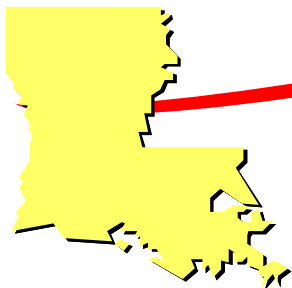


LOUISIANA WORKERS' COMPENSATION UPDATE

TAYLOR, WELLONS,
POLITZ & DUHE,
APLC



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

Bertrand v. Dowell Chemical Co., 2006 WL 3734371, 05-1246

(La. App. 1 Cir. 12/20/06)

In 1994, the employee sustained a work-related injury to his knee, but returned to full duty approximately 6 weeks later. In March 2003, a problem arose at the employer's plant requiring the employee to repeatedly climb 50-60 steps, causing his knee to swell and becoming so painful he could no longer walk. The employer denied the claim for benefits, arguing that the condition was a gradual deterioration and cited testimony from the employee's treating orthopedic surgeon who opined that the earlier injury resulted in a type of lesion in the knee that was likely to become symptomatic over time. The employer also pointed out that the employee had experienced some problems with that knee in the past and had earlier been restricted to light duty, although he was working full duty at the time of the alleged accident. The WCJ found that his job did not usually require him to climb those steps, and the employee had never experienced the type of pain he did after doing so. The WCJ also noted the testimony of the treating doctor that while the stair climbing would not have caused the lesion, the excessive amount of climbing could have aggravated the pre-existing condition. The WCJ held that the repeated stair climbing was a different type of work than what the employee ordinarily performed, and this work-related activity triggered an aggravation of the pre-existing condition, which met the statutory definition of an accident, and the appellate court affirmed. The First Circuit, however, reversed the award of penalties and attorney's fees because the employer had a reasonable basis for its denial.

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VOLUNTARY ACT

Girard v. Patterson State Bank, 2006 WL 3103256, 06-0049 (La. App. 1 Cir. 11/03/06)

The employee was injured while giving blood during a blood drive sponsored by her employer. She filed a claim after she could no longer work, but the WCJ granted the employer's motion for summary judgment, finding that she had not sustained an accident that arose out of and in the course of her employment. The plaintiff testified that the blood mobile came onto the employer's premises at least twice a year for blood drives, and it parked in the employer's parking lot during work hours. There were signs posted throughout the premises, and she was given information about the blood drive during a work-related meeting. She acknowledged, however, that while employees were encouraged to donate, the employer did not coerce her to participate and not all employees did so. A senior vice president submitted an affidavit that the employer simply allowed the bloodmobile to use its parking lot, but the blood drive was not related to any business activity. The bank did not require its employees to participate, they were not given a reward if they did so, and there were no adverse consequences for those employees who did not participate. The WCJ found that donating blood was not one of plaintiff's job duties, and she was not required to do so. Based on that evidence, the WCJ held that the plaintiff had not established either of the requisite elements, and the appellate court affirmed.

VAGUENESS

Thomas v. Sonic, 2006 WL 3105697, 06-0014 (La. App. 1 Cir. 11/03/06)

The claimant was allegedly involved in three separate accidents occurring within a short period of time, and in connection with one of them filed a claim on the pre-printed form. She merely checked the boxes next to the statements alleging that no indemnity benefits had been paid and no medical treatment had been authorized. In the space next to the word "Other" she alleged that attorney's fees and penalties were due, but gave no specifics. The defendant filed an exception of vagueness claiming that the employee had not given sufficient notice so that the employer could prepare a defense. The WCJ sustained the exception and ordered the claimant to amend her claim. When she failed to do so, the WCJ granted the employer's motion and dismissed the claim with prejudice. On appeal, the First Circuit affirmed, but noted that the defendant was not entitled to exact details. The court found that, under the circumstances, there was confusion among the claims, and the WCJ was correct to order the plaintiff to amend the pleading, but that the remedy for failure to do so was to have her claim dismissed, but without prejudice.

CHOICE OF PHYSICIAN

Figgins v. Wal-Mart, 945 So.2d 153, 06-0806 (La. App. 3 Cir. 11/15/06)

The claimant was initially injured in 1996, when a box of stereo equipment fell from a shelf, striking her on the head. She treated with a neurologist for five years and complained of intermittent but severe pain that reoccurred every few weeks. That doctor opined that if she did not have further complications, she would only need treatment approximately every 6 months, although if her pain persisted or got worse, he would recommend stronger medication or a nerve block. The defendant sent her to see a neurosurgeon, who diagnosed a neuroma, but did not recommend any treatment and advised her to learn how to cope with the pain. In 2004, she sought treatment with a physiatrist, but her employer denied the request, and she filed a claim, which was denied by the WCJ on the grounds that the requested treatment was not reasonable and necessary. The Third Circuit reversed, finding that she had an identifiable medical condition, but had experienced little or no relief, despite years of treatment. Pursuant to 23:1121B, the claimant had a right to select one treating physician in any field or specialty, and she had not previously sought treatment with a physiatrist. The appellate court reasoned that she was in need of treatment and was simply seeking to try a doctor in a different, but relevant, specialty in an effort to obtain better results. The court also found that the WCJ erred when he asked the claimant why she did not pay for treatment herself if her pain was so severe. The court held that it was the responsibility of the employer to pay for an injured worker's medical treatment and for the WCJ to hold otherwise was erroneous. The court also held that the denial was arbitrary and capricious and assessed penalties and attorney's fees in the amount of \$5,000.

SUSPENSION OF BENEFITS

Atwell v. First General Services, 2006 WL 3804501, 06-0392 (La. App. 1 Cir. 12/28/06)

The claimant failed to appear for an examination by the employer's choice of physician, and her benefits were suspended from the date of the scheduled second medical opinion until the date that the claimant agreed to attend the rescheduled examination. Due to the doctor's schedule, however, he could not see the injured employee for almost two months, and the WCJ refused to suspend the benefits until that date, but ordered that if the claimant failed to appear for the second appointment, her benefits would be suspended retroactively to the date she agreed without further action by the defendant. On appeal, the employer argued that the WCJ should have suspended benefits until the examination actually occurred. The appellate court, however, disagreed and affirmed the decision. Just as the employer's request for an examination had to be reasonable as to time, place and circumstances, the court reasoned that the rescheduled appointment also had to meet those criteria. The defendant could have selected a doctor in the same specialty who could have evaluated her sooner, and it was not fair to the claimant to suspend benefits for that length of time simply because the defendant's choice of physician could not see her for almost two months, which was not a reasonable amount of time. Moreover, the WCJ adequately protected the employer by imposing sanctions in the event of a second no-show.

1208

Life Flight of New Orleans v. Homrighausen, 2006 WL 3804670, 05-2538 (La. App. 1 Cir. 12/28/06)

The employee claimed he injured his back while loading a piece of equipment into an ambulance, and the employer paid benefits for approximately three years, then terminated pursuant to 1208. At trial, the WCJ heard testimony from various witnesses about the surveillance video and what it purported to demonstrate, but did not review the footage himself. Additionally, the WCJ stated at the close of trial that attacking the credibility of the claimant in a 1208 claim required a "much higher standard," which the employer had not satisfied. On appeal, the employer first argued that the WCJ's comments revealed that he held the employer to a higher evidentiary standard, which was not supported by the jurisprudence. The First Circuit disagreed, reasoning that the type of willful misconduct necessary to sustain a claim of forfeiture consisted of more than a credibility evaluation. Moreover, because forfeiture was a harsh remedy, it had to be strictly construed, and the employer's burden of proof required more than simple inconsistent statements or inadvertent omissions by the claimant. Viewing the WCJ's statements in context, the court found no error in the denial of the 1208 claim. With respect to the tapes, however, the court found that although the WCJ was free to assign no weight to the videotapes, to do so before reviewing the tapes was erroneous. Because the witnesses accurately discussed the contents of the videotapes, however, the appellate court found that the error was harmless and did not interdict the WCJ's factual findings.

PENALTIES/ATTORNEY'S FEES

Guillory v. Bofinger's Tree Service, 2006 WL 3103183, 06-0086 (La. App. 1 Cir. 11/03/06)

The OWC judge assessed the defendants \$2,000 in penalties for their underpayment of mileage reimbursement in the amount of 39 cents. The defendants admitted the error, but argued it was not arbitrary and capricious and was due to an oversight, since the adjuster simply paid mileage reimbursement of 32 cents per mile after the date it was increased to 34 cents per mile. The defendants also pointed out that the claimant's attorney had requested mileage reimbursement in the lower per mile amount. The First Circuit, however, held that the proper inquiry was whether the claim was reasonably controverted or resulted from conditions beyond the defendant's control as set forth in 23:1201F. The failure of the adjuster to increase the reimbursement rate did not satisfy either of those conditions. Moreover, at the time the claimant's attorney made the request for mileage reimbursement, he used the correct rate, and the defendants could not rely on the earlier request to justify their error. The court acknowledged that the payment was only for 39 cents, but despite the low amount, concluded that the WCJ was not clearly wrong in assessing the penalty.

PENALTIES AND ATTORNEY'S FEES (continued)

Lambert v. Brookshire Grocery Co., 945 So.2d 918, 06-1001 (La. App. 3 Cir. 12/20/06)

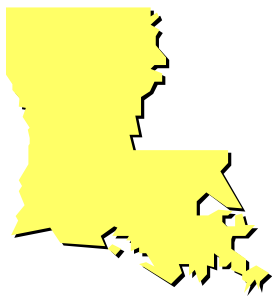
The claimant filed on August 19, 2003, seeking authorization for various medical treatments, payment of medical expenses, and mileage reimbursement. The WCJ found in favor of the claimant and assessed penalties of \$8,000 for the failure to authorize four different types of medical treatment, \$4,000 for the failure to timely pay the medical bills, and \$2,000 for the failure to pay the correct mileage reimbursement. The court also assessed \$12,000 in attorney's fees and \$1,975.40 in court costs. On appeal, the Third Circuit upheld each of the penalties, including that for mileage reimbursement, although the shortage was only \$1.08. The appellate court noted that the adjuster had not paid the mileage reimbursement because it did not believe one of the doctor visits was compensable, but did not offer any explanation for the payment shortage. Although the shortage resulted from a clerical error, the employer failed to reimburse the injured employee the correct amount, and therefore the imposition of the \$2,000 penalty was not clearly wrong. The employer also argued that the amount of penalties was excessive based on the amendment to 23:1201F. The appellate court noted that the amendment was effective August 15, 2003, and, as a substantive change in the law, could be applied prospectively only. Because the plaintiff filed her claim four days after the amendment went into effect, the amendment applied, and the awarding of multiple penalties in excess of \$8,000 was clearly wrong. Therefore, the court reduced the total penalty award from \$16,000 to \$8,000. With respect to the attorney's fees, however, the court noted that there was no limit on attorney's fees, so long as the fee was reasonable under the circumstances. Given the numerous requests for medical treatment and payment of medical expenses as well as the work involved, the court upheld the amount. Regarding court costs, the court held that article 1920 of the Louisiana Code of Civil Procedure allowed a court to render judgment for costs in an amount it determined to be "equitable," and that such an award would be disturbed only if there was an abuse of discretion. Because the claimant prevailed on the majority of her claims, the court found there was no such abuse and affirmed that award as well.

SURVEY OF PENALTIES AND ATTORNEY'S FEES

NAME OF CASE

PENALTIES/ATTORNEY'S FEES

<u>Baker v. Speedway Super America,</u> 2006 WL 3378304, 05-2451 (La. App. 1 Cir. 11/17/06)	\$ 6,000	Penalty
	\$ 6,000	Attorney's Fees - (Failure to authorize medical treatment and pay medical bills)
	\$ 1,500	Appeal
<u>Lanthier v. Family Dollar Store,</u> 942 So.2d 732,06-0779 (La. App. 3 Cir. 11/02/06)	\$ 6,000	Penalty (Failure to authorize medical treatment)
	\$ 2,000	Penalty (Termination of SEB)
	\$10,000	Attorney's Fees
	\$ 2,000	Appeal
<u>Chassion v. Cingular Wireless,</u> 943 So.2d 591, 06-0691 (La. App. 3 Cir. 11/02/06)	\$ 6,000	Penalty
	\$ 7,000	Attorney's Fees (Failure to pay indemnity and medical benefits)
	\$ 1,500	Appeal
<u>Atwell v. First General Services,</u> 2006 WL 3804501, 06-0392 (La. App. 1 Cir. 12/28/06)	\$ 2,000	Penalty
	\$ 5,000	Attorney's Fees (Failure to prove medical treatment)
	\$ 1,000	Penalty (Termination of benefits)
	\$ 2,000	Penalty
	\$ 5,000	Attorney's Fees (Failure to reinstate benefits)
	\$ 1,500	Appeal
<u>Life Flight of New Orleans v. Homrighausen,</u> 2006 WL 3804670, 05-2538 (La. App. 1 Cir. 12/28/06)	\$ 2,000	Penalty (Termination of vocational rehabilitation)
	\$ 2,000	Penalty (Termination of medical benefits)
	\$ 7,500	Attorney's Fees (Termination of benefits)
	\$ 1,500	Appeal



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