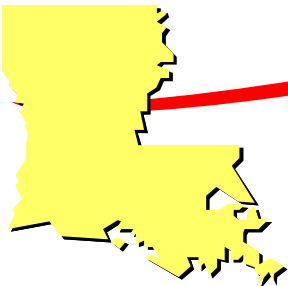


LOUISIANA WORKERS' COMPENSATION UPDATE



NEW ORLEANS ♦ BATON ROUGE

OCTOBER 2006

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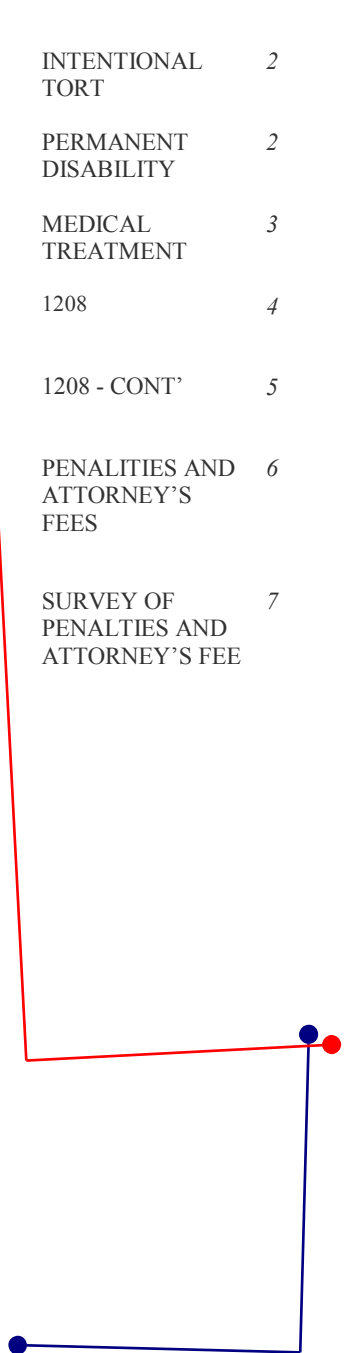
INTRODUCTION

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.

THIRD - PARTY CLAIM

Haynes v. United Parcel Service, 933 So.2d 765, 05-2378 (La. 07/06/06)

While receiving workers' compensation benefits, plaintiff was involved in a non-work-related car accident, which he settled without advising his employer of the accident or obtaining approval for the settlement. Subsequently, he was involved in another car accident and made a claim for his injuries, but again did not notify his employer. When the defendants learned of the accidents, his benefits were terminated. The plaintiff then filed a claim, alleging his employer terminated his benefits without justification, and the employer responded with a motion for summary judgment, based on 23:1102. The employee argued that § 1101 did not apply when the subsequent injuries were not compensable, and there were issues of material fact regarding whether the accidents aggravated his work-related injury. The Workers' Compensation Judge granted the employer's motion, holding that the plaintiff had forfeited his right to benefits pursuant to § 1102 because he failed to disclose the accidents and obtain approval for the settlements. The Second Circuit reversed, but the Louisiana Supreme Court reversed that decision and reinstated the judgment of the Workers' Compensation Judge. The Supreme Court found that the appellate court had not considered the effect of § 1101C, which clearly provided that if a third-party tortfeasor aggravated an employee's work-related injury, the employer had reimbursement rights against the tortfeasor, and the employee had an obligation to obtain written approval from his employer prior to settling or would forfeit his benefits.



INTENTIONAL TORT

Simoneaux v. Excel Group, LLC, 936 So.2d 1246, 06-1050 (La. 09/01/06)

As plaintiff bent down to retrieve tools for a co-worker, a manlift ran over his foot. Plaintiff filed suit, alleging his injury was the result of an intentional action, and the defendant filed a motion for summary judgment, arguing that the plaintiff's injury was not substantially certain to occur. In opposition to the motion, the plaintiff submitted the affidavit of a safety expert who opined that because the manlift was being operated with the boom extended but without a spotter, it was impossible for the operator to see where he was going. Moreover, given the congestion of the area, the noise level, the limited visibility, and the lack of rules enforcement, the accident was substantially certain to occur. The district court denied the motion for summary judgment, and the appellate court denied the defendants' writ. On a writ to the Louisiana Supreme Court, the court granted the motion. Citing Reeves, 731 So.2d 208, the court reiterated that "substantially certain" required more than a reasonable probability and meant that the accident was inevitable. Even if an employer knew that a particular machine was dangerous to use and that it was highly probable that someone could be injured, that knowledge did not rise to the "substantially certain" level. Moreover, knowledge and appreciation of a risk was not the same as intent, and even reckless or wanton conduct on the part of an employer did not constitute an intentional act. Accordingly, there was nothing to show that the plaintiff's injury was substantially certain or inevitable, and while the defendants may have been negligent or even grossly negligent, their actions did not qualify as an intentional tort.

PERMANENT DISABILITY

City of Covington v. Walker, 2006 WL 2636560, 05-1734 (La. App. 1 Cir. 09/15/06)

The employee initially injured his back in 1993, underwent surgery, and returned to work later that year. Approximately a year and a half later, he resigned for health reasons and received SEB until July 2003, when his employer filed a claim, asserting that since he had received more than 520 weeks of benefits, he was not entitled additional benefits. The Office of Workers' Compensation held that the employee was totally and permanently disabled and therefore entitled to additional benefits. At the time of trial, the Workers' Compensation Judge found the employee was 60 years old, had a fourth grade education and had usually worked as a general laborer. The state-appointed IME found him to be at MMI, but that he could not return to his previous occupation and lacked the skills necessary to perform light duty jobs. Although the employee had been offered vocational rehabilitation after his injury, no rehabilitation was offered after he resigned. The Workers' Compensation Judge concluded that there was no reasonable possibility of the employee being retrained for any suitable employment based on his lack of education, the fact that he was very inarticulate, his physical condition, and the fact that he had not worked for ten years at the time of trial; therefore, vocational rehabilitation would not be in either party's best interest. On appeal, the court found that while there was some conflict in the evidence as to whether he was disabled due to his work injury or his heart condition, the records supported the workers' compensation judge's conclusions.

MEDICAL TREATMENT

Louviere v. Food & Fun, Inc., 2006 WL 2872858, 06-0469 (La. App. 3 Cir. 10/11/06)

After the employee injured her back at work, her orthopedic surgeon treated her conservatively for almost a year, then recommended spinal fusion surgery. The employer's orthopedist agreed that she suffered from degenerative lumbar disc disease, but due to numerous "non-physiological signs" did not recommend surgery. The orthopedic surgeon appointed by the Office of Workers' Compensation also recommended against surgery and suggested pain management treatment, and after a second examination stated that he did not believe that the claimant was a good candidate for surgery due to her psychological condition. After additional evaluations by the employer's and Office of Workers' Compensation's orthopedic surgeons who recommended against surgery due to her emotional condition, a psychological evaluation was obtained, which found that the claimant was severely depressed, and because of the psychological overlay she was not a good candidate for surgery. There was additional conservative treatment by her doctor and another evaluation, which the employer relied on to deny authorization for the surgery. The claimant ultimately took out a second mortgage on her home and paid for the surgery, then filed a claim seeking reimbursement as well as penalties and attorney's fees. The Workers' Compensation Judge granted the defendants' motion for summary judgment finding that the surgery was an unauthorized, non-emergency medical procedure and was therefore subject to the \$750 medical reimbursement cap. On appeal, the Third Circuit reversed, holding that the continued denial of authorization constituted a denial of compensability. Moreover, the court concluded that the surgery was medically necessary based on the treating orthopedic surgeon's opinion and held the defendants liable for all medical expenses. The court also cited the language of 23:1142C which eliminates the need for prior approval in cases of emergency, or when the treatment was "immediately necessary." The appellate court concluded that based on the testimony of the plaintiff's doctor that she had two herniated discs, the surgery was "immediately necessary," and no approval was required. The appellate court did not find the defendants' conduct to be arbitrary and capricious, however, and denied the claim for penalties and attorney's fees.

1208

Angelo lafrate Construction Co. v. Herring, 2006 WL 2521458, 05-1461 (La. App. 1 Cir. 09/01/06)

The claimant was injured when he fell off a roof and received workers' compensation benefits. Due to a conflict in opinions between the claimant's and the employer's physicians, the Office of Workers' Compensation granted the defendant's motion to appoint an IME. A week after that examination, the employer obtained video surveillance film that showed the claimant engaged in a number of outdoor activities he allegedly he could not perform. Claiming a violation of 1208, the employer terminated benefits. The workers' compensation judge disagreed and ordered the employer to reinstate benefits retroactive to their suspension and assessed judicial interest on all outstanding indemnity benefits from that date. With respect to the video, the employee explained that his doctor had told him to what he could and to try to build himself up by walking with a light weight in his hands; additionally, he had good days and bad days. The Workers' Compensation Judge found that the employee was very hard of hearing and there was a likely a miscommunication between he and the IME doctor. The activities depicted were necessary repairs to his own house, and the Workers' Compensation Judge reasoned that there was a difference between those activities and performing repairs for pay somewhere else. There was nothing to show that the claimant engaged in those activities on a daily basis, and the judge found that he would likely "suffer for it" when he did so. Accordingly, the workers' compensation judge found no willful misrepresentation, and the appellate court affirmed.

1208 - Continued

Moore v. Transmissions, Inc., 2006 WL 2741655, 41,472 (La. App. 2 Cir. 09/27/06)

Claimant was allegedly involved in an unwitnessed accident at work in which he injured his left foot and low back. Although the employer initially paid benefits, it later sought restitution for violations of 1208 and 1208.1. The Workers' Compensation Judge ordered forfeiture and referred the matter to the Fraud Unit for further proceedings. In two separate recorded statements, the claimant denied any prior work-related injuries, back injuries, claims arising out of an automobile accident, and any settlements. He made similar statements in his deposition. An investigation, however, revealed a prior bike accident, a car accident which he settled, and a fractured vertebrae. The appellate court agreed with the workers' compensation judge, finding that the "volume and persistence" of the misrepresentations, many of which were made under oath and in the presence of counsel, eliminated the possibility that the statements were inadvertent or inconsequential and that claimant had violated 1208, forfeiting his right to benefits.

Franklin v. HealthSouth, 2006 WL 2686252, 41,458 (La. App. 2 Cir. 09/20/06)

The claimant was allegedly involved in an unwitnessed accident, and there were conflicting versions as to when she reported the accident as well as the extent of her injuries. During an interview with the adjuster, the plaintiff insisted she could not work and specifically denied that she had a second job of any kind. An investigation revealed that the claimant and her family had just opened a new restaurant, and surveillance video showed her carrying pots of prepared food from her house to her car and then into the restaurant. She was also seen running the cash register. The defendants argued that the plaintiff was not injured at work, but feigned an injury to get time off to fix up the building and open the business as well as to have some income in the meantime. Although the claimant's mother and two sisters corroborated her story, the Workers' Compensation Judge concluded that she deliberately lied about the extent of her disability, the work she performed at the restaurant, and her physical abilities in order to receive benefits and ordered forfeiture. The Second Circuit affirmed, finding that the failure to disclose a second job supported forfeiture.

PENALTIES AND ATTORNEY'S FEES

Broussard v. Lafayette Parish School Board, 939 So.2d 662, 06-0268 (La. App. 3 Cir. 09/27/06)

The Office of Workers' Compensation issued a judgment on June 11, 2003, ordering the defendant to increase the claimant's compensation benefits retroactive to the initial period of disability and to continue paying those benefits "until further order of this court." The defendant never increased the benefits, never paid the retroactive amount, and on May 14, 2004 terminated the benefits without filing a motion, arguing that it was authorized to unilaterally do so pursuant to 23:1221(1)(d), (which states that TTD benefits will cease when an employee's condition has resolved so that regular treatment is no longer required). At a hearing, the Workers' Compensation Judge assessed \$3,000 in penalties, \$2,500 in attorney's fees and court costs for the unilateral termination and \$5,040 for not paying the earlier judgment in a timely matter. On appeal, the defendant argued that 23:1201F limited all penalties to \$8,000. The appellate court concluded that the defendant had disregarded the Workers' Compensation Judge's previous order, and that if the employer believed that an employee was no longer eligible to receive benefits, the employer was required to petition the court pursuant to § 1310.8. The court specifically found that the process set forth in the statute was mandatory, not optional as suggested by the defendant, and that the defendant's conduct merited the penalty and attorney's fees. The defendant also argued that its failure to pay the retroactive benefits was "merely an oversight," but the court held that faulty recordkeeping was not an excuse. Moreover, the appellate court determined that the penalty to be assessed for the failure to pay a final judgment within thirty days pursuant to 1201G did not contain a maximum and affirmed that award as well. Finally, the defendant argued that the amendment to 1201F imposing a cap of \$8,000 applied to all subsections of 1201, and therefore, the workers' compensation judge could not assess penalties in the aggregate of more than that amount. Because the legislature is presumed to enact a statute with the knowledge of all existing laws on the same subject, the court reasoned that the legislature was presumed to know that subsection G, which had no limit on the amount of penalties, was in effect when subsection F was amended, and therefore it assumed that the legislature left subsection G intact because it intended to punish employers differently when they did not pay a final judgment as opposed to when they failed to pay benefits without a judgment in place. Furthermore, the language of subsection F generally referred to an employer's failure to make payment, while the language of subsection G was more specific and dealt only with the failure to pay a final non-appealable judgment within thirty days. Because subsection G was specific and F more general, the specific subsection had to be given priority, and the decision of the Workers' Compensation Judge was affirmed. The plaintiff was awarded an additional \$3,000 in attorney's fees for the appeal.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

NAME OF CASE

PENALTIES/ATTORNEY'S FEES

Roussell v. St. Tammany Parish School Board, 2006 WL 2422586, 04-2622 (La. App. 1 Cir. 08/23/06)

\$2,000 - Penalty
 \$5,000 - Attorney's Fees (Failure to reinstate indemnity)

\$2,000 - Penalty
 \$2,000 - Attorney's Fee
 (Failure to reimburse medical expenses)

\$2,000 - Penalty
 \$2,000 - Attorney's Fee
 (Failure to reimburse medical expenses)

\$2,000 Penalty
 \$2,000 Attorney's Fee
 (Failure to reimburse medical expenses)

\$2,000 Penalty
 \$2,000 Attorney's Fee
 (Failure to reimburse medical expenses)

Total for Penalties: \$10,000
 Total for Attorney's Fee: \$13,000
 Appeal: \$2,000

Elie v. Sears Roebuck & Co., 2006 WL 2773853, 06-0395 (La. App. 3 Cir. 09/27/06)

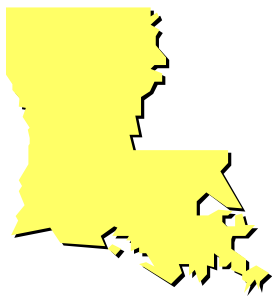
\$2,000 Penalty (untimely payment of benefits)
 \$2,000 Penalty (untimely payment of benefits)
 \$1,400 Penalty (untimely payment of benefits)
 \$4,000 Attorney's Fees
 \$2,000 Penalty
 \$2,000 Attorney's Fees (Failure to pay benefits)
 \$2,000 Penalty
 \$2,000 Attorney's Fees (Unreasonable delay in paying benefits)

Captain v. Citgo Petroleum Corp, 2006 WL 2781409, 06-0481 (La. App. 3 Cir. 09/27/2006)

\$2,000 Penalty (Failure to pay benefits timely)
 \$2,000 Penalty (Failure to provide medical treatment)
 \$7,000 Attorney's Fees
 \$1,500 Appeal

Mullins v. Concrete & Steel Erector, 2006 WL 2785739, 06-0510 (La. App. 3 Cir. 09/27/2006)

\$8,000 Penalty (Discontinuance of medical benefits)
 \$2,000 Penalty (Failure to pay indemnity)
 \$7,500 Attorney's Fees
 \$1,500 Appeal



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