



LANGUAGE BARRIER NOT AN EXCUSE FOR INCONSISTENT AND CONTRADICTORY STATEMENTS REGARDING UNWITNESSED ACCIDENT

Claimant, whose native language was Spanish, alleged he was injured in an unwitnessed accident. Claimant's co-workers testified that he did not report an accident to them and one co-worker testified that Claimant told him that the injury was not work-related. There was evidence of similar contradictory statements to physicians. Claimant alleged that the inconsistent statements to co-workers and physicians were caused by the language barrier and problems of interpretation. However, the co-workers further testified that although Claimant was a native Spanish speaker, they had multiple conversations in English and that it was clear that he understood English. As a result of conflicting stories of how the alleged work accident occurred, as well as the inconsistencies in other details such as reporting of the accident, the workers' compensation judge ruled that the alleged unwitnessed accident did not occur. The 4th Circuit Court of Appeal affirmed the trial judge's ruling dismissing the claim. *Duran v. Turner Industries Group, L.L.C.*, 2011-0210 (La. App. 4th Cir., 7/20/11). Note: This case was defended by our own, attorney Dominic Amato.

CLAIMANT LOSES UNWITNESSED ACCIDENT CASE DUE TO LATE REPORTING AND INITIAL MEDICAL REPORTS THAT DO NOT CORROBORATE THE CLAIM

This case is another in a series of cases that provide guidance on what it takes to defeat a claim involving an unwitnessed accident. On January 3, 2007, claimant was allegedly injured when she became "dislodged" from the forklift she was operating, although she did not fall to the ground. She sought medical attention within two days of the alleged incident, and sought compensation benefits. The claim was denied on grounds that no physical injury occurred from the alleged unwitnessed incident. Suit was filed. Much of the evidence was disputed. Although the official reporting of the incident was not immediate, claimant alleged she reported the accident immediately to a supervisor, who simply failed to write a report. There was no evidence denying or corroborating this testimony by claimant. However, the initial medical report was very telling in that it failed to mention any work accident but specifically indicated that claimant "denies any trauma." Claimant admitted at trial that she really did not know if she had an "accident" on the date reported or not, however the court noted that the claimant's assessment of what is or is not an "accident" as defined in the Workers' Compensation Act is not determinative of whether an

alleged incident meets the definition of “accident.” Claimant initially reported repeated “jarring” to her first treating doctor, but the doctor did not specifically relate this to the reported injuries. Claimant alleged the trial court erred in failing to apply the “good health” presumption in her favor, which essentially means that the law will presume an injury resulted from an incident if claimant was in good health prior to the incident. The court rejected the presumption in this case because claimant had similar complaints relating to right and left leg pain from a back injury in 2006. Based on all this evidence, the court held that claimant failed to carry her burden of proving the unwitnessed accident and alleged injury. *West v Wal-Mart* (La. App. 1 Cir. 6/17/2011).

APPLICATION OF DOLLAR-FOR-DOLLAR CREDIT FOR THIRD PARTY SETTLEMENT DOES NOT INCLUDE LOSS OF CONSORTIUM CLAIMS

Claimant and his spouse filed a personal injury suit for a work-related injury against a third party. A settlement was reached and the parties agreed on the compensation carries recovery for past benefits paid. The compensation carrier then applied to the trial judge for a determination of the future credit. The trial judge included the total amount of the settlement and applied LSA-R.S. 23:1102, which provides for a dollar-for-dollar credit. The trial judge also found that the credit would include six percent interest per annum. The 2nd Circuit Court of Appeal amended the trial judge’s ruling, finding that the credit should only be against amounts recovered by the claimant, not for loss of consortium claims, and further that the interest award was improper since that provision was found in LSA-R.S. 23:1103, and recovery from a third party tortfeasor is governed by either LSA-R.S. 23:1102 or LSA-R.S. 23:1103, but not both. *Kenly v. Fuller*, 46,398 (La. App. 2nd Cir. 7/13/11).

MENTAL INJURY DETERMINED TO BE DEVELOPED SECONDARILY TO PHYSICAL INJURY DESPITE CONFLICTING MEDICAL OPINIONS

Claimant injured his head, neck, shoulders, and upper body in a work related motor vehicle accident. He later complained of depression and after additional evaluation was found to have psychosis including fear, paranoia, and delusions. He was seen by three psychiatrists and three psychologists. All three psychologists, claimant’s psychologist, the SMO, and the State IME initially opined that the mental illness was not related to the work accident, but later claimant’s psychologist modified his opinion to allege that claimant had suffered from a major depressive disorder with psychosis as a result of the work accident. Of the three psychiatrists who examined claimant, claimant’s psychologist and the State IME found that the mental illness was related to the work accident and injury. The SMO opined that the mental illness was not related. The trial judge made a determination based upon the multiple mental health professionals in conjunction with claimant’s testimony of no prior mental health problems, and found that the claimant had proved by clear and convincing evidence that the mental injury was

caused by the work accident. The 4th Circuit Court of Appeal upheld the workers' compensation judge's ruling. *Janneck v. LWCC*, 2011-0027 (La. App. 4th Cir., 6/29/11).

EMPLOYEES ENTITLED TO MAKE FEDERAL FELA CLAIMS, LONGSHORE CLAIMS, OR JONES ACT CLAIMS NOT ALSO ENTITLED TO RECOVERY UNDER LOUISIANA WORKERS' COMPENSATION ACT

Claimant sued the State of Louisiana in district court alleging entitlement to Jones Act recovery. The State of Louisiana filed an exception asserting that the claims were exclusively under the Louisiana Workers' Compensation Act. The Appellate Court and trial court found that the Claimant was entitled to pursue the Jones Act claim as a seaman. The Supreme Court of Louisiana sustained that ruling and further opined that employees entitled to make federal claims are not entitled to make claims under Louisiana Workers' Compensation pursuant to LSA-R.S. 23:1035.2. *Fulmer v. State of LA., Dept. Of Wildlife & Fisheries*, 2010-2779 (La. 7/1/11).

MISSISSIPPI CASE: SUPREME COURT REFUSES TO OVERTURN COLE V. ELLISVILLE STATE SCHOOL REGARDING SCHEDULED MEMBER INJURY CASE AND CLAIMANT'S BURDEN OF PROOF

In our March, 2011 newsletter, we highlighted the *Cole* case, wherein the Mississippi Court of Appeal held that a post-injury job search was not required in a scheduled member injury case prior to a finding of total loss of use. We noted that the *Cole* case seemed to conflict with previous Commission Orders and with the Court of Appeals' own statement from 2002 in *Wagner v. Hancock Med Ctr.*, 825 So. 2d 703, that "an unexcused failure to show an effort to explore other employment opportunities more suited to the claimant's post-injury condition is fatal to a claim for permanent disability." The language in the *Wagner* case, however, refers to permanent disability collectively, and does not distinguish between scheduled member injuries and injuries to the body as a whole. After the Mississippi Court of Appeal denied rehearing on the *Cole* case on February 15, 2011, the employer/carrier filed a Writ of Certiorari with the Mississippi Supreme Court. On April 21, 2011, the Mississippi Supreme Court denied to hear the case.

Since the Supreme Court's refusal to overturn the *Cole* decision, claimant's attorneys have begun to heavily rely upon the case during settlement negotiations, suggesting that this new case now makes it easier to prove total loss of use. While we do not dispute that the *Cole* case has clarified Mississippi law with regard to the proof required to prevail on a claim for total loss of use, we believe the case can be, and will be, limited to the facts of that case. In other words, when dealing with scheduled member injuries, it will be easier for a

claimant to prove total loss of use of that scheduled member if the claimant's "usual employment," is substantially limited. *Cole v. Ellisville State School*, 59 So.3d 612 (Miss. Ct. App. Oct. 19, 2010), *rehearing denied*, (Feb. 15, 2011), *certiorari denied*, (April 21, 2011).

MISSISSIPPI CASE: COURT REJECTS ARGUMENT THAT "SPECIAL ACCOMMODATION" IN POST-INJURY JOB ENTITLED CLAIMANT TO AWARD FOR TOTAL LOSS OF USE

Just over one month after denying rehearing in the *Cole* case discussed above, the Mississippi Court of Appeal analyzed another scheduled member injury case, wherein the claimant had been awarded benefits for total loss of use of his leg, despite the fact that he earned more money in his post-injury job. There, the claimant was employed as a patrolman for the City of Laurel Police Department when he injured his left knee chasing down a suspect. The claimant remained employed as a patrolman and K-9 officer for the police department, but voluntarily left because he was concerned he could not longer chase suspects or easily get in and out of his patrol car. Thereafter, the claimant obtained a job with the Petal Police Department as a warrant officer, and was later promoted to the Investigations Unit, where he earned \$10,000.00 per year more than he did working as a patrolman for the Laurel Police Department. In 2007, when the City of Petal required all employees to undergo a physical examination, the Police Chief allowed the claimant to be accommodated due to his knee injury. At the hearing, the claimant expressed concerns to the administrative judge that his accommodations at the Petal Police Department would not last long. The administrative judge found the claimant's numerous knee surgeries, his inability to continue as a patrol officer, and his need for special accommodation to pass the physical test given by Petal and most police forces all supported the finding that the claimant had sustained a 100% industrial loss to his left leg. The administrative judge's decision was affirmed until ultimately appealed to the Mississippi Court of Appeal. On appeal, the Court of Appeal reversed the lower courts, finding that the claimant failed to prove a total loss of use. The Court of Appeal found that while the claimant did earn the presumption of total loss of use (evidence showed that he was unable to run - which the court found was a "substantial act" of his "usual employment"), the employer was able to rebut that presumption by showing that the "claimant was able to earn wages which the claimant was receiving at the time of the injury." The Court further noted that the claimant's special accommodations, allowed by the current Petal Police Chief, did not have any bearing on the issue of total loss of use. The fact that the claimant might lose his job in the future if the Police Chief was not re-appointed was far too speculative to substantiate an award for total loss of use. The Court remanded the case back to the Commission to determine whether the claimant sustained an industrial loss greater than his medical impairment and to award the claimant the greater of his industrial loss or medical impairment. *City of Laurel v. Guy*, 58 So. 3d 1223, 1225 (Miss. Ct. App. March 29, 2011).



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