

**IN THE SUPREME COURT OF MISSISSIPPI**

**MISSISSIPPI LOGGERS SELF INSURED FUND, INC.**

**APPELLANT**

**VERSUS**

**NO. 2007-WC-00554**

**HOWARD MCDONALD, Claimant,  
ANDY KAISER LOGGING, Employer  
TRI-LAKE TIMBER CO./MISSISSIPPI-PACIFIC CO.,  
KCS LUMBER COMPANY,  
COLUMBUS LUMBER CO., LLC.**

**APPELLEES**

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**On Appeal from the Circuit Court of Lawrence County, Mississippi**

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**BRIEF OF APPELLEE MISSISSIPPI PACIFIC CO.**

**Oral Argument Not Requested**

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KCS LUMBER COMPANY,  
COLUMBUS LUMBER CO., LLC.**

**APPELLEES**

**CERTIFICATE OF INTERESTED PERSONS**

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

1. The Mississippi Loggers Self-Insured Fund, Inc., Appellant;
2. J. Niles McNeel, Esq. and Steven D. Slade, Esq., Attorneys for Appellant;
3. Mississippi Pacific Co. Tri Lake is not a party to this appeal
4. Grain Dealers Mutual Insurance Company - Compensation Carrier for Mississippi Pacific Co
5. Suzanne N. Saunders, Esquire - Attorney for Mississippi Pacific Co. and Grain Dealers Mutual Insurance Company;
6. Andy Kaiser Logging, a sole proprietorship, William Andy Kaiser, proprietor, Employer;
7. Christopher E. Kelley, Esquire, Gwin, Lewis & Punches, LLP - Attorneys for Andy Kaiser Logging;

8. KCS Lumber Company, Inc. - [alleged] Employer;
9. Indiana Lumbermen's Mutual Insurance Company - Compensation Carrier for KCS Lumber Company, Inc.;
10. Clifford B. Ammons, Esquire, Watkins & Eager, PLLC - Attorneys for KCS Lumber Company, Inc./Indiana Lumbermen's Mutual Insurance Company;
11. Columbus Lumber Company, LLC - [alleged] Employer;
12. American Federated Insurance Company - Compensation Carrier for Columbus Lumber Company, LLC;
13. Richard M. Edmonson, Jr., Esquire, Markow Walker, P.A. - Attorneys for Columbus Lumber Company, LLC/American Federated Insurance Company;
14. Howard McDonald - Claimant;
15. John T. Ball, Esquire - Attorney for Howard McDonald;
16. Honorable R. I. Prichard, III - Circuit Court Judge, Lawrence County;
17. Mississippi Workers' Compensation Commission, Phyllis Clark - Secretary.

This, the 16<sup>th</sup> day of July, 2007.



**SUZANNE N. SAUNDERS, MSB No. 6479**

**Attorney for Appellee Mississippi Pacific Co.**

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## **STATEMENT OF THE ISSUES**

1. Whether the Mississippi Workers' Compensation Commission and the Circuit Court of Lawrence County, Mississippi correctly found that the "solely liable party" was Andy Kaiser d/b/a Andy Kaiser Logging who has paid claimant Howard McDonald all Mississippi workers' compensation benefits to which McDonald was entitled, pursuant to Miss. Code Ann. 1972 § 71-3-37 (13).

2. Whether the Circuit Court of Lawrence County, Mississippi correctly affirmed the Mississippi Workers' Compensation Commission's ruling when the Commission gave substantial deference to the findings of the Mississippi Workers' Compensation Commission Administrative Law Judge. See *Ross v. B. C. Rogers Processor, Inc.*, 787 So. 2d 664 (Miss. 2001).

## **STATEMENT OF THE CASE**

Tri-Lake Timber Co. (Tri-Lake) is not a party to this appeal. (See V. 3 pp. 133-134 & V. 3 pp. 139-140). No where in the record is there any reference to Mississippi Pacific Co. as being the "alter ego" of Tri-Lake. Appellant's footnote 1 at page -i- is not supported by the record.

Claimant Howard McDonald was injured on April 3, 1996, in the course and scope of his employment with Andy Kaiser Logging. (See Gen. Ex. 1 pp. 4-5).

Andy Kaiser Logging (Kaiser) was an independent contractor. (See Gen. Ex. 1 p. 7 lines 6-7). On April 3, 1996, Kaiser had four (4) employees. (See Gen. Ex. 1 p. 7 lines 9-13, & V. 3 p. 3).

The Mississippi Loggers Self-Insured Fund, Inc. (the Fund) was joined in the

Petition to Controvert and answered same on July 2, 1996, denying liability. (See V. 3 pp. 5-6).

On February 21, 1997, the Fund served a Motion for Summary Judgment for Declaratory Relief in which the Fund admits it paid claimant Howard McDonald both indemnity and medical benefits from April 3, 1996, through February 21, 1997.

Simultaneously, the Fund knew it had properly cancelled Kaiser's workers' compensation coverage on December 25, 1995, for non-payment of premiums. The Fund was a volunteer with no right of recovery from anyone. (See V. 3 pp. 8-12).

No dispute arose between the Fund and Mississippi Pacific or Tri-Lake when the Fund voluntarily began paying workers' compensation benefits to McDonald. No order was entered by the Mississippi Workers' Compensation Commission ordering the Fund to pay workers' compensation benefits to McDonald. Therefore, the Fund is not entitled to a reimbursable lien. (See V. 3 pp. 133-135 & 139-140).

Appellant's footnote 2 at page 1 of 16 in Appellant's brief commenting on a third-party administrator is not supported with any proof in the record and is not relevant to this appeal.

The Mississippi Workers' Compensation Commission Administrative Law Judge found Kaiser as the "solely liable party". (See V. 5 pp. 317-328; R.E. 18-29).

Kaiser has a suit pending in the Circuit Court of Adams County, Mississippi, against the Fund for reimbursement of Kaiser's payments to McDonald and bad faith breach of contract. (See Supp. Gen. Ex. 10).

On the track of timber at issue, Kaiser had a written contract with KCS Lumber

Co. and the landowner for harvesting the timber. (See Gen. Ex. 1 pp. 12 & 23).

All timber buyers Parker, Ratcliff and Allen testified that independent contractors in the logging business were required to supply timber buyers with proof of workers' compensation insurance coverage through certificates of coverage before logging operations could begin. Parker's offices maintained a certificate of insurance for Kaiser. (See V. 6 pp. 58-64 & V. 6 pp. 32, 41 & 42 & V. 6 p. 46 lines 20-29, p. 47 lines 1-9).

Robert Parker testified that Tri Lake was depending on insurance certificates on file from the Fund. According to Parker, the secretary at Tri-Lake would have told anyone who asked that they had a valid certificate of insurance on file for Kaiser. ( See V.6 p. 74 lines 11-24 ). Parker said that a certificate of workers' compensation insurance was on file was to show the time frame that the coverage was in place. ( See V.6 p. 75 lines1-5).

Neither the Fund nor Kaiser notified the timber buyers of the Fund's early cancellation of workers' compensation coverage due to non-payment of premiums. (See V. 3 p. 8-16).

The triple hearsay letter does not entitle the Fund to reimbursement of benefits paid to or for McDonald voluntarily. (See Gen. Ex. 2; R.E. 17). **Counsel for the Fund conceded that Gen. Exhibit "2", "the letter" was not necessarily evidence against Tri-Lake Timber Co., which is not a party. ( See V. 6 p. 87 lines 26-29). With the Fund's admission, the Fund has no claim with which to proceed in this appeal.**

Neither Tri-Lake nor Mississippi Pacific paid unemployment tax on McDonald. (See V. 6 p. 61 lines 10-14).

### **SUMMARY OF THE ARGUMENT**



Mississippi Pacific Co. (Pacific), a Mississippi corporation, is an appellee in this appeal. Tri-Lake Timber Co. (Tri-Lake), a Mississippi corporation, is not a party to this appeal. Tri-Lake is not the “alter ego” of Pacific. *See Penn National Gaming, Inc. v. Ratliff*, 954 So.2d 427, 431 (Miss. 2007).

Andy Kaiser d/b/a Andy Kaiser Logging was a self-insured logger through the Mississippi Loggers Association Self-Insured Fund, Inc. pursuant to the Mississippi Workers’ Compensation Self-Insured Guaranty Association Law, §§ 71-3-151 through 71-3-181.

Kaiser had less than five (5) employees. Kaiser was not subject to the Mississippi Workers’ Compensation Act. Miss. Code Ann. 1972 as amended § 71-3-5.

The Fund’s claim to a reimbursement lien herein does not exist as defined in Miss. Code Ann. 1972 as amended § 71-3-37 (13).

When it paid workers’ compensation benefits to McDonald, the Fund was a volunteer as defined in *McDaniel Construction Co. v. Burk-Hallman Co.*, 175 So.2d 603 (Miss. 1965), upholding *McLean v. Love*, 175 Miss. 168, 157 So. 361 (1934). Therefore, the Fund is not entitled to recover payments made to McDonald.

When the Fund stopped paying workers’ compensation benefits, Andy Kaiser Logging picked up and paid the workers’ compensation benefits to and for McDonald as a self insured under the “Act” §§ 71-3-151 through 71-3-181.

The “solely liable party” is Andy Kaiser Logging. Miss. Code Ann. 1972 as amended § 71-3-37 (13).

Neither Tri-Lake nor Mississippi Pacific paid unemployment tax on McDonald.

Miss. Code Ann. 1972 as amended § 71-3-5 provides that purchasers of timber are not liable for workers' compensation as defined in 26 U.S.C. § 3306, as amended.

### ARGUMENT

On appeal questions of workers' compensation law are reviewed de novo. *Spann v. Wal-Mart Stores, Inc.*, 700 So. 2d 308, 311 (Miss. 1997); *Davis v. Clarion-Ledger*, 938 So. 2d 905, 907 (Miss. Ct. App. 2006).

Appellant's footnote 1 at page i which claims that Tri-Lake and Mississippi Pacific are alter egos for each is not supported by the record, the facts or the law.

Mississippi Pacific is not the alter ego of Tri-Lake nor the reverse.

Mississippi Pacific Co. (Pacific), a Mississippi corporation, is an appellee to this appeal.

Tri-Lake Timber Co., (Tri-Lake) a Mississippi corporation, is not a party to this appeal. Tri-Lake is not the "alter ego" of Pacific. In *Penn National Gaming, Inc. v. Ratliff*, 954 So.2d 427 (Miss. 2007), the Supreme Court held:

... we have adopted the general rule that the corporate entity will not be disregarded in contract claims unless the complaining party can demonstrate: (1.) Some frustrations of expectations regarding the party to whom he looked for performance; (2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and (3) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. Gray, 541 So.2d at 1047 ...

954 So. 2d at 431.

No proof can be found in the record supporting piercing of the corporate veil as required in *Penn National*. Therefore, Tri-Lake and Mississippi Pacific are not "alter

egos" of each other.

McDonald was injured on the job on April 3, 1996, while in the course and scope of his employment as a logger with Kaiser. (See Gen. Ex. 1 pp. 4-5). Kaiser was an independent contractor. (See Gen. Ex. 1 p. 7 lines 6-7). Kaiser was a self insured through the Mississippi Workers' Compensation Self-Insured Guaranty Association Law, §§ 71-3-151 through 71-3-181.

On April 3, 1996, Kaiser had four (4) employees; therefore, Kaiser was not subject to the Mississippi Workers' Compensation Act. Miss. Code Ann. 1972 as amended § 71-3-5. (See Gen. Ex. 1 p. 7 lines 9-18 and V. 3 p. 3).

When the Carrier, Mississippi Loggers Self-Insured Fund, Inc., was joined in the Petition to Controvert, it answered on July 2, 1996, and denied liability. (See V. 3 pp. 5-6).

On February 21, 1997, the Fund served a Motion for Summary Judgment for Declaratory Relief in which the Fund admits it paid Claimant Howard McDonald both indemnity and medical benefits from April 3, 1996 through February 21, 1997. At the same time the Fund states that the Fund knew it had properly cancelled Kaiser's workers compensation benefits on December 25, 1995 for non-payment of premiums. The Fund was a volunteer with full knowledge of the facts. (See V. 3 pp. 8-12).

The record does not contain a reservation of rights document wherein the Fund made payment to McDonald with a reservation of rights. Further, there is no order in the record directing the Fund to pay workers' compensation benefits until a "solely liable party" is determined.

A party may not recover money which it voluntarily paid with full knowledge of all the facts. Here, the Fund had full knowledge as stated by its Motion referenced above. In *McDaniel Construction Co. v. Burk-Hallman Co.*, 175 So.2d 603 (Miss. 1965), the Court upheld the case of *McLean v. Love*, 175 Miss. 168, 157 So. 361 (1934), stating:

. . . A voluntary payment cannot be recovered back, and a voluntary payment within the meaning of this rule is a payment made without compulsion, fraud, mistake of fact, or agreement to repay a demand which the payor does not owe and which is not enforceable against him . . .

The Fund is not entitled to recover money benefits it paid to or on behalf of McDonald.

The Fund is not entitled to claim the benefits of Miss. Code Ann. 1972 as amended § 71-3-37 (13) as against Mississippi Pacific Co., appellee herein, nor any other party present or past.

Section 71-3-37 (13) provides as follows:

- (13) Whenever a dispute arises between two (2) or more parties as to which party is liable for the payment of workers' compensation benefits to any injured employee and there is no genuine issue of material fact as to the employee's employment, his average weekly wage, the occurrence of an injury, the extent of the injury and the fact that the injury arose out of and in the course of the employment, the commission may require the disputing parties involved to pay benefits immediately to the employee and to share equally in the payment of those benefits until it is determined which party is solely liable, at which time the liable party must reimburse all other parties for the benefits they have paid to the employee with interest at the legal rate.

(Emphasis added).

When the Fund was discharged from further payments to McDonald, Kaiser picked

up and paid all medical and indemnity benefits until McDonald was paid in full. (See V.5 pp. 317-328).

There was no dispute between Tri-Lake/Mississippi Pacific when the McDonald claim arose.

Mississippi Pacific was substituted for Tri-Lake on March 16, 1999, almost three years after McDonald was injured. (See V.3 pp. 133-135 and 139-140.)

There was no dispute between the Fund and Mississippi Pacific at the time McDonald was injured, and no order entered requiring anyone to pay workers' compensation benefits.

Miss. Code Ann. 1972 as amended § 71-3-37 (13) simply does not apply here as against Mississippi Pacific or Tri-Lake.

The Administrative Law Judge of the Mississippi Workers' Compensation Commission was eminently correct in the Commission ruling that Andy Kaiser Logging was the "solely liable party." (See V. 5 pp. 317-328; R.E. 18-29).

As a side note, Kaiser has sued the Mississippi Loggers Association Self-Insured Fund, Inc. in the Circuit Court of Adams County, Mississippi for the sums Kaiser paid to McDonald and for bad faith breach of contract. (See Supplemental Gen. Ex. 10, filed on January 16, 1999).

On the track of timber at issue, Kaiser had a written contract with KCS Lumber Co. and the landowner to harvest the timber. (See Gen. Ex. 1 pp. 12 and 23).

According to Robert Parker's testimony, independent contractors in the logging business were required to supply timber buyers with proof of workers' compensation

insurance coverage through their certificates of coverage before logging operations could begin. (See V. 6 pp. 61 lines 15-29, p. 62, 63 & 64).

Parker explained he worked for both Tri-Lake and Mississippi Pacific in two different capacities, for two different companies. (See V. 6 pp. 58, 60). Parker further testified and explained how the loggers operate.

Parker's testimony was further supported by Ted Ratcliff, a procurement forester for Columbus Lumber Co. Ratcliff testified the loggers must produce certificates of workers' compensation insurance. The certificates are required by timber buyers before cutting the timber begins. (See V. 6 pp. 32, 41 and 42).

Kirby Allen, a timber buyer for KCS Lumber Co., testified in further support of Robert Parker's testimony that KCS Lumber Co. required certificates of workers' compensation insurance before a logger began cutting timber. (See V. 6 p. 46 lines 20-29, p. 47 lines 1-9).

It is patently clear that Parker, Ratcliff and Allen all believed Andy Kaiser Logging had a valid certificate of workers' compensation insurance. The fact that the Fund did not notify certificate holders of the alleged cancellation of Kaiser's workers' compensation insurance coverage is a proximate reason logging operations commenced in April of 1996. (See V. 6 p. 63 lines 1-13; see also Gen. Exs. 6 & 7).

The law of prime contractors, general contractors and subcontractors does not apply in this workers' compensation claim. Kaiser was an independent contractor.

Neither Mississippi Pacific nor Tri-Lake had any contractual interest in the logging operation owned and operated by KCS Lumber Co. and Columbus Lumber Company.

Mississippi Pacific merely purchased gate logs as evidenced by Parker's testimony. (See Gen. Exs. 6 and 7, Also see V. 6 p. 76 lines 11-14 ).

None of the witnesses, including Kirby Allen, testified that they expected Tri-Lake or Mississippi Pacific to supply workers' compensation insurance coverage to their companies. Instead, all relied upon Kaiser and the Fund to keep them informed about the workers' compensation coverage held by Kaiser. The burden was upon Kaiser and/or the Fund to timely notify certificate holders of any cancellations of coverage.

Even the Fund through its Motion found at V. 3 page 8-16 makes no reference to notifying the certificate holders of an early cancellation by virtue of non-payment of premiums by Kaiser.

The triple hearsay letter does not entitle the Fund to reimbursement of benefits paid voluntarily to McDonald.

The testimony of Parker, Ratcliff and Allen all explain their understanding of the need for a current certificate of insurance from the logger. The letter makes no reference to a certificate of insurance, and it was written over one year after McDonald was injured. (See Gen. Ex. 2 dated April 16, 1997; R.E. 17). The author of the letter, Allen, did not remember the details. (See V. 6 p. 46, lines 20-29, p. 47 lines 1 & 2).

From the face of the pleadings herein, it is clear that workers' compensation insurance was carried by KCS Lumber Co. and Columbus Lumber Co. They all understood the distinction between workers' compensation coverage for their employees and a certificate of insurance by an independent contractor logging company.

The certificate of insurance held by Tri-Lake would have reflected the Kaiser policy

was in full force and effect unless Kaiser and/or the Fund notified Mississippi Pacific or Tri-Lake and all other certificates holders of the early termination of Kaiser's coverage for non-payment of premiums. The timber buyers would have no knowledge of the early termination. Miss. Code Ann. 1972 as amended § 71-3-77 outlines the duty of the insurer of its intent to cancel. The statute stops short of directing who should notify the workers' compensation coverage certificate holders of early termination.

It is untenable that certificate holders without notice of early termination should be held liable for workers' compensations benefits to an independent contractor's injured employee. Certificate holders rely to their detriment on the validity of the certificate of insurance.

Kaiser was a self insured by virtue of the Fund's cancellation of workers' compensation coverage. Kaiser did exactly what he should. Kaiser paid McDonald all workers' compensation medical and indemnity benefits to which McDonald was entitled.

Neither Tri-Lake nor Mississippi Pacific paid unemployment tax on McDonald. (See V. 6 p. 61 lines 10-14). Miss. Code Ann. 1972 as amended § 71-3-5 provides as follows:

Any purchaser of timber products shall not be liable for workers' compensation for any person who harvests and delivers timber to such purchaser if such purchaser is not liable for unemployment tax on the person harvesting and delivering the timber as provided by United States Code Annotated, Title 26, Section 3306, as amended.

Tri-Lake had no interest in the tract at issue. Mississippi Pacific merely purchased gate logs. In accordance with 26 U.S.C. § 3306, as amended, Mississippi Pacific did not owe workers' compensation benefits to McDonald.



Neither Tri-Lake nor Mississippi Pacific is liable for workers' compensation benefits paid to McDonald. Hence, they are not liable to the Fund.

The Court should reject the Fund's misguided quest for reimbursement of the workers' compensation medical and indemnity benefits which it voluntarily paid to McDonald.

### CONCLUSION

The Administrative Judge, the Commission, and the Lawrence County Circuit Court all correctly concluded that the "solely liable party" is Andy Kaiser d/b/a Andy Kaiser Logging. Therefore, this Court should affirm the circuit court's judgment and assess all costs against the appellant.

RESPECTFULLY SUBMITTED, this the 16<sup>th</sup> day of July, 2007.

MISSISSIPPI PACIFIC CO., Appellee

BY: SAUNDERS LAW FIRM, P.A.

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**CERTIFICATE OF SERVICE**

I, Suzanne N. Saunders, counsel for Appellee Mississippi Pacific Co., do hereby certify that I have this day mailed by U.S. Postal Service, first-class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLEE MISSISSIPPI PACIFIC CO.** to the following persons at their last known mailing addresses:

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