

REL:05/21/2010

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2009-2010

1090644

Ex parte Donald McInish

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(In re: KGS Steel, Inc.

v.

Donald McInish)

(Jefferson Circuit Court, Bessemer Division, CV-99-392;
Court of Civil Appeals, 2040526)

BOLIN, Justice.

WRIT DENIED. NO OPINION.

1090644

Woodall, Stuart, Smith, Parker, and Shaw, JJ., concur.

Cobb, C.J., and Lyons, J., dissent.

Murdock, J., recuses himself.

1090644

LYONS, Justice (dissenting).

I adhere to the views I expressed in Ex parte McInish, [Ms. 1060600, Sept. 5, 2008] ___ So. 3d ___ (Ala. 2008) (Lyons, J., concurring in part in the rationale and dissenting from the judgment):

"I would reverse the judgment of the Court of Civil Appeals and remand the case with instructions to that court to affirm the judgment of the trial court. I agree with Judge Crawley's dissenting opinion:

"'In this case, although Dr. Meyer, KGS's authorized physician, determined that McInish's condition was not related to his employment, Dr. Kelsey stated that McInish's neck problems were "consistent with" the cumulative trauma described by McInish. In addition, McInish's physique had drastically changed from when he started working for KGS to the time of trial, and testimony indicated that the onset of McInish's symptoms of his condition occurred during his employment with KGS, where he was subjected to violent vibrations. The resolution of conflicting evidence as to medical causation is the province of the trial court, not the appellate courts, and based on the totality of the evidence the trial court could have reasonably found that McInish presented clear and convincing evidence indicating that his disability arose out of his employment.'

"I must therefore respectfully dissent from the judgment."

Cobb, C.J., concurs.