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

LINDSAY LOGGING, INC and **APPELLANT**
MISSISSIPPI LOGGERS SELF INSURED FUND

V.

JAMES TERRY WATSON **APPELLEE**

REPLY BRIEF OF THE APPELLANT, LINDSAY LOGGING, INC., AND MISSISSIPPI LOGGERS SELF INSURED FUND

Oral Argument Requested

Appeal from the Circuit Court of Attala County, Mississippi

Cause No.: 08-0290-CV-M

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REPLY BRIEF OF THE APPELLANT TO THE COURT OF APPEALS

Come now the Employer/Carrier, by and through their counsel of record, and submits this, their reply brief of law and facts upon Employer/Carrier's Appeal to this Court.

ARGUMENT

I. Claimant's argument for failing to file his Petition to Controvert within the statute of limitations period is insufficient under the law.

The Claimant, in his brief, fails to adequately address the important points of law and fact in this case. First, unlike Claimant would have the Court believe, the Employer does not dispute that the Claimant missed several days for medical appointments. However, the simple fact is that he waited until February 3, 2006, nearly five years later, to file his Petition to Controvert. The testimony shows that the claimant knew of the nature of his injury and the relationship between his injury and his work environment, as he admitted that he only worked until May 25, 2001, before quitting to go work for Jerry Vowell Logging.

The claimant's testimony and actions demonstrate that he believed he suffered serious health problems which limited his ability to perform his job as a result of a work injury on March 23, 2001. The Claimant was immediately aware of the nature and seriousness of his injury, having immediately reported it to his supervisor and sought medical attention for the injury within two weeks from Dr. Lynn Stringer. Furthermore, the evidence is clear that he quit subsequent jobs following his injury. Yet never during this period did the Claimant file a petition to controvert and make a claim for indemnity benefits.

Even though the initial medical records post-accident reveal no injury, and the evidence suggests that this is at most an aggravation of a pre-existing condition, the evidence is clear that *he* believed he was injured. Therefore a reasonable claimant would take action to obtain benefits, and

accordingly, he should have acted within the statutory period.

On the other hand, if the claim is not disabling in the first instance, no compensation is owed to the Claimant. If the injured employee returns to his same or other employment at the same or greater rate of pay as his pre-injury earnings, there is a presumption that the injured employee does not have a permanent loss of wage earning capacity and, therefore, is not entitled to any permanent award for the non-scheduled injury. His subsequent jobs were with the same kind of employers and at the same rate of pay. Though he eventually moved on to several employers, he returned to work again for Mr. Lindsay in the summer or fall of 2003, while being paid "cash under the table" to supplement his workers' compensation benefits. He was only forced to quit this position as a result of a freak accident, which he deceitfully claimed on Mr. Lindsay's general liability policy. Therefore, the claim is not compensable.

II. The Mississippi Workers' Compensation Commission has recently amended it approach to cyclical or irregular work-hour employees

A matter similar to Mr. Watson's case was considered by the Commission on December 15, 2008 pursuant to the Employer's and Carrier's Notice of Appeal. In *Kenneth Mixon v. Grey Wolf Drilling Co. LP.*, MWCC No. 01-09745-H-2026 (May 26, 2009), the Employer/Carrier argued the Administrative Judge erred in finding the Claimant sustained a compensable injury on or about June 4, 2001, erred in finding that his average weekly wage was $1,290.00 at the time of injury, and erred in awarding the Claimant medical benefits as well as temporary and permanent disability benefits.

The Commission affirmed the Judge's finding that the Claimant sustained compensable injuries, was entitled to temporary total disability benefits and that the Claimant was entitled to temporary partial disability benefits, however the Commission amended the rate at which temporary partial disability benefits should be paid. The finding of the Commission was that the Claimant's average weekly wage was substantially less than that found by the Judge.

The Judge reached the average weekly wage by including only the weeks that Mixon was considered "on duty" for the Employer prior to his injury, as the Claimant's schedule with the Employer consisted of his working seven 12-hour days "on" followed by seven days "off.", a standard practice in the oil field industry. He worked eighty-fours during a seven days period, followed by seven days off. Reasoning that the Claimant was free to work elsewhere during his seven days off, the Judge excluded these weeks from the period of his employment in computing the Claimant's average weekly wage.

The Employer/ Carrier argued, on the other hand, that the entire sixteen week period should be used to figure the average weekly wage since that was the entire period of the Claimant's employment, regardless of how his days "on" and "off" may have been structured. Using this method, the total wages earned of $9,726.00, divided by a period of sixteen, yields an average weekly wage of $607.88.

Statutorily, to determine the Claimant's average weekly wage by dividing his earnings by the number of weeks and parts thereof during which he earned those wages, provided a just and fair result is obtained. Miss. Code Ann. § 71-3-31 (Rev. 2000). It is our opinion that the Claimant in this case earned wages for this Employer over the entire sixteen week period for which he was paid, notwithstanding the fact that his hours were compressed into seven-day hitches.

Since in the past, the Commission has given the Claimant the benefit of irregular work schedules, as per statute, the issue of rain-outs and off days in the logging business was not explored in Mr. Watson's case. However, typically the cutters and other loggers work long hours for days and then will experience rain-outs or days when the ground is too wet to operate the equipment. Also, there may not be any work at particular times, resulting in "off" days. In light of this, the effect is to skew the actual work days significantly in favor of the Claimant.

The Commission in the *Mixon* decision is leveling the playing field. Even though Mixon and Mr. Watson are free to pursue other employment during time off, the Commission stated "this is true of any employee in their 'off' time, and is, therefore, insignificant." *Id.* The Claimant's work for the Employer was irregular in nature. For average weekly wage purposes, the entire time should be included during which the Claimant "earned" his wages and divided by the total number of weeks he earned those wages.

In conclusion, Claimant's brief states, "[w]hen Mr. Watson had the jaw accident, Mr. Lindsay advised Mr. Watson to file the claim under his company's general liability insurance because he knew Mr. Watson could not make a worker's compensation claim and thus let the insurance carrier know that he was working and receiving temporary total disability benefits at the same time." This is not the complete story. Mr. Watson testified he worked for Mr. Lindsay for free. Judge Thompson found in her Order that Mr. Watson went to Arkansas with the expectation of receiving cash under the table from Mr. Lindsay. It is difficult to understand why any of Mr. Watson's testimony should be believed. It is also difficult to understand why Mr. Watson should receive any additional benefits when he testified under oath to a very material fact that was clearly not true.

CONCLUSION

Again, the Claimant's Petition to Controvert was not brought within the two year limitations period. No indemnity benefits were paid during the two year limitations period. The Claimant knew he was injured as a result of the March 23, 2001 accident. Therefore, the claim is procedurally barred.

More than five years after his work place accident, Mr. Watson claims he became permanently disabled. However, the evidence shows Claimant suffered, at most, a further deterioration of a condition that pre-existed his work place accident. Claimant never missed a day

of work after the injury for over two years other than to see a doctor. He was not physically restricted from work during this entire two year post injury period. The evidence bears this out as Claimant went to Arkansas to work for cash while receiving benefits for an alleged injury. Simply because the Claimant aggravated his back pain on this employer's job does not make this employer liable for all of the Claimant's disability.

Respectfully submitted, this the 17th day of June, 2009.

LINDSAY LOGGING, INC. AND
MISSISSIPPI LOGGERS SELF INSURED FUND

MICHAEL J. MCELHANEY, JR.

CERTIFICATE OF SERVICE

I, Michael J. McElhaney, Jr. of the firm of Wilkinson, Williams, Kinard, Smith & Edwards do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above Brief to Al Chadick, Esquire, P. O. Box 1637, Kosciusko, MS 39090 and the Honorable Clarence E. Morgan, III, Circuit Court Judge, P. O. Box 721, Kosciusko, MS 39090.

This the 17th day of June, 2009.

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