

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS
CAUSE NO. 2009-WC-00364-COA**

**LINDSAY LOGGING, INC. and
MISSISSIPPI LOGGER SELF INSURED FUND**

APPELLANT

V.

JAMES TERRY WATSON


APPELLEE


CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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 this Court may evaluate possible disqualification or recusal.

1. James Terry Watson, Appellee;
2. Al Chadick, Attorney for Appellee;
3. Lindsay Logging & Mississippi Loggers Self Insured Fund,
Employer/Appellant;
4. Michael J. McElhaney, Jr., Attorney for Appellants;
5. Honorable Clarence E. Morgan, III, Circuit Court Judge;
6. Full Commission of the Mississippi Workers' Compensation Commission.



AL CHADICK
Attorney for Appellee 

I. STATEMENT OF THE ISSUES

1. Claimant is not barred by the statute of limitations based upon the fact that there was an admitted compensable injury and that the claimant missed more than five (5) days of employment and thus was entitled to compensation;
2. The claimant received wages paid in lieu of compensation;
3. The existence and extent of disability or loss of wage earning capacity resulting from the back injury.

BRIEF OF APPELLEE TO THE COURT OF APPEALS

COMES NOW the claimant, by and through his counsel of record, and submits this his brief of law and facts upon the Employer/Carrier's Appeal to this Court.

II. SUMMARY OF THE ARGUMENT

The claimant would show that he missed between the date of injury, March 23, 2001, and March 23, 2003, at least eleven (11) days of employment as a result of medical treatment directly related to his on-the-job injury. During this period of time, the claimant received his wages from his employer in lieu of compensation for the days he missed while attending his physicians appointments. The claimant would show and the record reveals that he missed the following days of employment during the time frame mentioned. They are:

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| 1. | Dr. Gary Holdiness, Kosciusko Medical Clinic | April 9, 2001 |
| 2. | Dr. Lynn Stringer, Jackson, MS, & MRI in Jackson, MS | April 12, 2001 |
| 3. | Dr. Richard Carter, Kosciusko Medical Clinic | April 18, 2001 |
| 4. | Mississippi Diagnostic Imaging Center, Jackson MS, MRI | May 4, 2001 |
| 5. | Methodist Medical Clinic | May 31, 2001 |
| 6. | Dr. Michael Graeber, Jackson, MS, EMG Testing | June 8, 2001 |
| 7. | Dr. Richard Carter, Kosciusko Medical Clinic | December 6, 2001 |
| 8. | Dr. Richard Carter, Kosciusko Medical Clinic | January 7, 2002 |
| 9. | Dr. Richard Carter, Kosciusko Medical Clinic | January 2, 2003 |
| 10. | Dr. Mitchell Myers, Jackson, MS | January 28, 2003 |
| 11. | MRI Imaging, Jackson, MS, Cervical & lumbar MRI's | March 1, 2003 |

The claimant would show that all of these dates and medical treatment were paid by the employer and carrier in this cause. The claimant would show that he exceeded more than the five (5) days of disability and did receive compensation for these trips. The claimant would therefore show that this is not a medical only file and that wages were paid in lieu of compensation for these periods of disability and thus this claim does not fall within the two-year statute of limitations for claims resulting in medical only. A day of disability is any day on which the employee is unable, because of injury, to earn his or her full pre-injury wages or pay. Furthermore, determining whether this waiting period has been met, there is no requirement that the days of disability be consecutive. MWCC General Rule 11 (effective 4/1/2001).

Furthermore, the claimant received his regular wages for the dates he missed work to attend the doctor's appointments and was paid accordingly. Wages that are paid to an employee even though the employee does not work and performs no service are presumed to be in lieu of workers' compensation benefits. This presumption must be rebutted by showing that such wages were paid to the employee as a gift or gratuity by the employer and in that case credit is not allowed. In the case before us, there is no proof that the claimant received either a gift or a gratuity from the employer, but was rather intended to be paid his regular wages.

III. ARGUMENT

A. Argument and Authorities

The claimant has shown that he was injured on the 23rd of March, 2001, and that he notified his employer on that same date. Furthermore, the claimant began to receive medical treatment and as indicated previously, received medical treatment for at least

eleven (11) paid days prior to March 23, 2003. Furthermore, the claimant continued to receive medical treatment for another three (3) years after that date, all of which was paid by the employer and carrier in this cause.

The employer and carrier have raised the issue of the statute of limitations which would have barred this claim effective March 23, 2003. The Commission rules clearly state that ,” a day of disability is any day on which the employee is unable, because of injury, to earn his or her full pre-injury wages or pay. Furthermore, determining whether this waiting period has been met, there is no requirement that the days of disability be consecutive.” MWCC General Rule 11 (effective 4/1/2001). Clearly under the Commission rules, the claimant was paid wages in lieu of compensation as a result of this injury. The claimant received medical treatment for and missed work for eleven (11) days between the two-year period of time. Thus, the wages were in lieu of compensation and thus placed this claim clearly in a posture of being outside Mississippi Code Annotated Section 71-3-35(1) (1990). The employer and carrier never filed a B-31 form which would have started the one-year statute of limitations running in this claim since that would have been the appropriate statute of limitations controlling all issues in this matter.

The claimant would point to two cases which have recently been decided by this Court. In *Parchman v. Amwood Products, Inc.*, 988 So.2d 346 (Miss. 2008), the claimant was injured in March of 2000 when he was burned on his right lower extremity. As a result of this burn, the claimant received medical treatment periodically until February of 2002 when he was hospitalized for three weeks. During this hospitalization in February of 2002, the employer paid the employee his regular salary, even though he was

hospitalized at the time. *Id.* @ p. 350. The record reflects that Amwood continued to pay Parchman's full salary although he missed three weeks of work in February of 2002, ... This is clear evidence that Parchman did not continue to "earn" his full wages. It is an erroneous conclusion that Parchman was still performing the essential functions of his job and therefore continued to "earn" his full salary when he was absent from work for three weeks in February." *Id.* @ 350. We have a very similar situation in this case in that Mr. Watson continued to earn his regular wages for the dates that he missed work. He never did receive temporary total disability benefits until he had had his surgery which was also paid by the employer and carrier. In *Parchman*, the court found that because the employer and carrier continued to pay the salary of the employee even though he was off work, that that constituted a payment of salary in lieu of workers' compensation benefits and therefore his claim was not barred by the two-year statute of limitations.

This Court has ruled in the claim of *Prentice v. Schindler Elevator Company & Zurich American Insurance Company*, 2007-WC-00815-COA (June 24, 2008) that the claimant's claim was not barred by the two-year statute of limitations given the fact that he had missed more than five (5) days of work due to his injury. In the *Prentice* case, the claimant missed more than five (5) days of work for medical treatment related to his work-related injury and thus under Mississippi Code Annotated Section 71-3-11, the claimant's claim was not barred. Rather that the insurance company was supposed to file a Form B-3 under Section 71-3-67(1), Mississippi Code Annotated.

The claimant would show that both of these cases are directly on point regarding the issue of the statute of limitations before this Court. Clearly it has been set out that the claimant missed more than five (5) days of employment for medical treatment directly