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**

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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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant, Lindsay Logging, Inc. and Mississippi Loggers Self Insured Fund, certifies that the following persons and/or entities have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualification or recusal.

1. Lindsay Logging and Mississippi Loggers Self Insured Fund, Appellant

2. James Terry Watson, Appellee

3. Mississippi Workers Compensation Commission

4. Counsel for the Appellant: Michael J. McElhaney, Jr.
   Matt Lott
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5. Counsel for the Appellee: Al Chadick

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I. STATEMENT OF THE ISSUES

1. Whether claimant's request for workers compensation benefits is barred by the two-year statute of limitations.

2. Whether the claimant's back injury was a temporary aggravation of a preexisting condition.

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 brief of law and facts upon Employer/Carrier's Appeal to this Court.

II. STATEMENT OF THE CASE

A. Procedural History

The Administrative Law Judge conducted a hearing on the Claimant's Petition to Controvert on June 21, 2007. After receiving and considering the evidence, including exhibits and live testimony, the Administrative Law Judge issued her findings and opinion on September 26, 2007. The finding and opinion found in favor of the Claimant, though awarding credit to the Employer/Carrier for the period in which the Claimant was being paid indemnity benefits while also working and being paid cash (hereinafter "Final Order"). The Employer/Carrier filed a Petition for Review to the Full Commission on October 4, 2007. The Full Commission heard this matter on February 25, 2008 and issued its order on March 4, 2008 affirming the Administrative Judge's holding that Mr. Watson's claim is not time barred. On or about March 27, 2008, the Employer and Carrier filed a Motion to Reconsider the Decision of the Commission entered on March 4, 2008. On August 25, 2008, the Full Commission denied the Motion to Reconsider filed by the Employer and Carrier and reaffirmed their previous holding that Mr. Watson's claim is not time barred by the two year statute of limitations. The Employer appealed to the Circuit Court of Attala County and the court affirmed the Commission's ruling on January 27, 2009. Employer now appeals timely to this court.

B. Statement of the Facts

The Claimant, James Terry Watson, is fifty-seven years old and a resident of Kosciusko, Mississippi. He quit school after the ninth grade but later earned a GED certificate in 1970 while

serving in the military. His military duty was from 1969 until 1972; he was a mechanic who did engine and transmission work on jeeps and trucks. After the service, he was employed for a short period as an auto mechanic at Pearson's Auto Parts in Kosciusko.

Mr. Watson has received certification as a Datsun forklift mechanic. For a while he worked on the assembly line and then as line superintendent at a mobile home manufacturer. Then, for about ten years, Mr. Watson ran a skidder and did mechanic work for David Breazeale, Jr. Logging Company. Subsequently, he worked about five years as an iron worker and millwright welder doing industrial construction. He has some truck-driving experience, but he does not have a commercial driver's license. The rest of his work experience has been in the logging business.

There is no question that Mr. Watson had prior back trouble. He injured his back in 1992 and in November of 1992 had surgery, a back fusion, by Dr. W. Lynn Stringer, neurosurgeon in Jackson. (R. 20) In February 1993, Dr. Stringer released Mr. Watson to return to regular work duty. Mr. Watson worked without significant physical limitations for approximately eight years. (R. 20)

In 1995, Mr. Watson was hired as a cutter man by Clanton Lindsay, owner of the employer, Lindsay Logging, Inc. (R. 20) Mr. Watson drove a cutter - a 33,000-pound John Deere machine - to cut trees. He described the equipment as similar to a front-end loader but with a head on the front that cuts and holds trees. Running the cutter included maintenance, and Mr. Watson had to grease the moving parts. (R. 20) Getting in and out of the cutter involved climbing steps.

James Clanton Lindsay, Jr., lives in Kosciusko. He testified that he was the president and owner of Lindsay Logging. (R. 23) He has a twenty-year history in the timber cutting business, and he has had several companies; for instance, Lindsay Logging, Lindsay Trucking, Inc., and Quality Hardwood, Inc. (R. 23) He testified that he has always carried workers' compensation insurance on all the employees of the various companies. (R. 23)

At the time of Mr. Watson's accident on March 23, 2001, Mr. Lindsay had a sawmill and about fifty employees. Bubba Steen took care of the logging operation for Mr. Lindsay.

On March 23, 2001, Mr. Watson was cutting trees. (R. 23) He was on the skidder when he went over a bump or a tree and wrenched his back and felt pain in his back and both legs. (R. 23) He reported the injury to Clanton Lindsay and Bubba Steen but finished his shift. (R. 23) He did not go to a doctor until two weeks later. (R. 23)

Mr. Watson first saw Dr. Gary Holdiness, general practitioner at the Kosciusko Medical Center. (R. 20) Dr. Holdiness ordered an MRI scan of his neck and referred him to Dr. Stringer, who had treated him in the past. (R. 20) Dr. Stringer examined Mr. Watson in April 2001 and said he did not need surgery and sent him back to work. (R. 20)

Mr. Watson returned to work for Mr. Lindsay running a cutter and dozer and doing some mechanic chores. (R. 20) He worked for Mr. Lindsay approximately two more months, until May 25,2001. (R. 20) Mr. Watson testified that he quit to go to work as a foreman for Jerry Vowell Logging, because the foreman job allowed him to just sit in a truck, but he took two months off in between jobs. (R. 20; Depo of James Watson p. 19) He worked for Jerry Vowell for about a year and only had to run a cutter on two days during the year. (R. 21) He earned the same or more money than what he earned working for Lindsay Logging. (R. 21)

Then Mr. Watson went back to work for Mr. Lindsay. (R. 21) He had worked two months as a cutter man, when Mr. Lindsay sold his equipment to Michael Haynes and Keith Collins who formed their own business, H & C Logging, Inc., and continued to subcontract with Mr. Lindsay. (R. 21) Mr. Watson testified that he had some problems with his back, but he kept working for H & C Logging for about six months, until December 2002. (R. 21) According to Mr. Watson, he left H&C Logging "for physical and mental reasons", but stated it was confusing to him not to know for whom

he was working - Lindsey or H&C. (R. 21)

For a couple of months after that, Mr. Watson was employed as a cutter man for David Breazeale, Jr. Logging. (R. 21) Then Mr. Watson went to his family doctor, Dr. Richard Carter in Kosciusko, who referred him to Dr. Mitchell Myers, neurologist in Jackson, for treatment of his back condition. (R. 21) Dr. Myers referred Mr. Watson to Dr. Adam Lewis, neurosurgeon in Jackson, for more treatment. (R. 21) Mr. Watson first saw Dr. Lewis on April 22, 2003. (R. 21)

Dr. Lewis took Mr. Watson off work when he first examined him on April 22, 2003. (R. 21) He ordered another MRI and x-rays and sent Mr. Watson home. (R. 21) Beginning in May 2003, after he began treatment with Dr. Lewis, the Mississippi Loggers Self-Insured Fund paid workers' compensation disability benefits to Mr. Watson. The Fund continued to pay disability benefits until mid October 2004. Mr. Watson testified that he remained under the care of Dr. Lewis until mid October 2004. (R. 22)

In the late summer or early fall of 2003, Mr. Watson took an assignment from Mr. Lindsay for several days work running a cutter in Arkansas. (R. 22) Mr. Watson testified that he did not receive pay for this work, but Mr. Lindsay testified that he paid Mr. Watson cash for his services. (R. 22) Mr. Lindsay admitted that he knew Mr. Watson was receiving workers' compensation benefits at the time. (R. 22)

On October 7, 2003, during the Arkansas assignment, Mr. Watson had an odd accident. He was running a tree cutter, when a pin from the logging equipment hit him in the face and broke his jaw. (R. 22) He was knocked out and taken to the hospital for treatment. He filed a claim against Mr. Lindsay's general liability insurance company, at Mr. Lindsay's advice. (R. 22) Mr. Lindsay gave Mr. Watson $1,000 cash. (R. 22)

In August 2004, the Mississippi Loggers Self-Insured Fund sent Mr. Watson to Dr. Katz for

an employer's medical examination. (R. 22) Mr. Watson was told he could return to work so, in about October of 2004, Mr. Watson went back to work for about a year running a cutter for Mr. Lindsay, who at the time was owner of a company named Quality Hardwood, Inc. (R. 22) Mr. Watson said he worked until he could not do the job any more because his back pain got too bad. (R. 22)

Mr. Watson testified that he experienced sharp, blunt pain and burning, stinging, and tingling in his left leg. (R. 22) He returned to his family doctor, Dr. Richard Carter, who told him he was totally disabled in December 2005. (R. 22) He has not worked since then. Mr. Watson has been getting treatment from the Veterans Administration. He has a TENS unit and a back brace, and he takes various medications. (R. 23) He receives Social Security Disability Benefits in the amount of $1,476 a month. (R. 23)

When asked about daily activities, Mr. Watson said he "piddles" around the house, feeding his rabbits and watering the garden. (R. 23) He testified that he would work in the logging business if he could, that he enjoyed his job running a cutter and he took great pride in his work. (R. 23) He testified that his leg gives out regularly, and he cannot go back to the cutter-man job that he really loved. (R. 23)

Mr. Lindsay said he learned about Mr. Watson's accident when Bubba Steen told him about it a few days after it happened. (R. 23) He recalled that Mr. Watson did not miss work or see a doctor right away. (R. 23) Mr. Lindsay prepared a workers' compensation first report of injury on May 9, 2001, noting that James Terry Watson injured his back on March 23, 2001, when he backed his cutter into a tree and jerked something in his back. (R. 23) Mr. Lindsay reported that the employer was notified on March 23, 2001. (R. 23)

Mr. Lindsay said Mr. Watson always complained about his back hurting. (R. 23) He

explained that anyone who worked in the woods all the time had aches and pains and good days and bad days. (R. 23) It was not unusual for logging employees to complain about pain somewhere. On May 25, 2001, two months after the work accident, he let Mr. Watson go because "he would not do what I wanted him to." (R. 24) However, Mr. Watson stated, "the pain got so bad I had to quit" working for Lindsay. (T.R. 24)

Mr. Lindsay testified that when he was working a job in Arkansas in the late summer or early fall of 2003, he did not have a cutter operator. Another employee suggested that Mr. Lindsay call Mr. Watson. Mr. Lindsay agreed to pay Mr. Watson cash for the hours he worked. (R. 24) Mr. Lindsay said Mr. Watson worked for him about two or three days a week for four or five weeks. (R. 24) When Mr. Watson had the jaw accident, Mr. Lindsay advised Mr. Watson to file the claim under his company's general liability insurance because both knew Mr. Watson could not make a workers' compensation claim and thus let the insurance carrier know that he was working and receiving temporary total disability benefits at the same time. (R. 24)

After the jaw accident, Mr. Watson did not return to the Arkansas job. (R. 24) Mr. Lindsay testified, however, that Mr. Watson later ran the cutter for him again for about a year from October 2004 until September of 2005. (R. 24) His business at the time was Quality Hardwood. Mr. Lindsay said that Mr. Watson was able to do the job and maintain the cutter. (R. 24) Mr. Lindsay testified that Mr. Watson was a very good timber cutter. (R. 24) He said, however, that the last time Mr. Watson worked for Quality Hardwood, Mr. Watson's work was not as good as it had been in the past. Mr. Lindsay explained that it was not due to back troubles but that Mr. Watson had lost his son and become depressed before the last stint of employment. (R. 24)

H. Glen Fortenberry, vocational rehabilitation consultant in Brandon, testified for the employer that he did a labor market survey for the Mississippi Loggers Self-Insured Fund in June

2007. (R. 24-25) He found positions within Mr. Watson's restrictions in Carthage, Kosciusko, and Philadelphia, most paying $5.50 to $8.00 an hour. Watson made approximately $13.75 an hour at the cutter job. (R. 25)

The medical records of Dr. Walter Lynn Stringer, board-certified neurosurgeon in Jackson, were received into evidence, and Dr. Stringer testified by deposition dated March 26, 2007. (R. 25) Dr. Stringer first saw James Terry Watson in 1992 after an injury that occurred on September 29, 1992. (R. 25) Dr. Stringer performed surgery on November 9, 1992, for a disk herniation at the L5-S 1 level of the back. (R. 25) Dr. Stringer said Mr. Watson did well, and he released him in February of 1993 with a restriction against excessive lifting. (R. 25) Dr. Stringer testified at his deposition that Mr. Watson must have sustained a 10% permanent impairment to the body as a whole after the disk herniation and surgery. (R. 25)

Dr. Stringer saw Mr. Watson again on September 24, 1993, when he injured his back while lifting a telephone pole. (R. 25) Dr. Stringer testified that after conservative treatment Mr. Watson recovered from that accident. (R. 25) Dr. Stringer wrote on January 12, 1994 that scar tissue was causing his symptoms. (R. 25) Dr. Stringer urged Mr. Watson to lose weight and continue walking and back exercises. (R. 25)

The medical records of the Kosciusko Medical Clinic were received into evidence. These records show a history of general medical treatment to James Terry Watson for various complaints through the years, beginning in the early 1970s. On April 9, 2001, Mr. Watson reported an on-the job injury resulting in back pain and associated numbness. (R. 25) Dr. Gary Holdiness saw him, ordered a cervical MRI scan, which showed a tiny right paracentral disc protrusion at the C5-6 level. (R. 25-26) Dr. Holdiness referred him to Dr. Stringer.

Mr. Watson returned to the Kosciusko Medical Clinic on April 18, 2001, with complaints

similar to those he made on April 9, 2001. (R. 26) The medical report indicates that Mr. Watson stated the problems started when he fell out of a cutter when it caught on fire. (R. 26) The medical records of the Mississippi Diagnostic Imaging Center, Ltd. in Flowood, Mississippi, were received into evidence. These records contain a report of an MRI scan of the cervical spine taken April 12, 2001. The radiologist diagnosed "tiny right paracentral disc protrusion at C5-6." (R. 26) At the referral of the Kosciusko Medical Clinic, the neurosurgical specialist, Dr. Stringer, examined Mr. Watson on April 25, 2001. (R. 26) Mr. Watson presented with complaints of several weeks of low back pain and tingling in both arms and legs. Dr. Stringer noted that an MRI of the cervical spine, taken April 12, 2001, showed a slight disk protrusion between the C-5 and C-6 levels. (R. 26) Because of the physical symptoms, Dr. Stringer recommended an MRI scan of the lower back which was done at the Mississippi Diagnostic Imaging Center, Ltd., on May 4, 2001. (R. 26) Dr. Stringer testified that he saw degenerative changes and arthritis in the low back but nothing abnormal for Mr. Watson's age and surgical history. (R. 26)

Dr. Stringer said he considered the March 23, 2001, accident an aggravation of the preexisting back condition. (R. 26) Dr. Stringer did not know whether the aggravation was permanent or temporary. Dr. Stringer did not see Mr. Watson after April 25, 2001. (R. 26) He did not assign additional restrictions, and he did not rate him for permanent impairment. (R. 26)

Dr. Stringer also ordered an electromyogram and nerve conduction studies which were performed on June 8, 2001, by Dr. Michael C. Graeber, neurologist with Muscle and Nerve, P.A., Jackson, Mississippi. (R. 26-27) Dr. Stringer noted that the studies of the arms and legs were essentially negative. (R. 27) Dr. Stringer concluded that "there wasn't anything major going on here." (R. 27) Dr. Stringer testified that he did not think it would hurt Mr. Watson to return to normal activities, although to do so might cause him some discomfort and pain. (R. 27)

On December 6, 2001, Mr. Watson returned to the Kosciusko Medical Clinic with complaints of continuing numbness in his arms and legs. (R. 27) Mr. Watson told Dr. Carter he had seen Dr. Stringer but was no better. (R. 27) Dr. Carter diagnosed paresthesias, prescribed vitamins and Neurontin, and asked Mr. Watson to return in one month. (R. 27) On January 7, 2002, Mr. Watson presented to the Clinic for followup regarding numbness in his arms and legs. (R. 27) He reported that the Neurontin was helping him. (R. 27) Dr. Carter saw him and represcribed Neurontin, requesting that Mr. Watson return to see him if needed.

Mr. Watson returned to the Kosciusko Medical Clinic on August 30, 2002, for problems with his back and hip. Dr. Carter diagnosed a problem with the pelvis and bursitis of the left hip after a fall on August 5,2002. (R. 27) The x-ray of the pelvis was negative. Dr. Carter recommended limited walking at work and prescribed a Medrol Dosepack. (R. 27)

On January 2, 2003, Mr. Watson returned to the Kosciusko Medical Clinic with complaints of numbness and tingling mainly in his left leg and foot and pain in his back and leg. (R. 27) Dr. Carter prescribed Neurontin and referred Mr. Watson to Dr. Mitchell Myers.

A medical report of Dr. Mitchell J. Myers, neurologist in Jackson, Mississippi, dated January 28, 2003, in the form of a letter to Dr. Richard Carter, was received in evidence. Dr. Myers reported seeing Mr. Watson at Dr. Carter's referral, for complaints of neck and arm pain and pain in his low back radiating to the legs, with associated numbness and tingling. (R. 27-28) Dr. Myers noted Mr. Watson's complaints were suggestive of cervical and lumbar radiculopathy. (R. 28) He recommended repeat MRI scans of the cervical and lumbar spine. After the diagnostic testing, Mr. Watson returned to see Dr. Myers who reported that the cervical MRI showed diffuse disease but nothing surgical. (R. 28) The lumbar MRI suggested "quite a bit of degenerative disease," spondylosis, and disk bulge in the mid lumbar spine. (R. 28) Dr. Myers noted a referral to a surgeon.

The medical records of the Jackson Neurosurgery Clinic were received into evidence. These records indicate that Mr. Watson consulted Dr. Adam I. Lewis on April 22, 2003 at the referral of Dr. Mitchell Myers. Dr. Lewis noted complaints of low back and left leg pain and tingling in the neck and both arms resulting from an accident involving a skidder in March of 2001. (R. 28) Dr. Lewis reviewed an MRI of the lumbar spine done March 3, 2003, that showed degenerative disc changes at the L5-Sl level. (R. 28) He also reviewed the cervical spine MRI performed at Central Mississippi Diagnostics on March 3, 2003. Dr. Lewis recommended an electromyogram and nerve conduction study by Dr. Mike Graeber. He also prescribed medication, wrist splints, and physical therapy. Dr. Lewis stated Mr. Watson was temporarily totally disabled until follow up. (R. 28)

Dr. Lewis examined Mr. Watson again on July 22, 2003, for complaints of bilateral foot and hand pain. (R. 28) Dr. Lewis found the repeat electromyogram/nerve conduction study of June 6, 2003, showed chronic left S1 level radiculopathy with no signs of peripheral neuropathy or carpal tunnel syndrome. (R. 28) Dr. Lewis thought the cause of the low back and leg pain was lumbar spinal stenosis. (R. 28) Dr. Lewis recommended a functional capacity evaluation and said Mr. Watson was currently at maximum medical improvement. (R. 28) Dr. Lewis also said Mr. Watson might benefit from a lumbar laminectomy at the L3-4 and L4-5 levels to alleviate his pain. (R. 28-29)

The records of the Human Performance Company of Ridgeland were also received into evidence. On July 29 and 30, 2003, Mr. Watson underwent a functional capacity evaluation at that facility. Mr. Watson gave good, maximal effort on all aspects of the testing. The occupational therapist concluded that Mr. Watson was functioning at the medium exertional level for jobs and met the physical requirements for a logger-tractor operator. (R. 29) The therapist noted Mr. Watson should be restricted from long periods of walking activity and more than occasional squatting. (R. 29)

On September 26, 2003, Dr. Lewis examined Mr. Watson for complaints of left leg pain and numbness and back pain. (R. 29) Dr. Lewis recommended a lumbar discogram and CT scan. (R. 29) Dr. Lewis wrote to Dr. Myers that Mr. Watson was unable to perform the duties associated with the cutter and that he was temporarily totally disabled. (R. 29)

On October 22, 2003, Mr. Watson underwent a lumbar discogram by Dr. Lewis at St. Dominic-Jackson Memorial Hospital. (R. 29) Dr. Lewis found a posterior annular tear at the L4-5 level of the back. (R. 29) A post-discogram CT scan performed by Dr. Scott H. McPherson at St. Dominic-Jackson Memorial Hospital revealed posterior annular tear at the L4-5 level and highly degenerative disc at the L5-S level of the spine. (R. 29) There was also some central stenosis in the L4-5 level. (R. 29) On November 12, 2003, Dr. Jacob L. Mathis at the Jackson Neurosurgery Clinic discussed surgery with Mr. Watson for continued pain in his low back after a long period of conservative treatment. (R. 29)

On December 10, 2003, Mr. Watson was admitted to the hospital by Dr. Lewis after conservative treatment failed to alleviate his symptoms. Dr. Lewis performed an anterior lumbar interbody fusion at the L4-5 and L5-Sl level of the spine. (R. 30) On January 13, 2004, Mr. Watson saw Dr. Mathis at the Jackson Neurosurgery Clinic for a followup visit one month after surgery. Mr. Watson underwent x-rays of the lumbar spine on that date at St. Dominic-Jackson Memorial Hospital, at the request of Dr. Mathis. Dr. Mathis noted Mr. Watson was increasing his activities. Dr. Mathis prescribed medication and noted Mr. Watson remained temporarily totally disabled. (R. 30)

On February 16, 2004, Mr. Watson saw Dr. Mathis at the Jackson Neurosurgery Clinic for a followup visit two months after the back fusion. (R. 30) Dr. Mathis noted Mr. Watson was using his bone stimulator and lumbar brace and that he was recovering in a satisfactory manner. (R. 30)

Because of complaints of left leg swelling and pain, Mr. Watson underwent a venous Doppler ultrasound examination of the left leg on that date at St. Dominic- Jackson Memorial Hospital at the request of Dr. Mathis. (R. 30) On March 18, 2004, Mr. Watson saw Dr. Mathis for a followup visit and ordered physical therapy, including aquatic pool exercises. On that date, Mr. Watson underwent x-rays of the lumbar spine with bending at St. Dominic-Jackson Memorial Hospital, at the request of Dr. Mathis. Dr. Mathis prescribed medication and stated Mr. Watson was still temporarily totally disabled. (R. 30)

The records of Cornerstone Rehabilitation of Kosciusko were received into evidence. These records show that Mr. Watson reported for therapy on March 22, 2004, at the referral of Dr. Jacob Mathis, Jr., for treatment of a back injury that occurred when "he was operating a skidder & fell in a hole," resulting in back pain. (R. 30-31) Mr. Watson had ten therapy sessions on March 22, 24, 26, 29, and 31, and April 2, 7, 12, 14, and 16, 2004. (R. 31)

On April 21, 2004, Mr. Watson returned to the Jackson Neurosurgery Clinic for follow up with Dr. Mathis after the course of physical therapy. Dr. Mathis opined Mr. Watson had reached maximum medical improvement with physiotherapy and instructed him about a flexibility and stretching exercise program. (R. 31) Dr. Mathis released Mr. Watson to return to light-duty work with restrictions of no heavy lifting or repetitive bending or stooping. (R. 31) Dr. Mathis examined Mr. Watson on May 13, 2004, for complaints of recurrent pain, numbness, and weakness of the left foot and leg. (R. 31) Dr. Mathis ordered x-rays and MRI scan of the lumbar spine, an electromyogram study of the left leg, epidural steroid injections, and medications. (R. 31) Dr. Mathis wrote that Mr. Watson was still temporarily totally disabled.

The medical records of Dr. Howard Katz, Gulf States Physical Medicine and Rehabilitation, Jackson, Mississippi, were also admitted into evidence. Dr. Katz examined James Terry Watson on

August 23, 2004, for an independent medical evaluation. Dr. Katz reviewed the medical reports of Dr. John Davis, Dr. Lynn Stringer, Kosciusko Medical Clinic, Dr. Michael Graeber, Dr. Mitchell Myers, Dr. Adam Lewis, Dr. Scott McPherson, Dr. Jacob Mathis, and Milestone Rehabilitation of Kosciusko. Dr. Katz performed a physical examination of Mr. Watson and subsequently diagnosed left S1 radiculopathy, status post L4 sacral fusion, and signs of symptom magnification. (R. 31)

Dr. Katz addressed the question of causation and stated as follows:

> Based to a reasonable degree of medical certainty Mr. Watson's fusion is secondary to degenerative disc disease and lumbar spondylosis that was degenerative in nature and partially related to a 1993 diskectomy at L5/S1 . Based to a reasonable degree of medical certainty and based on his abnormal H-reflexes his left S1 radiculopathy is also chronic and present since about 1993. Based to a reasonable degree of medical certainty none of Mr. Watson's problems are specifically related to a March 2001 incident.

(R. 32) Dr. Katz opined Mr. Watson had reached maximum medical improvement and that he had a 20% impairment to the body as a whole based on "the chronic S1 radiculopathy and lumbar fusion." (R. 32)

Dr. Katz also addressed the issue of anticipated future medical needs as follows:

> I believe that it is reasonable to repeat the MRI of his lumbosacral spine to look for anything acute. Mr. Watson should be on a home exercise program. Mr. Watson's current medications are reasonable, however, it is unlikely that he will have any significant improvement in nerve function both from the injury itself and from the fact that he is drinking a six pack of beer per day which impairs any nerve healing. He should be on a regular exercise program and follow up with a physician one to two times per year. His regular exercise program should include Arthritis foundation Aquatics Program.

(R. 32) Dr. Katz wrote that Mr. Watson was capable of medium level work,

> exerting up to twenty to fifty pounds of force occasionally and/or ten to twenty-five pounds of force frequently and/or greater than a negligible amount of force constantly to move objects. He can occasionally bend, stoop and twist in the waist while standing.

(R. 32)

On November 22, 2004, Mr. Watson reported to the Kosciusko Medical Clinic with complaints of worsening back pain and numbness in his left leg and arms. (R. 33) The doctor noted a 2001 back injury and that Mr. Watson recently was sent to a Dr. Katz who released him to return to work. The physician recommended he return to see Dr. Lewis and Mathis for evaluation of his problems. On January 4, 2005, Mr. Watson presented to the Kosciusko Medical Clinic for complaints of numbness in his left foot and lumbar problems. (R. 33) The doctor prescribed medication and said Mr. Watson needed a repeat evaluation by the neurosurgeon who did his surgery. The medical records indicate that the Mississippi Loggers Self-Insured Fund authorized payment for the office visit. (R. 33)

On June 16, 2005, Mr. Watson returned to the Kosciusko Medical Clinic with complaints of pain in his back, legs, and arm, continuing from when he was operating a cutter and backed into a tree. (R. 33) The doctor diagnosed low back pain with radiculopathy and referred him to a pain clinic. (R. 33) The doctor noted Mr. Watson was still working in spite of the pain. (R. 33) On September 30, 2005, Mr. Watson returned to the clinic complaining of pain in his leg and everywhere. (R. 33) On October 14, 2005, Mr. Watson went to the clinic again, and the doctor diagnosed back pain with neuropathy and prescribed medication. (R. 33) He made two more visits to the clinic, on February 28 and April 18, 2006. The records for this case end after these visits.

III. SUMMARY OF THE ARGUMENT

The circuit court erred in not dismissing this case because the claim was barred by the statute of limitations. Though the Claimant alleges he was injured on March 23, 2001 and notified his employer on the same day, he waited until February 3, 2006, nearly five years later, to file his Petition to Controvert. Mississippi workers' compensation law plainly states that, "regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial

expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred." Miss. Code Ann. §71-3-35(1) (1990).

Further, since Mr. Watson discovered the injury the same day as the accident this would not be a latent injury. The Mississippi Supreme Court has held that a "latent injury" is such that a "reasonably prudent man would not be aware of at the moment it was sustained." *J. H. Moon & Sons, Inc. v. Johnson,* 753 So. 2d 445, 448 (Miss. 1999). The Claimant, however, reported his alleged injury on the date of occurrence. A true latent injury is virtually impossible for the plaintiff to know at the time a minor injury will develop into a compensable injury. This is certainly not the case with Mr. Watson.

Also, the injury was a non-disabling, temporary aggravation of a pre-existing condition evidenced by the claimant continuing to work at the same job for this employer and others, making the same wages as he did before the accident. The Claimant had a prior disc herniation in 1993, and an MRI after the alleged injury in question on May 4, 2001 showed degenerative disc changes in generally the same location. When a pre-existing condition, such as the Claimant's 1993 herniation, is aggravated, accelerated or contributed to by his new employment, a new injury exists. *Miller Transporters, Inc. v. Guthrie,* 554 So. 2d 917 (Miss. 1989). However, as in Watson's case, when the effects of the injury subside, and the injury no longer combines with the disease or infirmity to produce disability, the subsequent disability attributable solely to the disease or infirmity is not compensable. *Rathborne Bone, Hair & Ridgeway Box Co. v. Green,* 237 So. 2d 588 (Miss. 1959).

The Claimant continued to work for Employer until May 25, 2001 when according to the Claimant he quit due to the injury sustain two months earlier. The Claimant then immediately went to work for another employer doing the same job. It is undisputed that Claimant earned the exact

same wages at his subsequent employment. Under the Act, "disability" means an employee's incapacity to earn the same wages he or she was receiving at the time of injury, in similar or other employment. Miss. Code Ann. § 71-3-3(i) (1991). In those instances, a presumption is established that no disability exists. *Kelley* at 1303 (citing *Agee v. Bay Springs Forest Products, Inc.*, 419 So.2d 188 (Miss. 1982)); Dunn, § 67 at 75-76; *Smith v. Rizzo Farms, Inc.*, 870 So.2d 1231 (Miss. App. 2003).

IV. ARGUMENT

A. Standard of Review

Generally, the standard of review in a workers' compensation appeal is limited. In this case the appellate court may determine only whether the decision of the Commission is supported by substantial evidence. *Casino Magic v. Nelson,* 958 So. 2d 224, 228 (Miss. Ct. App. 2007) (citing *Westmoreland v. Landmare Furniture, Inc.,* 752 So. 2d 444 (Miss. Ct. App. 1999)). The Commission sits as the ultimate finder of facts and its findings are subject to normal, deferential standards upon review. *Id.* (citing *Natchez Equip. Co. v. Gibbs*, 623 So. 2d 270,273 (Miss. 1993)). Because the review is limited, the Court "will only reverse the Commission's rulings where findings of fact are unsupported by substantial evidence, matters of law are clearly erroneous, or the decision was arbitrary and capricious." *Id.* (citing *Westmoreland,* 765 So. 2d at 448). The Court maintains this deferential standard even when it would have been persuaded to rule otherwise if it had been the fact finder. *Vance v. Twin River Homes*, 641 So. 2d 1176, 1180 (Miss. 1994) (quoting *Fought v. Stuart C. Irby Co.*, 523 So. 2d 314, 317 (Miss. 1988)). However, the reviewing Court shall review the application of law de novo. *McElveen v. Croft Metals, Inc.*, 915 So. 2d 14, 19 (Miss. Ct. App. 2005)

B. Argument and Authorities

1. J. T. Watson's claim is barred by the statute of limitations.

The Claimant alleges he was injured on March 23, 2001, and he notified his employer on the same day. His first medical appointment was on April 9, 2001. Though indemnity payments were not made until May 2003, he waited until February 3, 2006, nearly five years later, to file his Petition to Controvert. Mississippi workers' compensation law plainly states that, "regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred." Miss. Code Ann. §71-3-35(1) (1990).

The statute of limitations commences when a reasonable man "knew, or should have known, the nature, seriousness and disabling character of his disease." *Quaker Oats Co. v. Miller,* 370 So. 2d 1363, 1366 (Miss. 1979). 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, a job which allowed him to sit in a truck all day. Watson further stated that at his next job, working for H & C Logging, he had some problems with his back. He noted that he left that job because of "physical and mental reasons," though he only elaborated on the mental reasons. 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. The Claimant previously testified that his back pain limited his ability to continue working in the same capacity and caused him to quit subsequent jobs. In his deposition, Watson stated:

Q. And how long did you work before you had to miss any work; if that question makes sense?
A. Well it went on like for in the - - I think it was into March. Like for two months, or maybe, and then I had to quit because Clanton wouldn't let me - - I just had to quit work so I could take off.
Q. The first time you saw Dr. Louis, would that have been in 2003?
A. Right.
Q. And then in 2003, almost two years after, you finally got to Dr. Adam Louis.
A. Right.
Q. All right. And did you work the whole time in between?
A. No. Like I say, I quit Clanton and took a few months off, and then I went to work for Jerry Vowell.
Q. Jerry Vowell Logging?
A. Yes, sir.

(Depo. of James Watson, pp. 37-38).

Q. All right. And then you worked for Haines and Collins then; correct?
A. Right.
Q. How long did you work for them?
A. About six months, I guess it was.
Q. Then after six months, did they lay you off or did you stop; what happened?
A. Well I quit, more or less.
Q. Why did you quit?
A. I had just had all I could stand.
Q. You didn't like the work environment?
A. That and my job.
Q. What was wrong with the job?
A. That and my back.
Q. Okay. And I guess that's what I'm asking. You've got your back bothering you -
A. Right. It bothered me all the time.

(Depo. of James Watson, pp. 39-40).

The Claimant admits that this injury caused him to quit at least two jobs in the year and a half following his injury. He quit Lindsay in May of 2001 from this back injury, taking two months off before beginning another job which was less strenuous. Not only did he take time off, but he told his physician about his back injury during this time. Yet never during this period did the Claimant file a petition to controvert and make a claim for indemnity benefits.

This statute of limitations issue has been decided a number of times by the Mississippi Court

of Appeals in recent years. In *Jordan v. Pace Head Start,* the Claimant notified her employer of a work related injury on August 2, 1995, and began receiving medical treatment later that year. Jordan later filed a Petition to Controvert on February 17, 1999. *Jordan v. Pace Head Start*, 852 So. 2d 28 (Miss. Ct. App. 2002). The Mississippi Court of Appeals held that the two year statute runs from the time of injury, and it applies when there have been no payments of disability or death benefits, despite the fact that she received medical benefits. *Id.* The Mississippi Supreme Court has upheld the denial of disability benefits when a timely Petition to Controvert was not filed, despite the Claimant's receipt of medical benefits. *Speed Mechanical Inc. v. Taylor,* 342 So. 2d 317 (Miss. 1977).

The Court applied this notion in *Cooper v. Mississippi Dept. of Rehabilitations Services,* 937 So. 2d 51 (Miss. Ct. App. 2006). In this case the Claimant first complained of sinus and allergy problems from workplace chemicals in 1993. *Id.* at 52. She first sought treatment in 1995 from an otolaryngologist, and ultimately in 1998 she was referred to a cardiologist who diagnosed her as having total physical impairment due to toxic exposure allergy. *Id.* She filed her petition to controvert in 1998. The Administrative Judge found this claim barred by the statute of limitations, and this decision was upheld by the Commission, the Lauderdale County Circuit Court, and Mississippi Court of Appeals. *Id.* at 54. The Court of Appeals stated that the evidence was clear that in 1995 the Claimant knew that her job was causing her health problems. *Id.* While the Claimant maintained that she did not know her injury was compensable, case law is unambiguous that she was only required to be aware of her illness, have knowledge of its nature, and its seriousness.

Just as Jordan and Cooper were aware of the nature and extent of their injuries, Watson knew the nature and extent of his injury. He knew the date on which the alleged injury occurred, and he sought medical treatment soon thereafter. He was treated at the Kosciusko Medical Clinic and by

his neurosurgeon, Dr. Stinger, in April 2001, and ultimately quit his job some two months after the injury. However, he did not file his Petition to Controvert until nearly five years after the date he first reported the injury. Since he did not file his Petition to Controvert within two years of the date of the injury, and this two year period expired before the Carrier began paying indemnity benefits, the statute of limitations expired on this claim and bars future indemnity payments.

a. The Claimant's injury does not qualify as a latent injury.

Mr. Watson claims that he suffered from a latent injury and thus did not file a Petition to Controvert timely because of the latency of the injury cannot be maintained. The Mississippi Supreme Court has held that a "latent injury" is such that a "reasonably prudent man would not be aware of at the moment it was sustained." *J. H. Moon & Sons, Inc. v. Johnson,* 753 So. 2d 445, 448 (Miss. 1999). The Claimant, however, reported his alleged injury on the date of occurrence. A true latent injury, such as the injury incurred by the Claimant in *Pepsi Cola Bottling Co. v. Long,* 362 So.2d 182 (Miss. 1978), are "virtually impossible" for the plaintiff to know at the time a minor injury will develop into a compensable injury. In *Long* the Claimant hit his head while climbing into the cab of a truck, two years later, this manifested in blackouts. The Claimant had no way of knowing the extent of the bump on his head at the time of injury.

Furthermore, just because an injury progresses in severity, it is still not a latent injury. In *Parchman v. Amwood Prods.*, 988 So. 2d 346 (Miss. 2008), the claimant knew at the time of the accident that he had sustained an injury arising out of the course and scope of his employment; therefore, his injury by definition, could not be a latent injury. Parchman was burned on the foot by a piece of hot metal. The wound did not heal and progressed into a bigger wound. At the time of the injury, Parchman believed that the burn was a minor injury that could be treated with a topical ointment and a bandage from his first aid kit. The Court stated, "[w]ithin a few months, however,

Parchman should have been aware that his injury was not minor," since shortly after the accident he saw the doctor regularly and entered a wound center for treatment. *Id.* at 349.

Watson's alleged injury was reported on the date it allegedly occurred and according to the Claimant, the injury quickly manifested into an injury which affected his ability to work. Again, Claimant stated he quit Lindsay in May of 2001 from this back injury, taking two months off before beginning another job which was less strenuous. Further, he soon thereafter reported the injury to his physician during this time. The Claimant's own testimony and actions support the fact that this was not a latent injury.

b. Conclusion

The Mississippi Supreme Court has stated that "the primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time." *Lee v. Thompson,* 859 So. 2d 981, 992 (Miss. 2003); *Cole v. State,* 608 So. 2d 1313, 1317 (Miss. 1992) *AirTran, Inc. v. Byrd,* 987 So. 2d 905 (Miss. 2007). Mr. Watson did not exercise his rights in a timely manner. Taking his testimony as true, the Claimant knew that he suffered an injury and quit due to the pain of the injury. (T.R. 24) He did not file his claim within two years of the injury and did not receive any payments during the two year period that would toll the limitations period. Therefore his claim is simply barred by the statute of limitations.

2. The Claimant's Injury was Merely a Temporary Aggravation of His Prior Injury, and His History of Stopping and Starting Work is Evidence that He Does Not Have an Actual Injury.

a. The injury was an aggravation of a pre-existing condition

The Claimant had a prior disc herniation at L5/S1 in 1993. (T.R. General Exhibit 14, p. 5). An MRI performed on May 4, 2001, after the alleged injury in question, showed degenerative disc changes at L5/S1 and L1/2 and a small bulge at L5/S1 and L4/5. (T.R. General Exhibit 14, p. 16).

When a pre-existing condition, such as the Claimant's prior diskectomy at L5/S1, is aggravated, accelerated or contributed to by his new employment, a new injury exists. *Miller Transporters, Inc. v. Guthrie,* 554 So. 2d 917 (Miss. 1989). However, as in Watson's case, when the effects of the injury subside and the injury no longer combines with the disease or infirmity to produce disability, the subsequent disability attributable solely to the disease or infirmity is not compensable. *Rathborne Bone, Hair & Ridgeway Box Co. v. Green,* 237 So. 2d 588 (Miss. 1959).

The initial medical records after the alleged injury show no new nerve damage or injury, and the actions of the Claimant show that he was not permanently disabled as a result of an injury in March 2001. (T.R. General Exhibit 14, p. 14). The Claimant was able to work for Jerry Vowell Logging and for H & C Logging through the end of 2002. (T.R. 45, 53-55). 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 being paid by the Carrier after the statute of limitations had expired. (T.R. 83). 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. (T.R. 84). Finally, Mr. Watson returned to work in October 2004 and worked until December 2005. (T.R. 74).

The Claimant's original neurosurgeon, Dr. Stringer, stated that the accident was an aggravation of the prior injury. (T.R. General Exhibit 5, p. 133). Likewise, neurologist, Dr. Graeber, related the injury back to the original L/S 1 radiculopathy in his June 6, 2003, report. (T.R. General Exhibit 23, p. 5).

Dr. Katz, after examining the Claimant and his medical records, opined that the Claimant's injury was secondary to degenerative disc disease and lumbar spondylosis, degenerative in nature, and partially related to the 1993 diskectomy at L5/S1. To a reasonable degree of medical certainty, none of the Claimant's problems are specifically related to an injury in March 2001. (T.R. General

Exhibit 20, p. 8).

b. Alternatively, the injury was never disabling.

The Claimant continued to work for Employer until May 25, 2001. However, it is disputable whether he was terminated for reasons unrelated to his injury or claim. According to the Claimant, he took two months off and then went to work for another employer doing the same job. It is undisputed that Claimant earned the exact same wages at his subsequent employment. Under the Act, "disability" means an employee's incapacity to earn the same wages he or she was receiving at the time of injury in similar or other employment. Miss. Code Ann. § 71-3-3(I). "Disability" means an occupational, rather than medical or functional incapacity. *International Paper Co. v. Kelley,* 562 So.2d 1298, 1302 (Miss. 1990). Because the test for "disability" is occupational rather than medical, a Claimant may have a "medical disability" but can return to work (or other employment) earning the same or a higher wage. In those instances, a presumption is established that no disability exists. *Kelley* at 1303 (citing *Agee v. Bay Springs Forest Products, Inc.,* 419 So.2d 188 (Miss. 1982)); Dunn, § 67 at 75-76; *Smith v. Rizzo Farms, Inc.,* 870 So.2d 1231 (Miss. App. 2003). In this case the Claimant neither had a medical or occupational disability for almost half of a decade. There is simply no medical evidence to support the March 23, 2001 accident was the cause of his disability in 2005.

An occupational disability and the extent thereof must be supported by adequate medical findings. Miss. Code Ann. § 71-3-3(i) (1991). *See also,* Dunn, § 82.1 at 42-43 (Supp. 1990). A Claimant does not have to prove with absolute medical certainty that his work-related injuries were the cause of his disability, but where there is a dispute between medical and non-medical (i.e., non-physician) testimony, the medical testimony should prevail. *Johnson v. Ferguson,* 435 So.2d 1191, 1193 (Miss. 1983).

The Claimant's ability to work the vast majority of the nearly five years following his alleged injury shows that he did not suffer a newly compensable, disabling injury on March 23, 2001. As evidenced by the Claimant's continued working at the same job making the same earnings, at the same rate of pay after the injury, the Claimant's alleged injury was merely a temporary aggravation of a pre-existing condition. As per *Rathborne,* once the disability of injury subsided, then the claim is no longer compensable. 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.

It is particularly bothersome that James Terry Watson is being rewarded with additional and continued payments of benefits even though the Administrative Law Judge found he was not telling the truth and actually received "cash under the table" from Clanton Lindsay on a job in Arkansas. This was "cash under the table" received at the same time Mr. Watson was receiving temporary total disability benefits. These benefits were paid by the Mississippi Loggers from April 22, 2003 until October 12, 2004 when Mr. Watson returned to regular duty work for Mr. Lindsay and Quality Hardwood.

In fact, Mr. Watson testified and tried to convince the Commission he had gone to Arkansas to operate a cutter for Clayton Lindsay free of charge.

Q. So you had the understanding you were going to Arkansas to operate a cutter for Clanton Lindsay free of charge? You wasn't going to get any money to do it?
A. I done it.
Q. But that was your understanding of the agreement?
A. Yes I didn't receive no money for going to Arkansas.

(T.R 59)

Yet the truth is he did receive compensation in Arkansas:

Q. So he told you at that time he was getting workers' comp but wasn't paying him enough money?
A. Right.
Q. So you made arrangements for what?
A. Well, I told him I would pay him in cash.
Q. All right. How much did you pay him in cash to operate that cutter?
A. I paid him by the hour and he kept up with his own time. And he would turn his hours in to my secretary at the end of the week, she would just pay him strictly in cash.
Q. Why was he being paid in cash?
A. Because we both knew that he wasn't supposed to be working.

(T.R 82)

As stated, the Administrative Law Judge clearly found Mr. Watson, was being paid "cash under the table" and even wrote in her opinion, "He went with the expectation of receiving cash under the table."

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. At most, this employer is only liable for the temporary, non-disabling aggravation.

V. CONCLUSION

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 Claimant's claim is procedurally barred.

Alternatively, if this was a true disabling injury, he would not have continued to work for this same employer, at the same job, at the same rate of pay until May 25, 2001. Further, the Claimant went to work for another employer doing the same job, at the same rate of pay well past March 23, 2003. The Claimant did not provide any medical evidence that his October 2005 disability was causally related to his March 23, 2001 accident. In fact both the medical evidence from Dr. Lynn Stringer and the Claimant's work history after the accident establish the Claimant did not suffer a disabling injury.

The Claimant not only failed to file a Petition to Controvert within the prescribed statute of limitations period, but also has not proved the March 23, 2001 accident caused his disability.

Respectfully submitted, this the 7th day of May, 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 and Brief to Al Chadick, Esquire, P. O. Box 1637, Kosciusko, MS 39090.

This the 7th day of May, 2009.

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