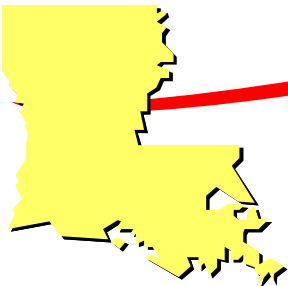


LOUISIANA WORKERS' COMPENSATION UPDATE



NEW ORLEANS ♦ BATON ROUGE

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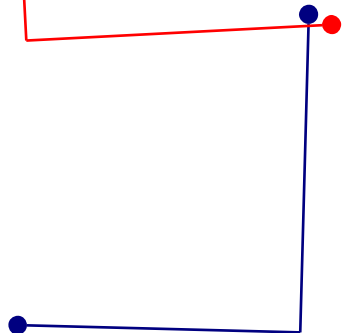
INTRODUCTION

This newsletter, which is published quarterly, is designed to provide you with a brief synopsis of recent cases that analyze issues of interest to our clients with potential worker's compensation concerns. For your convenience, we have organized the cases based on the type of claim. If you need more information, please contact us.

CHOICE OF DOCTOR

Snearl v. Kelly's Industrial Services, Inc., 924 So.2d 138, 06-0218 (La. 03/17/06)

Plaintiff was injured in the course and scope of his employment when a bush hog crushed his ankle. He was taken to the emergency room where the orthopedist on duty evaluated his condition and performed surgery the next day. The surgery was unsuccessful, necessitating a second operation. The claimant treated with the same doctor for approximately eight months, after which he was released to return to work without any restrictions. Claimant continued to complain of pain and sought to be evaluated by another orthopedic surgeon, but the employer refused on the grounds that the claimant had already selected a doctor as his treating orthopedist. The WCJ granted the claimant's request, concluding that since the first doctor had treated the claimant on an emergency basis, he was not the physician of choice for either party. The employer sought supervisory writs, which were denied, and then writs from the Louisiana Supreme Court, which reversed. The court acknowledged that pursuant to §1121E, a physician who provided only emergency treatment would not be deemed a physician of choice, nor did the language give a specific time limit for the duration of emergency treatment. The court found, however, that the claimant had treated for eight months, which did not qualify as an emergency. The court determined that once the employee's condition had stabilized, he was free to consult other physicians, and the first doctor's treatment would no longer fall within the characterization of "emergency treatment."



JURISDICTION

Beutler England Clinic v. Market Basket No. 27, 919 So.2d 816, 05-0952 (La. App 3 Cir. 12/30/05)

The plaintiff chiropractic clinic was part of a PPO and entered into an agreement whereby it would treat workers compensation claimants for a reduced rate, specifically 85% of what was permitted under the fee schedule. The clinic later filed a disputed claim alleging that it should be paid the full amount set by the fee schedule. The defendants filed an exception of lack of subject matter jurisdiction, arguing that the claim was not merely a fee dispute, but required an analysis of the contract between the clinic and the PPO and AIG Claims Services, which gave AIG access to the PPO. The court analyzed Article 5 §16 of the Louisiana Constitution and La. R.S. 23:1310.3E, which vested jurisdiction over workers compensation claims with a WCJ. It also found that the jurisprudence established that claims merely “relating to” workers’ compensation law were not within the jurisdiction of a WCJ, and §1310.3 was to be narrowly construed. The court also noted that 23:1034.2 conferred jurisdiction over fee disputes to the WCJ, but the claim at issue was “not a straightforward fee or insurance dispute. . . . [T]he initial issue which must be resolved is whether [the healthcare provider] contracted to receive less than the fee charged pursuant to the Louisiana Fee Schedule. If so, it must be determined whether that contract can coexist with La. R.S. 23:1034.2.” The court then reasoned that the plaintiff’s claim could not be fully considered outside of the realm of the contracts; therefore the case was a contractual matter and merely related to the workers compensation provisions. Accordingly, the OWC did not have subject matter jurisdiction.

OCCUPATIONAL DISEASE

Douglas v. Isle of Capri, 923 So.2d 950, 40,651 (La. App 2 Cir. 03/08/06)

The employee claimed that he had developed carpal tunnel syndrome as a result of his duties as a bartender and requested that his employer pay for an initial evaluation by a physician as well as diagnostic testing. The claimant presented no evidence to support his claim of an occupational disease or that such disease was job-related. The employer denied the request on the basis that the claimant had the burden of proof to substantiate that he had contracted a job-related occupational disease. The WCJ granted the claimant’s request, and the Second Circuit affirmed. The court found that when there was an obvious injury, there would ordinarily not be a dispute about the employee’s right to initial treatment, but an occupational disease had less obvious symptoms. Unless an employee was granted an initial examination, a worker who could not afford to see a doctor would be prevented from proving the fact of his occupational disease and its origin. Thus, an employer could escape his compensation obligation by simply refusing to pay for the initial evaluation. The court noted that the employer was protected against frivolous requests by §1208 because the employee could be ordered to reimburse the employer for the benefits obtained and could risk losing entitlement to future benefits.

MEDICAL TREATMENT

Gautreaux v. K.A.S. Construction, LLC, 923 So.2d 850, 05-1192 (La. App 3 Cir. 02/22/06)

The plaintiff's treating physician recommended a functional capacity evaluation ("FCE"), but did not specify a physical therapist or facility for the evaluation. The defendants arranged to have the FCE performed at one facility, but the plaintiff wanted to have the examination conducted at another, however, and the defendant filed a motion to compel the FCE with their choice of physical therapist. The plaintiff argued that an FCE was conducted by a physical therapist, not a doctor, and therefore, the employer was not entitled to its choice. The Third Circuit examined the statutory language of §1121 and agreed that a physical therapist was not a "physician," but did fall within the scope of the term "medical practitioner." Under the clear language of the statute, the plaintiff was required to submit to the FCE with the medical practitioner designated by the defendant. Moreover, since §1121B granted an employee only the right to choose a physician, the plaintiff had no right to select a particular physical therapist.

Smith v. Morris & Dickson, 924 So.2d 1217, 05-1120 (La. App 3 Cir. 03/01/06)

The plaintiff was injured at work, and his employer sent him to a doctor who referred him to an orthopedic surgeon. That doctor recommended surgery and referred the employee to another orthopedic surgeon to perform it. The surgery did not alleviate his pain, and the doctor recommended additional surgery. The defendant sought a second opinion, but that request was denied since they had selected the initial doctor. The adjuster then sent the medical records to an occupational medicine specialist for review, but never examined the employee. Based on that opinion, the employer refused to authorize the surgery. The WCJ found that the reviewing physician relied on incorrect information in reaching his conclusion and ordered the employer to authorize the surgery, which was finally performed eight months after the first request. The Third Circuit affirmed, finding that the request for surgery was not reasonably controverted, and the medical evidence from a doctor who had not examined the claimant was insufficient, particularly in light of the original opinion that surgery was needed.

PERMANENT AND TOTAL DISABILITY

Reeves v. International Maintenance Corp., 2006 WL 861616, 05-1149 (La. App 3 Cir 04/05/06)

The employee developed chemically induced asthma after he was sprayed in the face by some chemicals at work. After paying benefits for a time, the employer reduced the employee to SEB, but the claimant alleged he was permanently and totally disabled. The WCJ concluded that he was capable of returning to light-duty work, was entitled to SEB at zero-base earning capacity, and no penalties and attorney's fees were due. The Third Circuit reversed, emphasizing that all medical evidence had to be reviewed. His treating physician opined that it would be best for the claimant to return to work to do "something," and signed off on several jobs, not because he thought the claimant could actually perform them, but because the plaintiff should try to engage in as much activity as possible. He also opined that it was likely that the asthma would never be completely controlled, since it was triggered by a variety of factors, and that attacks could be so severe that they were life-threatening. Under those circumstances, the court found that being physically able to try employment was not the same as being physically able to "engage in" employment for workers compensation purposes. Based on the totality of the evidence, it was realistically impossible for the employee to ever return to gainful employment because there was no work environment in which he could truly work. The fact that he could do limited activities for limited periods of time did not equate to employment capability.

PRESCRIPTION

Hammons v. ABB C-E Services, Inc., 2006 WL 786732, 05-0807 (La. App 1 Cir. 03/29/06)

The employee was originally injured in 1990 and was later found to be totally and permanently disabled. As a result of the injury, he underwent a total left knee replacement, and in 2003 his treating doctor advised that a second procedure was necessary. The employer, who had last paid a medical bill in 1998, refused to pay for the procedure and raised an objection of prescription. Plaintiff argued that the prescriptive period set forth in §1209C applied only to claims for medical expenses when there was no prior judgment. Because he had a judgment recognizing his entitlement to benefits as a result of his total and permanent disability, his request was a modification under 23:1310.8, and prescription did not apply. The court reviewed the prior judgment, concluding that there was no mention of medical benefits because at that time, they were not at issue. Moreover, an employer was liable for medical expenses only as they arose, and a claimant was not entitled to an award for future medical expenses. Because his medical bills could only be paid as they accrued, and the employer was on notice that medical bills related to his condition could continue indefinitely, the earlier judgment could be modified, and the WCJ could order the employer to pay for the surgery if the claimant established that it was directly related to his condition as a result of his job injury.

SUPPLEMENTAL EARNINGS BENEFITS (SEB)

Grillette v. Alliance Compressors, 9223 So.2d 774, 05-0982 (La. App 3 Cir. 02/01/06)

After her third accident in less than two years, plaintiff began receiving TTD benefits. She was later terminated for cause due to attendance violations at a job approved by her treating physician. The claimant argued she was still due SEB, and the WCJ agreed, awarding a 12% penalty and attorney's fees of \$10,000. The plaintiff argued that regardless of the reason for her termination, she was still restricted to light duty work and was therefore entitled to SEB. The Third Circuit determined there was no reason the claimant could not have continued to work, but for the termination. The court specifically found that the fact that her job was no longer available due to the termination was no different than if the claimant had refused to accept the job in the first place, and she was no longer entitled to SEB. The court emphasized, however, that an employer could not avoid paying benefits by creating a job that accommodated the injured worker's restrictions and then firing the injured employee without cause; likewise, the employee could not refuse to accept suitable employment or violate company policy without consequences.

1208

Hebert v. Conner-Monceaux General Contractors, 922 So.2d 1236, 05-0760 (La. App 3 Cir. 02/01/06)

While the claimant was employed as a contractor, he fell twenty-nine feet from a roof, sustaining severe injuries, including a traumatic brain injury. A little over two years later, his doctor wrote an order for attendant care at the request of claimant's wife. The claimant's wife stopped working to care for her husband, and was paid \$5.15 per hour for ten hours per day, seven days per week. The insurer began investigating its suspicions that the claimant was able to function better than he claimed and learned that the wife had returned to work, although she continued to receive payment for the attendant care services. The insurer filed claims against both the claimant and his wife pursuant to §1208. The insurer obtained surveillance video tape, which it showed to the treating orthopedic surgeon and a physical therapist. The investigation revealed that contrary to his representations, the claimant could actually drive, use the car to run errands, carry groceries to and from the car and walk without a walker. The WCJ concluded that the claimant and his wife had committed fraud by accepting the attendant care benefits after they were no longer necessary, and their actions could not be justified as inconsequential or a lapse in memory. The court found that over the course of the year that attendant care benefits were paid, the claimant consistently exaggerated his symptoms and misled his healthcare providers about the extent of his disability. The court ordered restitution in the amount of \$18,746, forfeiture of benefits and payment of \$7,500 in investigation and litigation costs, all of which was upheld by the Third Circuit.

VICARIOUS LIABILITY

Garcia v. Furnace and Tube Service, Inc., 921 So.2d 205, 40, 517 (La. App 2 Cir. 01/27/06)

The plaintiff was employed as a welder and was assigned to a project with another welder, Broussard. Prior to the job assignment, the two men had never met, and there was no evidence of any problem between them. A quality control officer inspected plaintiff Garcia's work, made no comment, and left. Afterward, Garcia questioned Broussard regarding negative comments Broussard had allegedly made regarding the quality of Garcia's work. A verbal argument ensued which included profanity, but no physical blows. Garcia then walked away, told the foreman he was leaving, and proceeded to walk approximately fifty feet to a truck. Broussard followed a few moments later, and there were two very different versions of the ensuing altercation, although the foreman saw Broussard continue to hit Garcia with a metal pry bar while he was on the ground. Broussard also continued to hit Garcia even while the foreman was attempting to stop the fight. Garcia subsequently filed suit against both Broussard and the employer, and the trial court held them liable *in solido*. The employer argued that it was not vicariously liable for the intentional tort committed by Broussard, and Broussard was motivated by purely personal considerations. Citing LeBrane, the court found that the altercation occurred during work hours on the employer's premises. The dispute arose out of Broussard's request that Garcia's work be inspected, which would promote the employer's interest, particularly if that work had been found to be substandard. The employer argued that once Garcia left his post and walked to the truck, he was no longer within the scope of his employment, but the court disagreed, finding that everything occurred so quickly that the two men were still within the ambit of their employment. The court then concluded that Broussard's actions were reasonably incidental to the performance of his duties and work related. The employer also argued that Garcia should have been assessed with fault for his first use of profanity. The court noted that while the use of profanity may have been intended to irritate Broussard, the words did not rise to a verbal provocation that would incite a reasonable person to commit such a vicious attack.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

In the following cases, plaintiffs were awarded penalties and attorney's fees at trial, and these amounts are set forth, as well as any increases awarded on appeal.

NAME OF CASE

Ryan v. Blount Brothers Construction, Inc.,
2006 WL 1007627, 40,845
(La. App 2 Cir. 04/19/06)

PENALTIES/ATTORNEY'S FEES

\$2,000 penalty (failure to pay medical benefits)
\$2,000 penalty (failure to pay indemnity benefits)
\$2,000 penalty (failure to pay mileage reimbursement)
\$2,000 penalty (failure to reimburse out-of-pocket medical expenses)
\$2,000 penalty (failure to pay prescription benefits)
\$2,000 penalty (denial of claimant's choice of physician)
\$2,000 penalty (failure to provide vocational rehabilitation)
Total \$14,000

\$21,210.47 attorney's fees (\$3,000 for the appeal)

Broussard v. Lafayette Parish School Board,
2006 WL 862846, 05-0575
(La. App 3 Cir. 04/05/06)

\$2,000 penalty (improper conversion from TTD to SEB)
\$2,000 penalty (inadequate rehabilitation) (rev'd on appeal)

\$8,500 attorney's fees

Mitchell v. Alliance Compressors,
2006 WL 861696, 05-1186
(La. App 3 Cir. 04/05/06)

\$4,000 penalty (failure to pay indemnity and medical)

\$7,500 attorney's fees

Smith v. Morris & Dickson,
924 So.2d 1217, 05-1120
(La. App 3 Cir. 03/01/06)

\$2,000 penalty (refusal to approve claimant's choice of physician)

\$3,500 attorney's fees

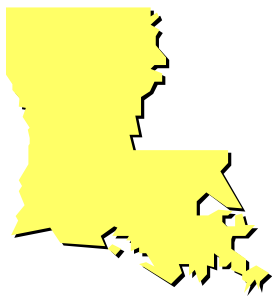
\$2,000 penalty (refusal to approve surgery)

\$7,000 attorney's fees

\$2,000 penalty (failure to pay a medical bill)

\$2,500 attorney's fees

\$2,500 for the appeal



TAYLOR, WELLONS, POLITZ & DUHE, APLC

NEW ORLEANS

1515 Poydras Street, Suite 1900
New Orleans, LA 70112

Phone: (504) 525-9888

Fax: (504) 525-9899

Email:

James M. Taylor
Paula M. Wellons
Paul J. Politz
Charles J. Duhe, Jr.
B. Scott Cowart

Gina Talluto Cursain
Daryl Daigle
Aaron Lawler
Denise Ledet
Devin Morris
Faye D. Morrison
Brent Steier

BATON ROUGE

7924 Wrenwood Blvd., Suite C
Baton Rouge, LA 70809

Phone: (225) 387-9888

Fax: (225) 387-9886

jtaylor@twpdlaw.com
pwellons@twpdlaw.com
ppolitz@twpdlaw.com
cduhe@twpdlaw.com
scowart@twpdlaw.com

gcursain@twpdlaw.com
ddaigle@twpdlaw.com
alawler@twpdlaw.com
dledet@twpdlaw.com
dmorris@twpdlaw.com
fmorrison@twpdlaw.com
bsteier@twpdlaw.com

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TAYLOR, WELLONS, POLITZ & DUHE
1515 Poydras Street, Suite 1900
New Orleans, LA 70112