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

BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT
COURT OF WARREN COUNTY,
MISSISSIPPI

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 No. 3 & 4 above.

THIS the 10 day of June, 2008.

JOHN HUNTER STEVENS

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STATEMENT OF THE ISSUES

1. Whether the claim is barred by the statute of limitations.

2. Whether the Commission erred in not reversing the findings of the Administrative Judge.

I. STATEMENT OF THE CASE

This claim was denied by the Administrative Judge based on the Statue of Limitations affirmative defense set forth by the employer and carrier. Claimant acknowledges that the Petition to Controvert was not filed within the two-year period set forth in the relevant portions of the Act. However, Claimant did timely file a claim in pursuant to the well-settled findings of the MS Supreme Court. The doctrine of equitable estoppel requires payment of this legitimate claim.

II. STATEMENT OF THE FACTS

The Claimant, David Bynum, at the time of the hearing, was fifty-three years old. He did not finish high school, nor did he obtain a GED. In his late teens or at approximately twenty years old Claimant went to work for Anderson-Tully, the employer herein. Claimant worked for Anderson-Tully for a period twenty-eight years before his admitted injury.

Claimant filed his Petition to Controvert, which is an exhibit in the record, alleging a "continuing" injury that started on February 27, 2001. This continuing injury was admitted in the Answer filed by the Employer and Carrier. Claimant admittedly returned to work after seeing the emergency room doctor and as a result of continued problems from the heavy lifting involved. Claimant's condition grew worse, and he reported the injury and condition to the plant nurse who advised him to seek treatment and/or sent him to see Dr. Ferrer, an orthopedic surgeon in Vicksburg, MS. March 20, 2001, Dr. Ferrer diagnosed Claimant with Lumbar Spondylosis, pre-existing, which "has been aggravated by the current job" (General Exhibit "1"). Dr. Ferrer informed the Claimant he could not return to his usual occupation, but could go to a job that was light-duty and did not require him to lift more than twenty pounds repetitively and forty pounds occasionally.

Claimant returned to his job, and gave the off-work excuse to his immediate foreman, Bobby Conrad. Mr. Conrad sent Claimant to the Human Resources Manager, Mike Myrick. Mr. Myrick

informed the Claimant there was no light-duty work at Anderson-Tully. Mr. Myrick told the Claimant "we're going to have to lay you off and pay you Workers' Comp" (T-23). Subsequently, the Claimant was paid benefit checks that were identified as sick pay, which he was told was Workers' Compensation for a period of six months in the amount of $200 per week. Subsequently, Mr. Myrick, when questioned about the Workers' Compensation, told Claimant his Workers' Compensation had "run out" (T-26) (see also General Exhibit "9"). None of these facts were disputed at the hearing.

Sometime in the year 2002 would have been within a year of the accident, the Claimant retained the services of at least one attorney, who made a claim for Workers' Compensation benefits to Anderson-Tully by and through Anderson-Tully. This was confirmed at least as early as March 7, 2002. In a letter from the Human Resources manager, dated March 7, 2002, it was further indicated that a claim of Workers' Compensation would have immediately been made and forwarded to Liberty Mutual. Mr. Myrick was also provided with a detailed typed-up statement as to what had occurred to Mr. Bynum when he hurt his back; specifically that he was told he was put on Workers' Compensation, and that his Workers' Compensation pay had run out, exactly as he had testified at the hearing. This again was dated within one year of the accident (see General Exhibit "9").

In addition, Mr. Bynum filled out what was identified and made an exhibit as "Anderson-Tully Company Injured Worker's Statement." This was signed by Mr. Bynum on an undated form, presumably also shortly after the accident. Additional exhibits were a drug test taken by the Claimant February 27, 2001, and also an "Anderson-Tully Company Injured Worker's Statement" signed by a witness involved in the accident, Jessie D. Kyle. Included in the additional documentation concerning the Workers' Compensation claim was a signed statement by Mr. Bynum

and Jessie D. Kyle dated February 26, 2001.

It is important to know that within a month shortly after that accident when Dr. Ferrer did not let him return in a light-duty capacity, he did sign a request for family medical leave and leave of absence. However, nowhere on that form was there any indication as to whether or not this was work-related or not work-related. It merely indicated there was a leave of absence. Granted, it was submitted to the Human Resources manager (see General Exhibit "7").

The additional evidence that a claim was timely made Liberty Mutual, in addition to taking recorded statements in an investigation, sent a letter to Dr. Ferrer, dated October 23, 2002, signed by Larry W. Clemmons of Liberty Mutual. Subsequently, while the Claimant did have at least two differently lawyers handling the claim, there were settlement negotiations undertaken between Liberty Mutual and at least one of the Claimant's prior lawyers. All of this occurred within two years of the date of the accident (see General Exhibit "10").

In addition, what is significant is that Liberty Mutual is now urging this Court to affirm the Administrative Law Judge's findings that the Claimant is barred by the Statue of Limitations in that the Claimant did not follow the procedures of the Workers' Compensation Act. This is in direct contrast that Liberty Mutual itself did nothing and further violated the Act in failing to file anything with the Workers' Compensation Commission as required by law.

Liberty Mutual and/or the Employer are required to file a Form B-3 First Report of Injury within fourteen days of being notified of a claim. According to the records, the Carrier and/or Anderson-Tully filed nothing until July 25, 2003, more than two years after the date of the accident and at least more than a year and three months when they first were notified that the Claimant was pursuing a Workers' Compensation claim, and had represented to them that he was of the opinion

that he had received Workers' Compensation benefits by virtue of the statement submitted by one of his prior attorneys (General Exhibit "10"). The Employer/Carrier's violation of the Act in failure to file the appropriate forms forecloses their right to affirmatively plea the Statue of Limitations was passed. Furthermore, the Employer/Carrier knew a claim was made at least as early as March of 2002 required pursuant to Miss. Code Ann. § 71-3-37 shall file a Notice of Controversy which was never filed by the Employer/Carrier. This failure on the part of the Employer and Carrier in and of itself should prevent them from relying on the limitations set forth in § 71-3-35.

In short, the Employer/Carrier should not be able to argue that the Claimant did not follow on the appropriate sections of the Act, procedurally when the Employer/Carrier itself failed to follow those similar provisions concerning filing of claims. Employer/Carrier should be estopped from relying on provisions of the Act that the Employer/Carrier, itself, did not comply with.

This case files squarely within the confines of *McCrary v. City of Biloxi*, 757 So.2d 978, 981-82 (Miss 2000). The MS Supreme Court has long held that the elements of equitable estoppel would apply exactly to protect the Claimant in a situation such as what has occurred in the present case. Conduct and acts, language or silence amounting to a representation or concealment of material facts with knowledge of such facts with the intent that representation or silence or concealment be relied upon with the other party's ignorance of the true facts in reliance to his damage upon the representation or silence on the party asserting estoppel. *Id.* at 981 (citations omitted) (emphasis added).

Anderson-Tully and Liberty Mutual, like the *City of Biloxi*, failed to file the statutory required Notice of Controversy, and failed to file a B-3 in a timely manner. Anderson-Tully and Liberty Mutual engaged in settlement negations, and conveniently made no effort to follow the guidelines

of the Act, knowing full-well the Claimant was assuming that the payments he received were for Workers' Compensation benefits.

When you apply these facts knowing full well that the Claimant relied on the representation of Mr. Myrick, which is not refuted. Mr. Myrick was not called as a witness at the hearing; therefore, the testimony concerning his out-of-court statement is taken as truth. In addition, the Employer and Carrier knew within one year of the accident that the Claimant was assuming the sick-pay benefits were Workers' Compensation, and still made no effort to file a Notice of Controversy or B-3 or any other filing within two years of the date of the accident. Therefore, applying *McCrary v. City of Biloxi*, especially when the Court considers the Workers' Compensation Act is to be liberally construed with doubtful cases in favor of compensation.

The Claimant was a long-term loyal employee, and his integrity and testimony was not questioned at the hearing. The testimony concerning the conversation with Mr. Myrick as set forth in his recorded statements was not refuted at the hearing. The transcript of the hearing and the exhibits at the hearing unequivocally reveal that Liberty Mutual and Anderson-Tully failed to file a first report of injury when the initial claim started in February of 2001. Even after taking statements and being formally notified in writing that the Claimant had a disabling injury, and that the Claimant assumed that he had received Workers' Compensation benefits, the Employer and Carrier took no action whatsoever until its filing of a B-3 in July of 2003, more than two years after the accident.

The Employer and Carrier cannot dispute that it failed to follow the procedural requirements of the Act. The Employer and Carrier cannot argue that it was prejudiced in any manner by any delays in the Claimant in pursuing this matter which all were at least within one year of the date of

this accident, and specifically immediately after the accident when the Claimant was initially told by Mr. Myrick that he was taking him off work since they had no light-duty and was putting him on Workers' Compensation.

Alternatively, applying the liberal construction to the Act § 71-3-35 provides the two year limitations period is erased if there is "payment of compensation." The fact that the Employer and Carrier argue that this is not Workers' Compensation but instead "sick pay" or some other type of disability payments made should not matter. This is considered "compensation." The fact is the Claimant received compensation. His interpretation of that compensation was that it was Workers' Compensation. Additionally, Mississippi law allows an employer and a carrier to take a credit for any payments that were made to a Claimant for disability purposes which would include short-term disability, long-term disability, sick pay and the like, even including unemployment benefits. In as much as the law allows a credit for Workers' Compensation benefits, it certainly would require that these payments should be considered "compensation," as that term is described and not defined in Miss. Code Ann. § 71-3-35. As such, the two-year Statue of Limitation is not applicable for this reason alone, and therefore the claim should be compensable.

CONCLUSION

In short, the holdings of the MS Supreme Court and the requirements of the Act require that this equitable estoppel prevent the Employer and Carrier from utilizing the affirmative defense of Statue of Limitation. Therefore, the Circuit Court Order affirming the Commission should be reversed.

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 Appellant upon the following counsel for the Appellees:

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Warren County Circuit Court Judge
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THIS the 10 day of June, 2008.

JOHN HUNTER STEVENS