LOUISIANA WORKERS' COMPENSATION UPDATE

TAYLOR, WELLONS, POLITZ & DUHE, APLC

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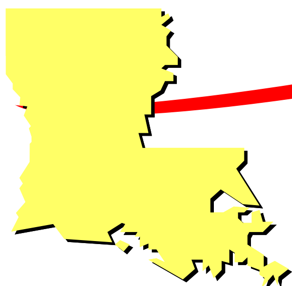

NEW ORLEANS ◊ BATON ROUGE

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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.

ACCIDENT

Maddox v. Texas Gas Transmission Corp., 971 So.2d 541, 07-0906 (La. App. 3 Cir. 12/05/07)

In connection with his work as a pipeline operator, claimant was given an all-terrain vehicle, as well as a trailer to haul it. He was returning from a field inspection when a problem developed with one of the trailer's wheels. While trying to repair it, his back started hurting. He returned the next day to complete the repairs and again felt pain in his lower back. He did not report the injury to his employer because he had just started working for the company and hoped that the pain would subside. Four days later, he strained his back again at work, but still did not report the injury. At home nine days later, he bent down to put on his boots, and his back pain was so severe that he fell to the floor and later went to the emergency room. He reported to each healthcare provider, as well as his employer, that the back pain started with the boot incident, but six weeks later his treating physician requested additional information about how the injury occurred and for the first time learned of the initial injury. At trial, the claimant explained that he did not know it was medically possible for the back pain he experienced to be related to the initial injury. After reporting the injury, he was discharged, and the employer refused to pay benefits on the grounds that no accident had occurred. The employer argued that not only was the accident unwitnessed, but the claimant had consistently reported his back pain as arising from the incident at home. The WCJ found the claimant to be credible and that his version was supported by the testimony of two friends who stopped by while he was working on the trailer. Additionally, once his doctor learned of the origin of the pain, he completed a form specifically relating the back pain to the earlier accident, which the court found satisfied the burden of proof. Because the employer took no other steps to investigate the accident after denying the claim, the WCJ assessed $6,000 in penalties and $8,000 in attorney's fees, which the Third Circuit also affirmed.

CHOICE OF VENDOR

Brown v. KTBS, Inc., 2008 WL 80847, 42,847 (La. App. 2 Cir. 01/09/08), writ denied, 2008-WL 466647, 08-03553 (La. 02/15/08)

Plaintiff, who had cerebral palsy, was injured at work and then again while undergoing physical therapy. Due to those injuries, her treating physicians recommended that she use a "power assist" wheelchair, rather than a manual wheelchair. Although the defendants initially refused to authorize the new wheelchair, they later stipulated it was reasonable and medically necessary, but insisted that it be purchased from a vendor of their choice. The claimant explained that she wanted to use a local vendor with whom she had prior experience and who would customize the chair to her needs. The vendor testified that his charge would fall within the fee schedule. The appellate court noted that 23:1203 did not address the issue of which party had the right to choose the vendor, although 23:1226 gave the employer the right to select the vocational counselor and 23:1121 gave the claimant the right to select a treating physician. Analyzing the statutory language of §1203, the court determined that the employer's obligation was to reimburse a claimant the actual cost or the amount set forth by the fee schedule. Accordingly, the claimant had the right to choose the provider of necessary drugs, supplies, and services, and the employer's duty to reimburse was limited by the fee schedule.

PERMANENT DISABILITY

Tillery v. State of Louisiana Through the Department of Public Safety & Corrections, 2008 WL 399298, 07-1228 (La. App. 1 Cir. 02/08/08)

The claimant fell down a flight of stairs sustaining injuries to his head, neck, back, shoulders, arms and legs and resulting in the total hearing loss in his left ear and a moderate to severe hearing loss in the right. He also developed vertigo, headaches and chronic pain from his injuries. His treating doctor found that he could probably work in a sedentary position, and the WCJ ordered a vocational rehabilitation evaluation. After receiving that report, the WCJ determined the claimant was permanently and totally disabled, noting that he had difficulty with attention and concentration, and while he had some physical skills, he no longer had the mental capability to work. The employer argued on appeal that since the employee was physically capable of working, he was not entitled to permanent disability benefits. The appellate court reviewed the record, but citing the conclusions of the vocational consultant and the WCJ, who observed the claimant at the hearing, agreed that he was not mentally capable of performing those jobs that met his medical restrictions and affirmed the lower court's decision.

<u>Freeman v. Chase</u>, 974 So.2d 25, 42,716 (La. App. 2 Cir. 12/05/07)

Claimant was employed as a research analyst at a Chase Bank branch when she injured her back. She ultimately underwent a fusion and also sought treatment from a pain management specialist, who prescribed numerous drugs, including OxyContin. She was later hospitalized in an effort to wean her from narcotic pain medication, but she still took a number of prescription drugs, which impaired her memory and caused dizziness. One of the issues at trial was whether the claimant had misrepresented her complaints, symptoms, and medical history. At trial, she was confronted with her deposition testimony, which contained numerous inconsistencies about her prior medical problems and her failure to report a car accident that occurred eighteen years earlier. The court acknowledged that several of the claimant's statements in her deposition were clearly false, but were not made for the purpose of obtaining benefits. Citing her prior drug addiction and continuing physical problems, the appellate court affirmed the WCJ's determination that the statements were not made willfully, and therefore forfeiture did not apply.

<u>James v. Express Marketing, Inc.</u>, 973 So.2d 125,42,740 (La. App. 2 Cir. 12/05/07)

The claimant, a field service technician, injured his back and reported it the next day. While working light duty a few days later, he claimed that his back "popped," causing him to fall. He was taken to the emergency room, and his treating neurosurgeon later recommended surgery. His employer denied the claim, arguing there was no accident, it was not timely reported, and the employee had failed to truthfully answer questions about his prior medical condition. Therefore, pursuant to §1208.1, he had forfeited entitlement to benefits. In addition to the Second Injury Fund Questionnaire, the employer had its own medical questionnaire with eighty-six questions. On that questionnaire, the employee denied prior back problems, although he told his treating physicians about a childhood injury and back pain he experienced a few years earlier while working as a waiter. Based on that information, the WCJ concluded that the employee had forfeited his right to receive benefits. After reviewing the medical evidence, however, the appellate court determined that there was nothing that would rise to the level of a permanent partial disability and that he had never missed work for any back problems until the incident at issue. The court also held that general back pain was not covered by the Second Injury Fund and, therefore, the employee did not answer untruthfully and reversed the WCJ's decision.

SEB

<u>Snowton v. Sewerage and Water Board</u>, 972 So.2d 417, 07-0677 (La. App. 4 Cir. 12/05/07)

The WCJ awarded the employee SEB and used a presumption that the claimant had worked forty hours per week for the four weeks preceding the accident. Although the plaintiff's treating physicians opined that he could return to work at a sedentary to light position, the WCJ accepted the testimony of the plaintiff's vocational expert, who opined that the claimant was intellectually impaired and the fact that he had a high school diploma should be discounted because the plaintiff received it at a time when some schools gave handicapped individuals diplomas even if they had not completed the requirements for graduation, although he submitted no proof of this assertion. Psychological testing by the defendant produced scores at the low end of the intellectual ability range, but the doctor believed the plaintiff exhibited a sub-maximal effort. The employer's rehabilitation consultant identified a number of jobs within his physical limitations, but the claimant never applied for any of the jobs and never appeared for the testing required for one position. The Fourth Circuit noted that two of the jobs were within his physical capabilities, his doctor had stated he had reached maximum medical improvement, and each of those jobs would have paid more than 90% of his pre-accident wage; therefore, he was not entitled to SEB's, and the employer was entitled to a credit for all amounts previously paid. Additionally, the appellate court noted that the claimant routinely missed work without pay, which rebutted the statutory presumption, and the court recalculated his average weekly wage to reflect the reduced hours. Finally, the court determined that since the claimant was not entitled to SEB payments, the claim had been reasonably controverted, and no penalties and attorney's fees were due.

TTD

Fassit v. Jefferson Parish Hospital Service, 2007 WL 4553954, 07-0695 (La. App. 5 Cir. 12/27/07)

Claimant was injured at work on March 16, 2004 and was paid TTD until November 15, 2006, when the employer terminated benefits based on a doctor's report that she could return to her prior job. In the meantime, however, claimant had relocated to Texas following Hurricane Katrina and sought reinstatement of her benefits along with penalties and attorney's fees, arguing that she could not return to her former job because she had moved. The WCJ granted summary judgment in favor of the claimant, ordering reinstatement of her TTD benefits, and the employer appealed. Citing 23:1226, the claimant argued that for purposes of identification of jobs for vocational rehabilitation, the employee's local job pool had to be considered, and the employee's geographic area had to be the focus. The appellate court disagreed, finding that in order to receive TTD, it was the plaintiff's burden of proof to introduce objective medical evidence establishing by clear and convincing evidence that she could not work in any type of employment. The claimant presented no evidence that she was not able to return to her former job, nor did she provide any evidence that she was unable to earn 90% of her pre-injury wages. The court agreed that vocational rehabilitation should be conducted in Texas, but that was irrelevant to the issue of TTD and reversed.

PENALTIES AND ATTORNEY'S FEES

Campbell v. City of Leesville, 2008 WL 239656, 07-1061 (La. App. 3 Cir. 01/30/08)

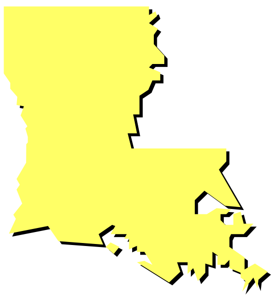
Claimant injured his left ankle at work and was paid indemnity and medical benefits. Approximately six months later, his treating doctor opined that he had reached MMI, requested a functional capacity evaluation, and referred him for chronic pain management. The FCE found he could perform light duty work. Two months later, however, the claimant returned to see his doctor complaining that use of a cane had caused right ankle and right shoulder pain, which the doctor believed was related to the original injury and caused by overuse. He requested authorization to obtain an MRI on both areas, but the employer refused authorization. After trial, the WCJ ordered reinstatement of TTD and assessed a $2,000 penalty for each failure to authorize the MRI. On appeal, the employer argued *inter alia*, that the failure to authorize the MRI's was a single demand resulting in a single violation, and therefore only one penalty should be awarded. The court rejected that argument, noting that the employer had failed to authorize a specific test of two different parts of the claimant's body, and the fact that the request and the denial were made simultaneously did not transform the denials into one violation. If that were true, the court noted, then any time there was a request for more than one medical procedure, it could be combined into one denial, limiting the employer's exposure to one penalty. With respect to the determination of TTD, the WCJ assessed an $8,000 penalty, the maximum under the statute. The Third Circuit found that amount to be an abuse of discretion, citing the differing medical opinions. The court also noted that after the treating doctors had changed their position on his ability to work, the employer was not entitled to rely on those original opinions, making the termination arbitrary and capricious. The court, however, reduced the penalty to $5,000.

Dufour v. River City Management, Inc., 970 So.2d 1233, 06-1487 (La. App. 3 Cir. 11/28/07)

After the claimant settled the dispute, his attorney filed several motions which were found to be frivolous, and the WCJ assessed the attorney with a $500 sanction pursuant to Article 863 of the Louisiana Civil Code of Procedure. The attorney failed to pay the sanction, and the defendant filed a motion for penalties pursuant to 23:1201G, which the WCJ granted, and assessed a penalty of $3,000 for failure to pay the previous judgment, as well as $3,000 in attorney's fees. The attorney appealed, arguing that 1201G could not be used to sanction an attorney, but applied only to unpaid judgments of worker's compensation benefits. First, the appellate court determined that a worker's compensation judge had the authority to impose sanctions under Article 863. The court then examined the statutory language and found that while it applied to "any award," the statute as a whole was intended to apply only to the non-payment of a judgment by employers and insurers. Since there were other means available to enforce the judgment, it could not be used to penalize an attorney, and the court reversed.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

NAME OF CASE	PENALTIES/ATTORNEY'S FEES	
Hickerson v. Shaw Services, LLC, 2008 WL 399192, 07-1049 (La. App. 1 Cir. 02/08/08)	$ 2,000 $ 5,000 $ 1,500	Penalty (termination of medical benefits) Attorney's Fees Appeal
Bennett v. Pilgrim's Pride, 972 So.2d 423, 07-0753 (La. App. 3 Cir. 12/12/07)	$ 2,000 $ 5,000 $ 2,500	Penalties (failure to reinstate benefits) Attorney's Fees Appeal
Worley v. Town of Brusly, 2007 WL 4463341, 07-0572 (La. App. 1 Cir. 12/21/07)	$ 2,000 $10,000	Penalties (failure to pay TTD) Attorney's Fees
Maddox v. Texas Gas Transmission Corp., 971 So.2d 541, 07-0906 (La. App. 3 Cir. 12/05/07)	$ 2,000 $ 2,000 $ 2,000 $ 6,000 $ 8,000	Failure to pay indemnity Failure to pay medicals Failure to investigate the claim TOTAL Attorney's Fees
Freeman v. Chase, 974 So.2d 25, 42,716 (La. App. 2 Cir. 12/05/07)	$ 2,000 $ 5,000 $ 2,500	Penalties (improper reduction in benefits) Attorney's Fees Appeal
Campbell v. City of Leesville, 2008 WL 239656, 07-1061 (La. App. 3 Cir. 01/30/08)	$ 2,000 $ 4,000 $ 8,000* $ 2,500 (*The WCJ apparently awarded attorney's fees at trial, but that amount was not given).	Failure to timely pay TTD Failure to authorize medical tests Termination of TTD (reduced on appeal to $5,000) Appeal



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