LOUISIANA WORKERS' COMPENSATION UPDATE

TAYLOR, WELLONS, POLITZ & DUHE, APLC

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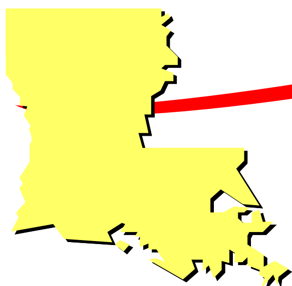

NEW ORLEANS ◊ BATON ROUGE

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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.

SETTLEMENT

MacFarland v. Schneider National Bulk Carriers, 2008 WL 2002575, 07-1386 (La. App. 4 Cir. 04/30/08)

The parties agreed to settle the claimant's workers' compensation claim and jointly drafted a settlement agreement which provided for a lump sum payment and a defendant-funded Medicare Set-Aside Account ("MSA"). While the agreement provided that the lump sum was to be paid within 30 days of the order approving the settlement, there was no such requirement for the MSA, and it was not funded until 105 days after the order. Plaintiff filed a motion for penalties and attorney's fees on the basis that the MSA was not funded within 30 days, but the OWC denied the motion. The defendant argued that the parties never contemplated that it would have only 30 days to fund the MSA since both parties were aware that the settlement had to be submitted to Medicare for approval, a process that in all likelihood would not be completed within 30 days. The Fourth Circuit disagreed and held that §1201G applied, even though the statute did not specifically address the funding of an MSA. The language, however, specifically provided for penalties and attorney's fees for the non-payment of "any award" payable pursuant to a final, nonappealable judgment within 30 days. The court found the language to be clear and unambiguous and that its application did not lead to absurd consequences. There were no exceptions in the language for an MSA, and consequently, the failure to fund it within 30 days subjected the defendant to penalties, although only on that portion of the settlement not paid within the 30 days, rather than the entire settlement.

SEB

Terral v. Justiss Oil Co., 979 So.2d 589, 07-1014 (La. App. 3 Cir. 03/05/08)

The claimant was injured in 1999 and received indemnity and medical benefits through the end of 2002, when he completed his studies to be an associate computer technician. He obtained employment, however, as a jailer and later as a deputy sheriff. In 2004, he exacerbated his prior back injury while getting out of bed and sought SEB from his original employer, arguing he did not earn 90% of his pre-injury wages. The WCJ disagreed, finding that he was able to perform his job as a deputy sheriff and had chosen not to seek employment that would pay higher wages, which was tantamount to a voluntary reduction in his income. The claimant was not unable to earn 90% of his pre-accident wages, but voluntarily chose an occupation with a lower income, and therefore, was not entitled to SEB. The Third Circuit agreed, finding that the claimant had not met his burden of proof.

FORFEITURE

Gross v. Gaudin, 982 So.2d 164, 07-0670 (La. App. 5 Cir. 03/11/08)

Plaintiff was injured in 1992 and received benefits through 2004 when they were terminated. Plaintiff claimed she was permanently disabled, and the employer's insurer responded that not only was she capable of working, but she had failed to obtain approval for settlements for injuries received in two car accidents and had forfeited her right to further benefits pursuant to 1208. Plaintiff argued that she was not required to obtain approval for the settlements because there was no evidence of an aggravation of the employment-related injury to her back, since she sustained only soft tissue injuries to her neck and shoulders. The court disagreed, however, finding that the statute clearly required her to notify her employer, and therefore she had forfeited her right to future compensation. The WCJ also concluded that she had violated §1208 by exaggerating her mileage claim. Her social worker and one of her treating physicians were located in the same building, yet claimant routinely submitted mileage claims for almost double the actual mileage. An investigator testified as to the mileage when he made the trip, and the court found that the plaintiff exaggerated the mileage by over 80%, thus forfeiting her benefits, and the appellate court agreed that the matter should be referred to the OWC's fraud section.

INTENTIONAL ACT

Campiome v. Alderman, 978 So.2d 1111, 07-1254 (La. App. 3 Cir. 03/05/08)

Plaintiff was engaging in horseplay or roughhousing with another employee while the defendant worked nearby opening boxes with a box cutter. Plaintiff admitted that he and the other employee may have acted as though they were going to throw punches, but denied actually doing so. The plaintiff then turned toward the defendant with his hands raised in the same manner, as if to throw a punch, and defendant threw up his hands to ward off the anticipated blow. The plaintiff's right wrist came in contact with the box cutter, cutting his wrist. Both plaintiff and defendant agreed that the defendant had no intent to cut the plaintiff. Plaintiff argued that the concept of an "intentional act" should be equated with "voluntary act." In other words, the focus should be the defendant's intent to make the movement, rather than on the consequences. The trial court disagreed, finding that intentional conduct was more reprehensible, noting that "even a dog distinguishes between being stumbled over and being kicked." The appellate court affirmed, noting there was no evidence that the defendant had any intent or goal to injure the plaintiff or that the plaintiff's injury was certain or substantially certain to result from his act. The defendant believed that the plaintiff was going to throw a punch in his direction, and put up his own hands in a blocking maneuver. It was the plaintiff's own momentum which brought him into contact with the box cutter, not a swing by the defendant. Accordingly, summary judgment on behalf of the defendant was appropriate.

PENALTIES AND ATTORNEY'S FEES

Erwin v. Town of Jena, 2008 WL 2289699, 08-0137 (La. App. 3 Cir. 06/05/08)

Plaintiff was injured in late 1999 when a staircase collapsed, causing him to fall fourteen feet. He underwent a number of surgeries, which did not completely alleviate his pain. He was referred to a doctor in Lafayette for a cervical radio-frequency procedure, which was scheduled for June, 2004. At the same time, the claimant and his wife were planning to move from Louisiana to Florida and did so in April. In June, the claimant and his wife returned to Louisiana for the procedure, during which the claimant incurred travel expenses of airfare, transportation to and from the airport, and a rental car. The defendant declined to reimburse the claimant for those travel costs. Following a hearing, the WCJ concluded the travel expenses were reasonable and necessary and that the defendant had failed to reasonably controvert the entitlement to those expenses and assessed penalties of $2,000 and attorney's fees of $3,500. The appellate court noted that the claimant was under the care of several physicians over a five year period for persistent pain, and the defendant had approved the procedure prior to the move. Defendant claimed that the plaintiff could have waited until after the procedure to move or could have found a physician in Florida. The Third Circuit disagreed, finding that it was reasonable for the claimant to continue with his treating physician, particularly since it involved a one-time procedure, and the travel expenses were not unreasonably expensive or burdensome. Moreover, defendant failed to pay anything toward the travel expenses and presented no evidence as to what it considered to be reasonable for the trip.

At the hearing, the claimant also requested reimbursement for pharmaceutical expenses. The defendant's risk manager was to pay the pharmacy directly for prescriptions, but on one occasion, the pharmacist was unable to obtain an authorization, requiring the plaintiff to write a check in the amount of $1,471.92. A copy of the receipt from the pharmacy and a copy of the check were forwarded by fax with a demand letter, and confirmation of the fax transmission was introduced into evidence. The WCJ denied penalties and attorney's fees for failure to timely pay the pharmaceutical expenses, concluding that a fax confirmation sheet did not rise to the standard of proof necessary to establish receipt. The appellate court reversed, finding that faxed transmissions were generally reliable and trustworthy, and once it had been introduced into evidence, it was up to the defendant to rebut the presumption that it had received the demand for payment. Since the late payment was uncontradicted, and the employer did not make a showing that it occurred due to conditions beyond its control, the court awarded $2,000 in penalties and $2,500 in attorney's fees, as well as an additional $2,500 in attorney's fees for the appeal.

PENALTIES AND ATTORNEY'S FEES (continued)

Ducote v. Louisiana Industries, Inc., 980 So.2d 843, 07-1536 (La. App. 3 Cir. 04/02/08)

The employer paid several weeks of indemnity benefits late, and the claimant sought a penalty for each check that was not paid timely as well as attorney's fees. The employer made an unconditional tender of $2,000 in penalties and $750 for attorney's fees, claiming that no additional amounts were owed, and the WCJ agreed. There was no dispute that the reason for the late payment was a clerical error, which the court found would nonetheless subject the employer to penalties. The issue was whether each week of the six week period in which benefits were not timely paid constituted a new claim, thereby entitling the plaintiff to multiple penalties. While the Third Circuit had never addressed the specific issue, it noted that other circuits, when faced with similar circumstances, had concluded that late payment of benefits that were subsequently paid in a lump sum constituted a single violation and reasoned that the employer's action was one ongoing violation that should result in one penalty award. The Third Circuit affirmed the WCJ's decision, and no additional penalties or attorney's fees were due.

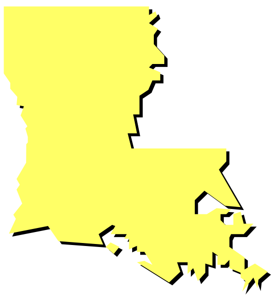
PENALTIES AND ATTORNEY'S FEES (continued)

Barrios v. Lambar, Inc., 2008 WL 1930525, 07-2070 (La. App. 1 Cir. 05/02/08)

At the time of the accident, the employee was employed by Lambert Construction ("Lambert"), but had been loaned to Lambar, Inc. ("Lambar"), and the WCJ concluded that since he was a borrowed employee, Lambar and Lambert were solidarily liable for the benefits due. Lambar had been paying indemnity and medical benefits, and the WCJ ordered Lambert to reimburse Lambar for one-half of the amount paid. Lambert appealed that judgment, which was affirmed. Lambar then filed a motion for penalties due to Lambert's failure to pay the judgment timely as well as a penalty of 24% of the amount of the judgment and attorney's fees. Lambert claimed that it was entitled to a breakdown of the medical and indemnity benefits prior to reimbursing Lambar, and since they had not received such a breakdown despite a request, the failure to pay was excusable. The WCJ found for Lambar and awarded legal interest of $21,752.90 and attorney's fees of $3,000, but no penalties. On appeal, the court found that Lambar had attempted to cooperate with Lambert's demands for categorization of the amounts owed, but no effort was ever satisfactory, and finally after months of "haggling," Lambar filed the motion. A review of the record revealed that Lambert improperly refused to authorize any amount, including one-half of the benefits already paid and that its allegation that its system would not allow it to cut one check, was legally insufficient. The court also found that the language §1201G mandated a penalty of 24%, the WCJ was wrong not to make such an award, and remanded the matter to the WCJ to hold a hearing within fourteen days to calculate the precise amount of the 24% penalty and awarded an additional $1,500 in attorney's fees for the appeal.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

NAME OF CASE	PENALTIES/ATTORNEY'S FEES
Stewart v. Livingston Parish School Board, 2008 WL, 1930536, 07-1881 (La. App. 1 Cir. 05/02/08)	\$ 2,000 Penalty (Failure to pay medical) \$ 2,000 Penalty (Failure to pay TTD) \$ 7,500 Attorney's fees
Brien v. Leon Angel Constructors, Inc., 978 So.2d 576, 42,904 (La. App. 2 Cir. 03/12/08), writ denied, 983 So.2d 919, 08-0802 06/06/08)	\$ 2,000 Penalty (Wrongful termination of indemnity) \$ 7,500 Attorney's fees \$ 1,000 Appeal
Morris v. Cactus Drilling Co., 982 So.2d 957, 07-1248 (La. App. 3 Cir. 04/30/08)	\$ 2,000 Penalty (Premature termination of TTD) \$ 2,000 Penalty (Failure to reimburse travel expenses) \$ 2,000 Penalty (Failure to authorize medications) \$ 6,000 Attorney's fees \$ 2,500 Appeal
Honeycutt v. Henry's Plumbing, 981 So.2d 60, 07-1270 (La. App. 3 Cir. 04/02/08)	\$ 2,000 Penalty (Failure to pay indemnity) \$ 2,000 Penalty (Failure to authorize care with physician of choice) \$ 2,000 Penalty (Failure to timely pay medical bills) \$ 7,500 Attorney's fees
Mouton v. Walgreen Co., 981 So.2d 75, 07-1403 (La. App. 3 Cir. 04/02/08)	\$ 8,000 Penalty (Failure to pay indemnity, medical, and mileage benefits) \$ 18,500 Attorney's Fees
Ivory v. Southwest Developmental Center, 980 So.2d 108, 07-1201 (La. App. 3 Cir. 03/05/08)	\$ 2,000 Penalty (Failure to reinstate benefits) \$ 1,100 Penalty (Late payment of benefits) \$ 10,000 Attorney's fees \$ 2,500 Appeal



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