores's temper, including threatening his employer, threatening to wreck his truck, abandoning his truck, and throwing a rock at his truck and breaking the windshield. Prior to exiting the truck, Mr. Shores was angry with his wife and with Total because of problems and delays in repairing the truck.

¶10. The Commission, in adopting the ALJ's ruling, erred in only considering Mr. Shores's intoxication within the context of Mississippi Code Annotated Section 71-3-7(d) (Rev. 2000), which states that "[n]o compensation shall be payable if the intoxication of the employee was the proximate cause of the injury . . . ." Total did not use Mr. Shores's intoxication as an affirmative defense, but instead argued that Shores's intoxication bolstered the showing of deviation from the course of employment. *See* Arthur Larson, 1 *Larson's Workers' Compensation Law* § 17.06 [1] (2006) (drinking is one component in establishing deviation from course of employment but, if used as affirmative defense, must be strictly proven). The Commission also erred in finding that Mr. Shores's noncompliance with company policy regarding drinking alcohol while on the job did not preclude him from reentering his employment. Total's company policy clearly stated that drivers are prohibited from consuming alcohol while on duty and for a period of four hours before going on duty. United States Department of Transportation regulations state that an employee cannot report

for duty while having an alcohol concentration of 0.04 or greater. We fail to see how someone clearly intoxicated throughout the course of the evening could reenter the course and scope of his employment if doing so would violate company policy and Department of Transportation regulations.

¶11. The Commission found this case to be analogous to *Retail Credit Co. v. Coleman*, 227 Miss. 791, 86 So. 2d 666 (1956). In *Retail Credit*, Coleman was a traveling employee who stopped for dinner and had two beers while visiting with friends between 9:30 p.m. and midnight. While driving back to his headquarters Coleman was killed in a car accident. The supreme court, upholding the award of compensation, found that Coleman had completed his temporary personal errand and resumed his direct business route. *Id.* at 800, 86 So. 2d at 670. We find the facts in *Retail Credit* clearly distinguishable from the case sub judice for many reasons, most of which have been discussed supra. Coleman was in his company car and had resumed his business route when the accident occurred. Mr. Shores was not on a temporary personal errand and the facts sub judice cannot be stretched to find such.

¶12. We cannot find that the intent of our workers' compensation laws is to sanction such behavior as Mr. Shores exhibited. Mrs. Shores stated that her husband was stranded and had no choice but to wait at the bar. We are unpersuaded by that statement as Mr. Shores chose to drink large amounts of alcohol and only left the bar because it was closing. The fact that Mr. Shores remained at the bar for eleven hours, his drinking, his state of mind prior to leaving the truck and even prior employment history clearly indicate that Mr. Shores was not acting reasonably incident to employment. This was no mere dinner break.

II. DID THE COMMISSION ERR IN HOLDING THAT THE THIRD PARTY ASSAULT ON MR. SHORES WAS DIRECTED AGAINST HIM BECAUSE OF HIS EMPLOYMENT?

¶13. If an employee's injury or death has been caused by a third party intentional tort, it must be shown that such willful act was directed against the employee *"because of* his employment while so employed and working on the job . . . ." Miss. Code Ann. § 71-3-3(b) (Rev. 2000) (emphasis added). "The words 'because of,' like other broadly-construed words of causation with the act, such as 'arising out of,' express the necessity of a nexus between the injury and employment." *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888, 890-91 (Miss. 1980). "The base line is simply a rational connection of employment and injury." *Id.* at 891. The employment and injury must be connected in "some more direct manner than the mere furnishing of an opportunity" to the third party to commit the assault. *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 635, 59 So. 2d 294, 299 (1952). The employment must be a "contributing cause" of the willful act of the third party, not merely a "contributing cause" of the employee being present at the place where the assault occurred. *Id.*

¶14. In *Watts* the court held that an employee injured by a third party for personal reasons was not injured because of his employment. *Id.* at 635, 59 So. 2d at 304. Watts, a route man for Brookhaven Steam Laundry, began an affair with a married woman named Mrs. Garrett. One day Watts came to the Garrett's residence to see Mrs. Garrett and pick up the Garrett's laundry and dry cleaning. After talking for several minutes without realizing that Mr. Garrett was at home, Mr. Garrett suddenly appeared with a pistol in his hand and told Watts to leave. When Watts refused, Mr. Garrett shot him and Watts later died. In analyzing whether Watts was killed because of his employment, the court stated the following:

> There is no direct testimony in the record to show that Watts' employment was in any manner a contributing cause to his injury. He did not become involved in a quarrel with Garrett over the receipt or delivery of laundry, or the collection of a laundry bill, or because of any dissatisfaction with the service rendered by the Brookhaven Steam Laundry, or by Watts as its employee. Garrett and Watts had had no sharp words concerning the quality of service that Watts had rendered in the handling of the laundry for Garrett and his family. So far as this record shows Garrett killed Watts because Garrett believed that Watts was having improper relations with his wife. The fact that Watts was an employee of the Brookhaven Steam Laundry was a contributing cause of Watts' being at the Garrett home that day, but it was in no sense a contributing cause of the willful shooting of Watts by Garrett.

Id. at 635, 59 So. 2d at 299.

¶15. Similarly, Shores did not become involved in an altercation with Shandy over Shores's trucking services or anything related to trucking. While Shores's employment with Total was a contributing cause of his being in Shandy's car when he was shot, his employment as a truck driver was not in any way a contributing cause of Shandy's decision to rob and then fatally shoot him. Most likely, Shandy would have robbed and shot Shores regardless of the nature of his employment, as Shores had several hundred dollars, was heavily intoxicated, and needed a ride to his truck. If Shores had not asked Shandy for a ride, then he possibly would not have been robbed and eventually shot, and if he had not been employed as a trucker he would not have needed a ride. In that narrow sense his death was employment-related. However, the fact that his job as a trucker caused him to be in Shandy's car is insufficient to establish a nexus between employment and injury. In order to satisfy the "because of" requirement, the employment must have a causal relationship with the willful assault of the third party. In this case there clearly is no causal relationship.

¶16. However, the ALJ's reasoning, which was adopted by the Commission, in this case was formed by a different legal theory. The judge invoked the "positional risk doctrine" and held that Shores was killed because of his employment based on "the fact that the risk of assault was a street

risk which was incidental to his employment as a traveling employee far away from home." The "positional risk doctrine" was defined in *Johnson v. Roundtree*, 406 So. 2d 810 (Miss. 1981), as follows:

> Since every jurisdiction now accepts, at the minimum, the principle that a harm is compensable if its risk is increased by the employment, the clearest ground of compensability in the assault category is a showing that the particular character of claimant's job or because of the special liability to assault associated with the environment in which he must work. Among the particular jobs that have, for self-evident reasons, been held to subject an employee to a special risk of assault are . . . those jobs that specially expose the employee to lawless or irresponsible members of the public, . . . or that merely subject the employee to increased and indiscriminate contact with the public, such as the jobs of streetcar conductor, bus driver, taxi driver or hotel manager.

Roundtree, 406 So. 2d at 811 n.1 (quoting 1 *Larson's Workmen's Compensation Law*, § 11.11(a) (1978)).

¶17. In *Johnson*, the supreme court held that the death of Roundtree, a taxicab driver who was shot in the head while picking up a fare, was compensable. *Id.* The court found a rational connection between Roundtree's employment and his death based on the positional risk doctrine:

> Roundtree was exposed to the hazard of robbery or assault because of the nature of his employment; and . . . his death would not have occurred except for the fact that his employment conditions placed Roundtree in the position where he was injured by a force neither personal to him nor associated with his employment.

Id. at 810-11.

¶18. A few other Mississippi cases have employed a rule similar to the "positional risk doctrine" in cases involving third party intentional torts. The general rule is that in determining whether an employee is injured because of his employment "[a]ll that is required is that the 'obligations or conditions' of employment create a 'zone of special danger' out of which the injury arose." *Williams*

v. Munford, Inc., 683 F.2d 938, 939 (5th Cir. 1982).[1] Put another way, an employee is injured because of his employment if the "injury arose as a result of a risk created by employment conditions." *Id.*

¶19. In *Williams* the Fifth Circuit held that a convenience store clerk who was raped during a store robbery could not sue her employer in tort and could only sue under the Mississippi Workers' Compensation Act. *Id.* at 940. The eighteen year old clerk worked at a convenience store that had been frequently robbed and continued to lack security devices and security guards. The clerk did not have a key to lock the doors and was not allowed to keep a firearm. The court found that the store was a "zone of risks" and the rape came about as a result of conditions created by the employer. *Id.*

¶20. This Court applied the aforementioned rule in *Green v. Glen Oaks Nursing Ctr.*, 722 So. 2d 147 (Miss. Ct. App. 1998). Green was a nurse who worked the night shift from 11:00 p.m. to 7:00 a.m. at the Glen Oaks Nursing Center. She was forced to park in a secluded parking lot without security guards and one night she was assaulted and robbed in the parking lot by an unknown assailant. This Court held that "the injury to Green arose as a result of a risk created by employment conditions." *Id.* at 150 (¶12). In a similar case, *Adams v. Lemuria, Inc.*, 738 So. 2d 295 (Miss. Ct. App. 1999), this Court held that the injuries sustained by an employee, who was injured when she jumped from her car after being abducted in the parking lot of her employer, arose as a result of a risk created by employment conditions. *Id.* at 298 (¶11).

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[1]This is a quote from the original opinion of *Brookhaven Steam Laundry v. Watts*, which was withdrawn after the appellants filed a suggestion of error. *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 55 So. 2d 381 (1951), *withdrawn by Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 59 So. 2d 294 (1952).

¶21. However, in *Sanderson Farms, Inc. v. Jackson*, 911 So. 2d 985 (Miss. Ct. App. 2005), Jackson was hit over the head at work with a two-by-four by a co-worker from whom he had demanded repayment of a ten dollar loan. This Court held that the Sanderson Farms chicken plant was not a "zone of danger" and that "the risk to Jackson in this case arose solely from his personal disagreement with Allen concerning the ten dollar loan." *Id.* at 991 (¶16).

¶22. In the instant case, the issue to be decided is whether the employment conditions of truck drivers subject them to a special risk of assault. Other states have held that the "positional risk doctrine" or "street risk doctrine" applies directly to truck drivers. *Special Fund of Industr. Comm'n v. Catalina Trucking Co.*, 658 P.2d 238, 241 (Ariz. Ct. App. 1982) (holding that the risk of assault is inherent to a truck driver's employment environment); *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W.2d 597, 602 (Tenn. 1979) (holding that truck drivers are exposed to the risk of assault and highway robbery to a much greater extent than the general public). However, the Supreme Court of Virginia, which employs the "actual risk" test, has held that truck drivers are not exposed to the risk of being robbed and assaulted to a greater degree than the general public. *Hill City Trucking, Inc. v. Christian*, 385 S.E.2d 377, 380 (1989).

¶23. Truck stops are viewed by some as dangerous places, but there is no evidence, and the appellee does not suggest, that a person is more likely to be robbed and assaulted at a truck stop than any other public place where large numbers of people interact. Of course, Shores's employment did not require him to be in Foster's Bar at 2:00 a.m. His employment required him to visit truck stops, not the bars located in or near truck stops. This Court will not apply the positional risk doctrine to truck drivers based on unfair stereotypes of them and generalizations about the environment in which they work.

CONCLUSION

¶24. In reversing the Commission's decision, we are mindful that the Mississippi Workers' Compensation Act should be given a liberal interpretation in order to effect its humanitarian aims. *ABC Mfg. Corp. v. Doyle*, 749 So. 2d 43, 47 (¶17) (Miss. 1999). However, "it is the duty of the court to construe the Act as it is written." *Watts*, 214 Miss. at 633, 59 So. 2d at 298. The court in *Big "2" Engine* stated that "no public policy would be served by compensating an injury or death originating with the employee's personal indiscretions, whether real or fancied. Risks associated with such escapades cannot reasonably be viewed as risks associated with employment." *Big "2" Engine*, 379 So. 2d at 891. Shores's death did not originate with his personal indiscretions, but the extended escapade he went on at Foster's Bar exposed him to risks that cannot reasonably be viewed as being associated with the trucking business or arising out of or in the course of his employment. To grant compensation in this case would be contrary to public policy and would effectively erase the "because of his employment" requirement from the Mississippi Workers' Compensation Act.

¶25. For the above reasons, we find the Commission improperly applied the law in holding that Mr. Shores's death was compensable under the law. Therefore, we reverse.

¶26. THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

MYERS, P.J., GRIFFIS, BARNES, ISHEE AND ROBERTS, JJ., CONCUR. CHANDLER, J., DISSENTS WITH A SEPARATE WRITTEN OPINION JOINED BY KING, C.J., SOUTHWICK AND IRVING, JJ.

CHANDLER, J., DISSENTING:

¶27. I respectfully dissent. In my opinion, the order of the Workers' Compensation Commission affirming the decision of the administrative law judge correctly applied the law and was supported by substantial evidence. Therefore, I would affirm the decision of the circuit court affirming the Commission's award of death benefits to Gerry Lynn Shores. As explained below, I believe the majority impermissibly substitutes its judgment for that of the Commission and misapplies the law governing whether Phillip Shores's death arose out of and in the course of his employment.

¶28. This Court's review of the decisions of the Workers' Compensation Commission is limited and deferential. *Weatherspoon v. Croft Metals, Inc.*, 853 So. 2d 776, 778 (¶6) (Miss. 2003). We may reverse the Commission only if its decision was unsupported by substantial evidence, was arbitrary and capricious, or involved an erroneous application of the law. *Id.* While our review of questions of law is de novo, we are prohibited from retrying de novo matters on appeal from the Commission. *Ricks v. Miss. State Dep't of Health*, 719 So. 2d 173, 177 (¶10) (Miss. 1998). Rather, our review of the evidence before the Commission is limited to determining whether there was evidence substantially supporting the Commission's decision such that its decision was not arbitrary and capricious. *Weatherspoon*, 853 So. 2d at 778 (¶6). "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and affords "a substantial basis of fact from which the fact in issue can be reasonably inferred." *Cent. Elec. Power Ass'n v. Hicks*, 236 Miss. 378, 389, 110 So. 2d 351, 357 (1959). If substantial evidence supports the Commission's decision, this Court may not reverse even if, acting as the fact-finder, we would have reached the opposite conclusion. *Vance v. Twin River Homes, Inc.*, 641 So. 2d 1176, 1180 (Miss. 1994). To do otherwise constitutes an impermissible intrusion by this Court into the

field of the Commission. *Miss. State Tax Comm'n v. Mississippi-Alabama State Fair*, 222 So. 2d 664, 665 (Miss. 1969).

¶29. The sole issue before the Commission was whether Shores's death met the definition of a compensable injury under Mississippi Code Annotated section 71-3-3(b) (Rev. 2000), which provides in pertinent part:

> "Injury" means accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. . . . This definition . . . also includes an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job, ...

The court discussed this language in *Big "2" Engine Rebuilders v. Freeman*, 379 So. 2d 888 (Miss. 1980). The phrase "arising out of" demands some causal connection between the injury and the employment. *Id.* at 890. "Reasonable relation of employment and injury may involve minimal causation, less than needed for liability in the field of Torts." *Id.* For an injury to arise out of the employment, the employment need not be the sole cause of the injury; it is sufficient if the employment rationally contributes to it. *Id.*

¶30. The phrase "in the course of" "is satisfied whenever the injury resulted from activity which is (1) in its overall contours actuated at least in part by a duty to serve the employer, or (2) reasonably incidental to the employment." *Id.* This includes some personal pursuits incidental to the employment such as using the telephone and purchasing soft drinks. *Id.* It has also been stated that a compensable injury is one that arises within the time and space limits of the employment and also while the employee is engaged in an activity related to the employment, that is, when the employee

is carrying out the employer's purposes directly or indirectly. *Bivens v. Marshall R. Young Drilling Co.*, 251 Miss. 261, 274, 169 So. 2d 446, 451 (1964).

¶31. A special rule applies to traveling employees such as Shores. A traveling employee remains in the course of employment from the time he leaves home on a business trip until he returns and the employment covers both the time and the place of travel, except in deviation cases or when the employee is on a personal mission or personal errand. *Bryan Bros. Packing Co. v. Dependents of Murrah*, 234 Miss. 494, 500, 106 So. 2d 675, 677 (1958). To constitute a deviation, the employee's personal activity must equate to an abandonment. *Estate of Brown ex rel. Brown v. Pearl River Valley Opportunity, Inc.*, 627 So. 2d 308, 311 (Miss. 1993). The "mere deviation or departure by a servant from a strict course of duty, does not in and of itself constitute such a departure from the master's business as to relieve a master from liability for the servant's act on the ground that the servant has deviated from his service." *Id.* Thus, for example, a traveling employee remains in the course of employment during breaks to stop and eat, such activity being reasonably incidental to employment as a traveling employee. *Retail Credit Co. v. Coleman*, 227 Miss. 791, 799, 86 So. 2d 666, 669 (Miss. 1956).

¶32. The claimant bears the burden of proof of a compensable injury. *Hedge v. Leggett & Platt, Inc.*, 641 So. 2d 9, 13 (Miss. 1994). The Commission, by affirming the opinion of the administrative law judge, found that Lynn had sustained her burden of proof that Shores's death arose out of and in the course and scope of his employment. As discussed below, I would find that the Commission's decision was supported by substantial evidence and that the Commission properly applied the law.

¶33. The Commission approached the question of whether Shores's death occurred in the course of his employment chronologically by examining Shores's activities on the afternoon of January 17, 2003 and in the early morning of January 18, 2003. The undisputed evidence before the Commission showed that, on the afternoon of Friday, January 17, 2003, Lynn let Shores out of the truck at the Sinclair Truck stop in Laramie, Wyoming. The Sinclair Truck Stop was located off Interstate 80 at exit 310. Lynn watched Shores approach the door of the truck stop. Then, Lynn drove the truck to the Petro station located at nearby exit 311 to procure a new fuel filter. The Shores's pay was deposited into an account every Friday. After Lynn dropped Shores off, he withdrew cash in the amount of his weekly paycheck from the account.

¶34. Before the Commission, Total argued that Shores's departure from the truck constituted an abandonment of his employment sufficient to remove him from the course of his employment for the purposes of section 71-3-39(b). Total argued that the manner in which Shores left the truck constituted an abandonment of the truck, known in the industry as "jumping truck," and a terminable offense. Total contended that it required its truckers to inform the dispatcher if the trucker was going off-duty for any period of time over an hour, and that Shores had failed to contact the dispatcher before leaving. Total further argued that Shores's drinking at Foster's Restaurant violated company policy and was a terminable offense. Total contended that the weight of the evidence showed that, when Shores left the truck on the afternoon of January 17, 2003, Shores intended to resign his employment by abandoning the truck and going on a drinking binge.

¶35. The Commission found from the preponderance of the evidence that Shores's departure from the truck was not a severance of his employment with Total and did not remove Shores from the course of his employment. This finding was supported by substantial evidence, including the

following, most of which was cited by the Commission in support of its finding. Lynn testified that Shores left the truck intending to get something to eat and to take a break, not to abandon the truck or his employment. Lynn further testified that Shores had not eaten since the day before. Undigested food particles were found in Shores's stomach at the autopsy, indicating Shores indeed had eaten after exiting the truck. Lynn testified that Shores logged off duty before leaving the truck and asked her if she could handle the fuel filter repair. Both Lynn and another Total driver, Bonnie Faulkner, testified that it was not their regular practice to notify dispatch before going off-duty; rather, they would call dispatch when they picked up or dropped off a load or were having problems with the truck.

¶36. Lynn testified that she and Shores had been arguing that day due to the fuel filter problem and that they needed some time apart. The existence of the fuel filter problem was supported by the slow speed of the truck on its approach to Laramie as indicated by the global positioning system. Omar Hadi, the dispatcher, testified that, when Lynn told him she could not find Shores, he thought Shores would return to the truck and had no concerns that Shores would not deliver the load. At that time, Hadi did not tell Lynn that Shores's actions violated company policy or constituted a terminable offense. Further, Shores never told Lynn or anyone else that he was abandoning the truck or his employment with Total. The Commission found that Shores's withdrawal of his paycheck from the ATM machine did not evince a resignation or intent to resign.

¶37. The Commission found that the idea that Shores intended to abandon the truck was inconsistent with the fact that he asked his co-driver, Lynn, to handle the truck repairs when he logged off and left the truck, and that Shores left Lynn in charge of the load when he went off-duty. The Commission further observed that the idea that Shores abandoned the truck was inconsistent

with his telling the patrons of Foster's Restaurant that he was a truck driver and asking for a ride back to the truck upon leaving Foster's. The Commission recognized Total's argument that Shores's intent to abandon his employment could be inferred from the fact that he remained in Foster's Restaurant for eleven to twelve hours. The Commission rejected this argument, observing that, as a long-haul truck driver away from home with no transportation and no cell phone, logically Shores would not have left the fuel center complex where Lynn left him. The Commission found that Shores remained where his co-driver had left him and where she expected to pick him up. After noting that there would be no way for Shores to have known Lynn would not be able to find him, the Commission stated,

> Obviously, if Decedent did not think that his co-driver and wife would not be able to find him where she had left him, he would not have thought that he would be away from the truck for eleven or twelve hours or, thereby, needed dispatch approval to be off duty for eleven or twelve hours.

¶38. The Commission's conclusion that Shores remained in the course of his employment at the time that he left the truck primarily turned on Shores's intent. If Shores intended to resign his employment when he left the truck, his departure could have been a deviation amounting to an abandonment of employment. But, if Shores left the truck for the purposes of obtaining food or rest, activities incidental to employment, then Shores remained in the course of employment. The matter of Shores's intent, whether to resign from his employment with Total and to go on a drinking binge or to obtain rest and food, presented a question of fact. I believe that the evidence recited above was adequate to substantially support the Commission's finding that Shores did not resign his employment and depart from the course of employment when Lynn dropped him off at the Sinclair Fuel Center.

¶39. Without discussing the Commission's findings, the majority appears to agree with Total's assertion that Shores left the truck with the intent to abandon his employment. Certainly, as noted by the majority, Shores had a spotty employment record. He had been fired from several trucking jobs. Several witnesses attested to his bad temper. While Lynn did testify that, when she was unable to find Shores she worried that he had quit, she said that this fear was one of several that she developed in bewilderment over having lost contact with Shores, including fears that Shores had been kidnaped or hospitalized, or had checked into a motel for the night. This evidence that Shores had abandoned his employment at the time that he left the truck is far too speculative to enable our reversal of the Commission's contrary finding.

¶40. The Commission further found that Shores entered Foster's Restaurant, which served both food and alcohol, with the intent to obtain something to eat. This finding was supported by substantial evidence. In addition to the evidence cited above concerning Shores's intent to get something to eat when he left the truck, Lynn testified that the Sinclair Fuel Center served only pre-packaged cold sandwiches and that Shores was afraid to eat pre-packaged cold sandwiches due to the risk of food poisoning. Lynn stated that, when she was looking for Shores at the Sinclair on the evening of January 17, 2003, and discovered that the Sinclair only had cold sandwiches, Lynn reasoned that Shores had gone elsewhere for food.

¶41. Next, the Commission found that Shores deviated from his employment "when he elected to drink alcohol, become intoxicated, play pool and otherwise engage in personal activities unrelated to his employment." Rejecting Lynn's argument that her inability to locate Shores had created an enforced lull in his work, the Commission found that Shores's "decision to drink alcohol and pursue a frolic of his own established a distinct, personal deviation from the direct or incidental activities

of his employment." The Commission found that there would have been no deviation from the course of Shores's employment had he remained at Foster's Restaurant for eleven or twelve hours but refrained from drinking alcohol while awaiting his co-driver's return. The Commission's conclusion that Shores deviated from his employment while drinking at Foster's Restaurant is not challenged on appeal, and I do not address it.

¶42. I next discuss the Commission's finding that, because Shores's deviation from employment ended when he asked Shandy for a ride back to his truck, his death was in the course of his employment. That finding was based upon *Coleman*, 227 Miss. at 799, 86 So. 2d at 669, in which a traveling employee was found to have temporarily abandoned his employment by remaining at a restaurant after eating in order to drink alcohol and socialize. The court held that Coleman had resumed his employment when he left the restaurant and continued driving on his route. *Id.* The majority distinguishes *Coleman*, holding that, as a matter of law, Shores could have not resumed his employment due to his intoxication. The majority states:

> The Commission also erred in finding that Mr. Shores's noncompliance with company policy regarding drinking alcohol while on the job did not preclude him from reentering his employment. Total's company policy clearly stated that drivers are prohibited from consuming alcohol while on duty and for a period of four hours before going on duty while having an alcohol concentration of .04 or greater. We fail to see how someone clearly intoxicated throughout the course of the evening could reenter the course and scope of his employment if doing so would violate company policy and Department of Transportation regulations.

Later, in the majority's holding that Shores's death did not arise out of his employment, the majority states that Shores's "job as a trucker caused him to be in Shandy's car," that, if Shores "had not been employed as a trucker he would not have needed a ride," and that "Shores's employment with Total was a contributing cause of his being in Shandy's car when he was shot." The implication of this

reasoning by the majority is that, although Shores's securing of a ride back to the truck was reasonably incidental to his employment as a trucker, Shores's intoxication was a violation of company policy that prevented his death from occurring in the course of employment.

¶43. I begin by addressing the majority's holding that, because Shores was intoxicated and legally could not have gone on duty at the moment Shandy would have dropped him at the truck, his murder by Shandy on the ride back to the truck was not in the course of his employment. This holding erroneously equates on duty status under Total policies and Department of Transportation (DOT) regulations with being in the course of employment under section 71-3-3(b). As the Commission correctly recognized, "neither company policy nor DOT regulations govern whether the death of an employee arises out of and in the course of employment within the meaning of Miss. Code Ann. Section 71-3-7(b) (Rev. 2000)." Under our Workers' Compensation scheme, a traveling employee remains in the course of employment from the time he leaves home until the time he returns home, absent a deviation equivalent to an abandonment of employment. *Bryan Bros.*, 234 Miss. at 500, 106 So. 2d at 677. This is because almost all of the traveling employee's activities away from home, even rest and recreation, are within the time and space limitations of the employment and reasonably incidental to being a traveling employee. Certainly, time spent for personal rest and recreation is reasonably incidental to employment as a long-haul truck driver, especially since DOT regulations mandate that drivers rest between periods of time spent driving, and place daily and weekly limits on the amount of time a driver can be on duty. Thus, whether Shores was on or off duty, when he was away from home he was within the course of his employment as a long haul truck driver unless he deviated from his employment to a degree coextensive with an abandonment of his employment.

¶44. I next address the effect of Shores's intoxication on his ability to resume his employment for workers' compensation purposes. The Commission found that Shores's intoxication when he left Foster's violated company policy and/or DOT regulations but that his intoxication did not bar him from resuming his employment. In fact, testimony from Total employees, regulations promulgated by the DOT, and Total's written employee policies raised a question as to whether Shores's intoxication violated company policy. Bill Robertson, Total's former director of safety and human resources, testified that, according to DOT regulations, a driver could not consume alcohol when performing any duty for the company or for four hours before performing any duty for the company. Lynda Lee Lollar, Total's night dispatcher, testified that a driver violated Total's policies by consuming alcohol while "on duty" or "running a load." Lollar testified that she interpreted the policy as barring any use of alcohol while on dispatch. She stated that a driver would not violate Total's policies by drinking alcohol while off duty. Lynn testified that no one at Total had instructed drivers not to drink alcohol while off duty and that Total tolerated other truck drivers drinking alcohol while off duty.

¶45. According to Total's written policies, "on duty" means the driver is engaged in safety-sensitive functions as defined by DOT regulations. DOT regulations provide that:

> safety sensitive functions shall include:
>
> (1) All time at an employer or shipper plant, terminal, facility or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the employer;
>
> (2) All time inspecting equipment as required by §§ 392.7 and 392.8 of this subchapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;
>
> (3) All time spent at the driving controls of a commercial motor vehicle in operation;

> (4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth (a berth conforming to the requirements of § 393.76 of this subchapter);
>
> (5) All time loading or unloading a vehicle, supervising, or assisting in the loading or unloading, attending a vehicle being loaded or unloaded, remaining in readiness to operate the vehicle, or in giving or receiving receipts for shipments loaded or unloaded; and
>
> (6) all time repairing, obtaining assistance, or remaining in attendance upon a disabled vehicle.

¶46. Total's alcohol policies mirror DOT regulations and provide that drivers are prohibited from consuming alcohol while on duty performing safety-sensitive functions and for a period of four hours before going on duty, and that an employee cannot report for duty with a blood alcohol concentration of .04 percent or greater. Also, alcohol is not allowed inside the truck. The punishment for an employee's violation of these policies is mandatory termination. According DOT regulations, a driver is off duty when occupying the sleeper berth of the truck. It appears that a driver could log off duty, drink alcohol outside the truck, and then remain outside the truck or occupy the sleeper berth of the truck without running afoul of Total policies or DOT regulations provided the driver did not return to duty for four hours or until his blood alcohol level was below .04 percent. There was no evidence that Shores intended to return to on-duty status when he returned to the truck. Therefore, it is questionable whether Shores violated Total's alcohol policies or DOT regulations by logging off duty, becoming intoxicated, and attempting to return to the truck.

¶47. Even if Shores's intoxication did violate Total policies and/or DOT regulations, as the Commission recognized, Shores's intoxication in violation of company policy or federal regulations could not bar compensability of his injury under Mississippi Code Annotated section 71-3-7. Section 71-3-7 states that compensation is payable "without regard to fault as to the cause of the

injury . . . ." Subsection (b) provides that compensation is not payable if the employee's intoxication was the proximate cause of the injury. The Commission found that Shores's intoxication did not proximately cause his murder by Shandy and, therefore, his intoxication did not render his death non-compensable.

¶48. In *Tyson Foods, Inc. v. Hilliard*, 772 So. 2d 1103, 1105 (¶¶8-9) (Miss. Ct. App. 2000), this Court addressed the effect of Hilliard's possible intoxication at the time of his injury upon the compensability of his injury, which was otherwise work-related. At the emergency room immediately after the injury, Hilliard refused to submit to an employer-mandated drug test. *Id.* at 1104 (¶3). The employer terminated Hilliard for violating the company's post-accident drug testing policy. *Id.* at 1105 (¶4). The employer argued that Hilliard's injury was not compensable because of Hilliard's post-injury misconduct. *Id.* at 1105 (¶8). While there was no showing that intoxication proximately caused Hilliard's injury, Hilliard's failure to submit to a drug test implied that he was impaired at the time of the injury in violation of the employer's drug policies. We affirmed the Commission's finding that the injury was compensable, stating:

> The relevant statute stated that "compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment, without regard to fault as to the cause of the injury or occupational disease." Miss. Code Ann. § 71-3-7 (Rev. 2000). Regardless of whether Hilliard had been slightly or egregiously careless, or whether his own, a fellow employee, or a supervisor's negligence caused the injury, he is still entitled to benefits for that disability. An employee's possible negligence includes being intoxicated or impaired by other substances, legal or illegal. Such conduct is not an issue in whether the benefits for the injury arising on the job are payable. Should such conduct be discovered before it causes injury, then termination or other discipline of the employee may be appropriate. However, we find no statutory support for allowing these considerations to deny disability benefits once an otherwise compensable injury has occurred.
>
> . . . .
>
> A post-injury termination for misconduct, even if the misconduct contributed to the injury, does not end the right to benefits.

. . . .

> Job-site negligence that arises from illegal drug use may be especially likely to cause injuries. Yet every area of the law does not serve the same remedial purposes. The purposes of the statutes that we review in this appeal are to provide benefits for injuries suffered on the job. If workers' compensation law is to become part of the vanguard against drug use by denying benefits to workers suffering otherwise compensable injuries, that is for the legislature to decide.

Id. at 1106-07 (¶¶14-16). In this case, the Commission correctly recognized section 71-3-7 and *Hilliard* as the controlling law, finding that, because Shores's intoxication did not proximately cause his death, his intoxication in violation of employer policies did not bar his otherwise work-related death from compensability.

¶49. Having found that Shores's death was in the course of his employment, the Commission concluded that Shores's death arose out of his employment because the risk of assault and robbery was a street risk attendant to Shores's employment as a truck driver. In reversing the Commission, the majority finds that assault and robbery are not special risks of employment as a truck driver. I defer to the majority's general discussion of the positional risk doctrine and our relevant precedent, but disagree with the majority's result. While recognizing that other states have applied the positional risk doctrine to truck drivers, the majority finds that "there is no evidence, and the appellee does not suggest, that a person is more likely to be robbed and assaulted at a truck stop than any other public place where large numbers of people interact." Then, for fear of engaging in unfair stereotyping and generalizations about truck drivers, the majority refuses to hold that robbery and assault are inherent risks of employment as a truck driver.

¶50. The majority cites *Hill City Trucking, Inc. v. Christian*, 238 Va. 735, 385 S.E. 2d 377, 380 (1989), for the proposition that truckers are not subject to an increased risk of robbery and assault.

However, the Virginia Supreme Court in *Hill City* applied the stricter actual risk test to determine whether the injury arose out of the trucker's employment. In *Hill City*, criminals, impersonating police, pulled over a truck driver and robbed and shot him. Applying the actual risk test, the court questioned whether the employment was a contributing proximate cause of the risk of robbery and assault on a trucker's person. The court determined that it was not, and reversed the contrary finding of the court of appeals. The court of appeals had held that driving down dark roads, which was required by the employment, increased the trucker's risk of robbery and assault. The supreme court found that the court of appeals had erroneously applied the positional risk doctrine to find compensability. Since this Court applies the positional risk doctrine, I regard *Hill City* to be inapposite to this case and consider the question under the positional risk doctrine.

¶51. Discussing the positional risk doctrine, our supreme court has stated:

> "It is not the peculiar nature of the environment or of the risk, provided it is accidental, but the fact that the work brings the worker within the orbit of whatever dangers the environment affords that is important. It follows also that it is not necessary for the injury or the risk to be 'natural,' 'normal,' or predictable. When it is so, this fact, like 'special danger,' makes causal connection between work and injury more plain. But the very essence of compensation is that the injury be accidental, and that means unexpected.
>
> . . . [N]o more is necessary than that the work subject the employee to a peril which comes from the fact that he is required to be in the place where it strikes when it does so. It is immaterial whether the place is the employer's premises or a street; whether the risk arises from physical features or human agencies connected with the place; whether it is a common occurrence or an extraordinary happening; one which threatens only employees at work or others also.["]

Brookhaven Steam Laundrey v. Watts, 214 Miss. 569, 603-04, 55 So. 2d 381, 393 (Miss. 1951) (quoting *Hartford Accident and Indemnity Co. v. Cardillo*, 112 F.2d 11, 14 (D.C. Cir. 1940)). The activities of a traveling employee are "not to be lifted from the perimeters of his employer's mission

and viewed in isolation, but must be viewed in . . . context, as a whole." *Big "2" Engine Rebuilders*, 379 So. 2d at 891.

¶52. A long-haul truck driver's employment requires the driver to traverse the country and to meet delivery deadlines. Yet, truckers are required to punctuate periods of driving with periods of rest. Truck stops are specifically designed to meet the needs of truck drivers. Conveniently located along the nation's major highways, truck stops provide a trucker with expeditious access to trip necessities such as fuel, repairs and service, sustenance, restroom and shower facilities, ATM machines, shopping, and opportunities for rest and recreation. Thus, a long-haul truck driver's presence at truck stops easily may be seen as being associated with the employment. Accordingly, in *Special Fund of Industry Commission v. Catalina Trucking Co.*, 134 Ariz. 585, 588, 658 P.2d 238, 241 (Ariz. Ct. App. 1982), the court found that, for the purposes of the street risk doctrine, there was no meaningful distinction between a self-service truck stop premises and the street because the exposure to the hazards of the truck stop resulted from the demands of the trucker's employment. The court further found that truck stops pose an increased hazard of assault. Quoting *Hudson v. Thurston Motor Lines, Inc.*, 583 S.W. 2d 597, 602 (Tenn. 1979) the court stated:

> No one can quarrel with the conclusion that a truck driver for a motor freight carrier is exposed to the hazards of the streets and highways to a substantially greater extent than is common to the public. That is the basis for the street-risk rule, which simply stated, is that the risks of the street are the risks of the employment, if the employment requires the employee's use of the street.

Id. at 589, 242.

¶53. I believe that a trucker's risk of assault and robbery is increased by the employment environment as one that "specially expose[s] the employee to lawless or irresponsible members of

the public, . . . or that merely subject[s] the employee to increased and indiscriminate contact with the public." *Johnson v. Roundtree*, 406 So. 2d 810, 811 n.1 (Miss. 1981) (quoting 1 Larson's Workmen's Compensation Law, § 11.11(a) (1978)). There was evidence of the increased risks of harm to truck drivers at truck stops in this very case. Lynn Shores testified that Total had instructed its female drivers not to exit the truck at a truck stop after dark because truckers had been robbed at fuel islands. Lynn also stated that she had read an article in a trucker's magazine warning that people had been "snatched" while walking between parked trailers. Viewing the matter more generally, a long-haul trucker's job requires the trucker to spend time far away from home and to interact at truck stops with other itinerant strangers. In addition to hauling goods, truckers must carry their money and personal effects along with them on trips. Truckers may readily be found at truck stops. For these reasons, it is reasonably foreseeable for truckers such as Shores to be preyed upon at truck stops by opportunistic criminals. *See Big "2" Engine Rebuilders*, 379 So. 2d at 891. Without apparent fear of stereotyping, our courts have acknowledged the reality that persons employed as streetcar conductors, bus drivers, taxi drivers, hotel managers, and convenience store workers are subject to increased risk of assault by virtue of their employment. I would apply the same reasoning to long-haul truck drivers such as Shores.

¶54. Under our Workers' Compensation scheme, the Act must be "construed fairly to further its humanitarian aims" and "doubtful cases are to be resolved in favor of compensation." *Id.* at 899. The Commission recognized and applied these principles in its decision that Shores's death was compensable. I would affirm the decision of the circuit court affirming the Commission.

KING, C.J., SOUTHWICK AND IRVING, JJ., JOIN THIS OPINION.