LOUISIANA WORKERS' COMPENSATION UPDATE

TAYLOR, WELLONS, POLITZ & DUHE, APLC

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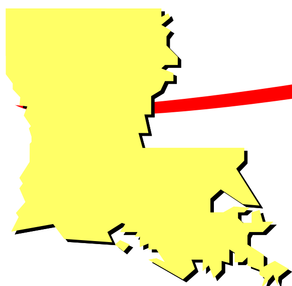

NEW ORLEANS ◊ BATON ROUGE

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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 workers' compensation concerns. For your convenience, we have organized the cases based on the type of claim. If you need more information, please contact us.

INTOXICATION

Buxton v. Iowa Police Dept., 952 So.2d 922, 06-1389 (La. App. 3 Cir. 03/07/07), writ denied, 2007 WL 1797701, 07-0719 (La. 06/01/07)

The claimant, a police officer, was injured when his police car was hit by a motorcycle as he attempted to block the street on which the motorcycle was traveling. At the conclusion of his shift, some four hours later, the Chief of Police told him to take a drug test. Plaintiff testified that he went to a facility to be tested, but did not stay because he was in pain and because he had taken his wife's pain medication earlier in the evening for an abscessed tooth. Based on a subsequent investigation unrelated to the accident, a search warrant was executed for the claimant's home, where marijuana and other drugs were found. At trial, the WCJ determined that the claimant had refused to undergo the drug test, that the employer was entitled to the presumption of intoxication, and that the plaintiff had failed to rebut that presumption. On appeal, the court reviewed the evidence, which included a police log of approximately 84 radio contacts between the plaintiff and the dispatcher, who testified that he seemed fine. The plaintiff also presented testimony from four other officers, including the Chief, none of whom saw anything in his actions that indicated he was intoxicated. The WCJ noted that the plaintiff was not "falling down or stumbling," but, citing the evidence of illegal drug possession, determined that the plaintiff was likely impaired at the time of the accident because of his illegal drug use and that the evidence did not overcome that presumption. The appellate court found that the testimony regarding whether the plaintiff refused to undergo a drug test was conflicting, and that none of the witnesses was completely credible. It was clear, however, that the plaintiff had been ordered to undergo a drug test by his employer and had failed to do so; therefore, the employer was entitled to the presumption of intoxication. The appellate court also determined, however, that the drugs found later in his home had no bearing as to whether he was intoxicated when the accident occurred and reversed the decision of the WCJ, holding that the plaintiff had met his burden to rebut the presumption.

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ACCIDENT

Hosli v. Rent-A-Center, Inc., 2007 WL 1176802, 06-1466 (La. App. 4 Cir. 04/11/07)

The plaintiff, a manager for several of the defendant's stores, was ordered by a supervisor to conduct an inventory of a store where merchandise was allegedly missing. To conduct the inventory, the plaintiff was required to move large appliances, and while doing so, he felt a "pop" in his back. Because the condition was not immediately painful, he did not report the injury and continued working. At the end of the day, the supervisor demoted him. His back pain became worse that evening, and he sought treatment the following day, and he told the doctor that he hurt his back moving merchandise at work the previous day. The employer argued that the claimant did not suffer a work-related accident, but was upset about being demoted and fabricated the accident. In support of its position, the employer presented the testimony of three co-workers who had seen the plaintiff on the day of the accident; all testified that he made no mention of any injury. The employee countered with medical records from his treating doctor, an orthopedic surgeon, and a neurosurgeon, which revealed objective evidence of injury as well as treatment shortly after the accident. The court specifically noted that the testimony of the co-workers did not disprove that an accident occurred, only that the plaintiff did not discuss his injury with them. The court held that an accident had occurred, but that due to the suspicious timing, the employer had reasonably controverted the plaintiff's claim and and therefore, no penalties and attorney's fees were due.

Crawford v. Ponchartrain Materials, 2007 WL 914203, 06-1780 (La. App. 1 Cir. 03/28/07)

The claimant, a truck driver, was unloading sand when an unsecured line struck him on the right leg, knocking him to the ground. After securing the line, he was able to complete the delivery, but reported the incident to his supervisor the next day, who directed him to write a statement about the incident. The supervisor did not complete an accident report. Approximately one month later, the claimant began having problems with his right leg and back. Initially, the claimant believed that his leg problems were related to a stent inserted for a blocked artery inserted prior to the accident and did not tell his doctor about the accident. When his doctor, a cardiologist, learned about the accident, he related the condition to the accident and informed the claimant that he needed surgery. The employer took the position that no accident had occurred and obtained no additional medical evidence. The WCJ concluded that, although the claimant was a poor historian, there was no evidence that contradicted his testimony about the accident. He had worked without difficulty for over a year following the stent surgery and did not experience problems until after the incident. The fact that a claimant did not realize or understand the full extent of his injury immediately after an accident did not bar recovery. Although the employer's insurer argued that the plaintiff's need for back surgery was outside the expertise of a cardiologist, it did not submit any additional medical records or obtain any second opinions, and the court concluded that the claimant had met his burden of proof for entitlement to TTD. Because the employer and insurer had failed to reasonably controvert the claim, the plaintiff was also entitled to penalties and attorney's fees.

MEDICAL TREATMENT

Romero v. Northrop Grumman Corp., 952 So.2d 855, 06-1210 (La. App. 3 Cir. 03/07/07)

Claimant was employed as an aircraft mechanic, and his duties included cleaning sections of the wings using organic solvents. He alleged that he was exposed to toxic chemicals at work and filed a claim for benefits. He sought treatment with a neurogastroenterologist, who prescribed weekly injections of gamma globulin, colon hydrotherapy, manual lymphatic drainage, ear candling, and oxy-ozone sauna therapy. The plaintiff's claim was determined to be compensable, but there was disagreement about the treatment recommended by his doctors, and the employer filed a motion to terminate unnecessary medical treatment. After appointing a toxicologist to review the evidence, the WCJ granted the motion. The plaintiff argued that although the treatments would not cure his condition, they were palliative and improved his quality of life; therefore, pursuant to §1203(a), the defendant was required to provide them. The appellate court reviewed the medical records and testimony submitted by both sides and found that even the claimant's treating physician acknowledged that some of the treatments were "controversial." The opinion of the doctors consulted by the employer were unanimous that none of the treatments were medically necessary, while the plaintiff's treating doctor opined that he had no opinion, but since the plaintiff showed some "slight" improvement and felt better, he recommended the therapy. Because the plaintiff had not demonstrated that the treatments at issue were medically necessary, the appellate court affirmed.

PERMANENT DISABILITY

Johnson v. East Baton Rouge Parish School Board, 2007 WL 914206, 06-1010 (La. App. 1 Cir. 03/28/07)

The plaintiff was injured during the course and scope of his work as a roofer, and he received benefits for approximately 12 years, until the employer terminated them. The plaintiff argued that he was permanently and totally disabled, and the WCJ agreed. Although his doctors opined that he could physically perform some type of sedentary work on a part-time basis, the WCJ noted the plaintiff was 61 years old, never graduated from high school, and had worked as an unskilled laborer his entire life. The vocational rehabilitation counselor concluded that he had no transferable skills and was basically illiterate. There were jobs identified, which the plaintiff was physically capable of performing, but the testimony was clear that the employer did not consider his mental capability for those jobs. The court concluded that the defendant had not looked at the claimant as a whole individual, but only in terms of his physical capabilities, which was “not appropriate,” and that considering all factors, the claimant was permanently and totally disabled.

Odom v. Kinder Nursing Home, 956 So.2d 128, 06-1442 (La. App. 3 Cir. 04/25/07)

Plaintiff was employed as a night nurse at the defendant’s facility when a patient’s bed rail gave way, causing her to fall and hit her head. She was unconscious for almost 20 minutes and injured multiple parts of her body. The WCJ initially awarded her TTD and appointed a neuropsychologist, who concluded that she suffered from cognitive impairment secondary to post-concussion syndrome as a direct result of her work-related injury as well as a number of psychological problems that were also related. The WCJ considered both the plaintiff’s pain management problems, as well as her psychological condition, and determined that she was permanently and totally disabled. The appellate court reviewed the testimony of her treating doctors, who opined that because the employer had not provided appropriate treatment early on and had denied psychological treatment, the claimant’s condition was worse. Some of the employer’s doctors found no physical basis for her ongoing complaints, while others stated that she was incapable of returning to work. Based on the totality of the evidence, the court concluded that the claimant’s mental instability and physical limitations prevented her from working. The fact that she could do limited activities at certain times for a limited amount of time was not the same as being capable of employment.

HEART ATTACK

Smith v. Kinder Retirement & Rehabilitation Center, 954 So.2d 365, 06-1480 (La. App. 3 Cir. 04/04/07)

Plaintiff was employed as a nursing assistant caring for physically and mentally handicapped individuals at the employer's facility. After working there for over 20 years, she suffered a heart attack at home, but returned to work at light duty. Although the plaintiff was not supposed to care for patients alone, she was directed to accompany a large, heavy male patient to a doctor's appointment out of town. After waiting for six hours, she was called to the telephone. In the interim, the patient disappeared, and she later found him in a bathroom covered in his own feces. Due to the resident's agitation and large size, she had a great deal of difficulty cleaning him, and she became weak and short of breath. She managed to get the resident into the vehicle that had transported them, they were driven back to the facility, and she was subsequently taken to the hospital where she was diagnosed with another heart attack. The employer paid no benefits, contending that there was nothing extraordinary or unusual about her activities that day. The employer argued that the plaintiff had cleaned and dressed patients numerous times during the course of her employment, and given her pre-existing heart condition, another heart attack was inevitable. The court disagreed, finding that while the claimant may have performed such activities prior to her first heart attack, she had not done so since that time. In the past, when she accompanied a patient to a doctor's appointment, either the driver or another employee assisted her with the patient, and she was not left alone. Moreover, the plaintiff was alone with the large patient at a doctor's office 150 miles away, with no help available. One of the doctors who testified found that given the increased physical exertion and emotional stress the plaintiff experienced, her work activity was the predominant cause of the heart attack. Additionally, the plaintiff had successfully worked for over a year since her first heart attack, and the court affirmed a determination that plaintiff was entitled to TTD and medical benefits.

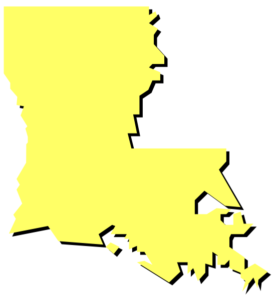
1208

<u>Porter v. Pellerin Construction Co.</u>, 2007 WL 1078820, 06-0949 (La. App. 5 Cir. 04/11/07)

Plaintiff was injured when he fell backward from a ladder and was paid benefits until they were terminated on the basis that he had intentionally misrepresented his mileage in order to obtain additional compensation. Plaintiff testified that immediately after his injury his sister, who lived in another town, took him to his doctor's appointments and that she had prepared the log book of mileage. She testified that she calculated the mileage from her house to her brother's home and then to the doctor's office. The plaintiff also explained that after he got a car, he did not change the mileage on the logs because the odometer on his car was broken, and he did not know that his mileage estimates were inaccurate. The WCJ concluded that the plaintiff's explanation was credible, his mistake was not a willful misrepresentation designed to secure compensation payments, and the Louisiana Fifth Circuit affirmed. The court also affirmed the assessment of $5,000 in penalties and $5,000 in attorney's fees, concluding that the actions of the defendants were not reasonable under the circumstances and termination of all benefits was not warranted under the facts presented.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

NAME OF CASE	PENALTIES/ATTORNEY'S FEES	
Olivier v. After Crash, Inc., 952 So.2d 880, 06-1481 (La. App. 3 Cir. 04/04/07)	$ 5,843.55	Penalty (failure to pay judgment timely)
	$ 7,000	Attorney's Fees
	$ 1,500	Appeal
Odom v. Kinder Nursing Home, 956 So.2d 128,06-1442 (La. App. 3 Cir. 04/25/07)	$ 4,000	Penalty (Improper reduction of benefits and denial of medical treatment)
	$12,000	Attorney's Fees
	$ 2,500	Appeal
Doyal v. Vernon Parish School Board, 950 So.2d 902, 06-1088 (La. App. 3 Cir. 02/07/07)	$ 8,000	Penalty (Termination of benefits and failure to provide medical treatment)
	$25,000	Attorney's Fees
	$ 2,500	Appeal
Crawford v. Ponchartrain Materials, 2007 WL 914203, 06-1780 (La. App. 1 Cir. 03/28/07)	$ 2,000	Penalty (Failure to pay indemnity)
	$10,000	Attorney's Fees
Johnson v. East Baton Rouge Parish School Board, 2007 WL 914206, 06-1010 (La. App. 1 Cir. 03/28/07)	$10,000	Attorney's Fees (Improper termination of benefits)
Smith v. Kinder Retirement & Rehabilitation Center, 954 So.2d 365, 06-1480 (La. App. 3 Cir. 04/04'07)	$ 2,000	Penalty (Denial of indemnity benefits)
	$ 2,000	Penalty (Denial of medical treatment)
	$ 7,000	Attorney's Fees
	$ 4,000	Appeal
Courville v. SCI Louisiana Funeral Service, 954 So.2d 903, 06-1441 (La. App. 3 Cir. 03/07/07), writ Denied, 2007 WL 1796104, 07-0715 (La. 05/18/07)	$ 3,000	Penalty (Failure to reinstate indemnity benefits)
	$ 3,000	Penalty (Failure to authorize medical treatment)
	$ 8,000	Attorney's Fees



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