

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS**

**DAVID BYNUM**

**CLAIMANT/APPELLANT**

**V.**

**NO. 2008-WC-00506-COA**

**ANDERSON TULLY LUMBER COMPANY**

**EMPLOYER/APPELLEE**

**AND**

**LIBERTY MUTUAL INSURANCE COMPANY**

**CARRIER/APPELLEE**

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**REPLY BRIEF OF APPELLANT**

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**APPEALED FROM THE CIRCUIT  
COURT OF WARREN COUNTY,  
MISSISSIPPI**

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**ORAL ARGUMENT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel for the Appellant, David Bynum, 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. David Bynum, Claimant;
2. John Hunter Stevens, Grenfell, Sledge & Stevens, PLLC, Counsel for Appellant;
3. Anderson Tully Lumber Company, Appellee;
4. Liberty Mutual Insurance Company, Appellee; and,
5. W. Bienville (Ben) Skipper, Esq., Counsel for Appellees.

THIS the 16 day of July, 2008.



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**JOHN HUNTER STEVENS**

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## **INTRODUCTION**

In their Brief, the employer and carrier acknowledge that the claimant received wages in lieu of compensation and provide no proof to refute the claimant's position in this regard. They did not call any witness(s) to refute that claimant's supervisor, Mike Myrick, Human Resources Manager, at the time of his accident, told claimant that the benefits he was receiving were in lieu of workers' compensation benefits. The claimant's integrity and truthfulness in this case is not questioned. He was a 28 year employee before the admitted injury. He testified unequivocally about his conversations with Mike Myrick regarding these payments being workers' compensation. Mr. Myrick was never called to refute this testimony.

## **DISCUSSION**

Additionally, reversal of the findings of the Commission and Circuit Court are required due to Liberty Mutual Insurance Company's failure to follow the provisions of the Act, while knowing full well that the claimant had an admitted injury, was missing work because of that injury, and had assumed that payments made by the employer were workers' compensation. (See Ex. 9 & 10) This was identified directly in correspondence from Wayne Clemmons, Liberty Mutual Claims Manager, in correspondence to Dr. Porter. Despite this, and in violation of the Act, Liberty Mutual never filed a Notice of Controversion. The employer and carrier instead waited so they could assert an invalid statute of limitations defense. The facts further support the requirement that the claimant's claim was timely, in that he did receive what he considered workers' compensation benefits. The carrier, itself, knew this as early as October, 2002. (See Ex. 10) Reliance on the time limitations is ineffective, and although Wayne Clemmons of Liberty Mutual knowingly and with full knowledge that the claimant had received benefits and had missed more than two weeks of work as a result of

the admitted injury and accident, and knowing that the claimant assumed that these were workers' compensation benefits, waited until the time period ran. Mr. Clemmons even went so far as to initiate settlement negotiations with the claimant's prior attorney and all the time waiting so that he could rely on the statute of limitations, all of which would have been within two years of the date of the accident. Based on his actions alone, it should be equitably estopped from utilizing the timeliness provisions of the Act.

The employer and carrier in their Brief seem to make much of the fact that the claimant cites only one case in his primary Brief from *McCrary v. City of Biloxi*. (See *supra*). However, facts in *McCrary* are seemingly identical to the facts in the instant case. Liberty Mutual, like the *City of Biloxi*, "failed to file a Notice of Controversion after knowledge of the injury" as is required by Miss. Code Ann. §71-3-37 (4) (1995). Relying on the liberal and broad construction favoring compensation in the Act, the Mississippi Supreme Court correctly found that estoppel in that case applied. There is nothing to refute in this case that Mr. Bynum, a long term loyal employee of unquestioned character, relied on his employer's representations, and openly and freely through his attorneys made it known to them that he assumed this was workers' compensation. Despite this information and despite clear evidence that this was work related by Dr. Porter's reports, Liberty Mutual's senior claims manager having direct knowledge of these facts and even going so far as drafting significant correspondence to the claimant's treating physicians yet fails to file a Notice of Controversion. As in *McCrary*, Liberty Mutual, the employer in this case, should be estopped from asserting a statute of limitations defense.

Notably absent from the employer and carrier's Brief are the Supreme Court's recent ruling in *Parchman v. Amwood Product's Inc.'s, et al.* (2006-CT-00075-SCT) (June 12, 2008). In

*Parchman*, identical issues were raised. The Supreme Court found that the employer and carrier wrongfully denied the claim based on the statute of limitations. It reversed the findings of the Mississippi Workers' Compensation Commission and held that payments made by the employer while the claimant was absent from work seeking medical treatment should be constituted payments in lieu of workers' compensation benefits. Applying the rationale of the recent holding in *Parchman*, reversal of the Commission in the instant case is required.

Furthermore, this Court's recent findings in *Prentice v. Schindler Elevator Company, et al.*, 2007-WC-00815-COA, also support reversal of the findings of the Commission and Circuit Court below. In *Prentice*, as in the instant case, the employer/carrier attempted to rely on the two year statute of limitations even though it failed to comply with the notice requirements of the Act. The Court of Appeals correctly found that the employer and carrier should be estopped from asserting the statute of limitations defense. In this case, the facts dictate that the employer and carrier failed to comply with the Act. With full knowledge that the claimant was unable to work as a result of his condition, the employer and carrier failed to follow the Act. Simply put, the remedial and liberal construction of the Act require reversal. This is especially apparent considering the recent findings of the Mississippi Supreme Court and the Court of Appeals.

It is worth noting the dissent of Commissioner Collins in the Full Commission's Order of October 18, 2007. The claimant testified he was told and he believed that the sick pay benefits he received were workers' compensation for the admitted injury he sustained on the job. He made this known after these checks stopped in his communications with Mr. Myrick.

Commissioner Collins found:

The **only medically documented injury** to the claimant was the injury sustained on-

the-job. There is no medical documentation to show that the claimant injured himself at home as stated by Ms. Priest. Therefore the claimant had no reason to believe he was being paid for anything other than the injury that arose out of and in the course of his employment....therefore the "sick payments" are presumed to be for the only medically documented injury and should be considered within the meaning of "payment for compensation".

Given the claimant's lack of education and the fact that he worked for the employer for over twenty-seven (27) years, he had no reason to doubt what was told to him by his supervisor.

**The Workers' Compensation Act allows that it is to be construed liberally, and doubtful cases are to be resolved in favor of compensation so that beneficent purposes of the Act may be achieved. *Holbrook ex rel. Holbrook v. Albright Mobile Homes, Inc.*, 703 So.2d 842 (Miss. 1997).**

Many questions exist in this case. However, there is no question that an accident occurred at the place of employment in February 2001. There is no question that the claimant suffered a debilitating back injury. There is no question that the claimant received medical compensation payments immediately after the on-the-job injury. There is only one medically documented injury to this claimant during this period. These facts support the claimant's appeal that he received payments in lieu of workers' compensation payment.

Since claimant received compensation, regardless of the label, the statute of limitations is therefore tolled. The ruling of the Administrative Law Judge should be reversed and the claimant granted a hearing on the merits of his claim. (*Id.* R. 33 and 34).

Commissioner Collins correctly describes in his dissent facts identical to the aforementioned holdings of the Mississippi Supreme Court and the Court of Appeals which reveal that the Decision of the Commission would result in a travesty of justice to the claimant in the instant case.

### CONCLUSION

That the claimant, in his mind, received wages in lieu of compensation is not disputed. That the employer and carrier failed to follow the statutory requirements for notice of injury and Notice of Controversion and failed to file the appropriate forms with the Commission is undisputed. The



fact that Liberty Mutual, knowing full well that the claimant assumed he had been receiving workers' compensation benefits, and took no action is admitted and, in fact, engaged in settlement negotiations all within two years of the date of the injury. Miss. Code Ann. §71-3-37 provides:

Compensation under this Chapter shall be paid periodically, promptly in the usual manner, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

*Id.* at § 71-3-37 (1).

Despite the carrier admitting to this injury, despite the Claimant's orthopaedic surgeons describing the history of the job injury causing the problem and restricting his work shortly after the admitted accident, Liberty Mutual did nothing. Despite knowing full well that he had received what he thought was workers' compensation for six months, then Liberty Mutual did nothing, including refusal to comply with Miss. Code Ann. §71-3-37 (4). Liberty Mutual failed to comply with the Act; therefore, reliance on the statute of limitations is misplaced.

The facts dictate that under each of the above scenarios, the claim is timely; therefore, reversal is mandated.

Claimant respectfully requests this Court to reverse the findings of the Mississippi Workers' Compensation Commission and the Circuit Court and find that this claim was timely.

**DAVID BYNUM, APPELLANT**

BY:

  
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**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 Reply Brief of Appellant upon the following counsel for the Appellees:

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*Warren County Circuit Court Judge*

THIS the 16 day of July, 2008.

  
\_\_\_\_\_  
JOHN HUNTER STEVENS