



LOUISIANA EMPLOYERS AND ADJUSTERS NEED TO KNOW... RECENT DEVELOPMENTS IN WORKERS' COMPENSATION LAW

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PROCEED WITH CAUTION WHEN TERMINATING BENEFITS AFTER 520 WEEKS: MAKE SURE MEDICAL IS CURRENT AND SUBMIT THE WC FORM

Claimant received temporary, total disability benefits for 10 years from June 199 through September 30, 2009, when the claims adjuster, without notice, converted claimant's benefits to SEB and then terminated them on grounds that 520 weeks of benefits had been paid. Until that time, the benefits had never been identified as SEB and for the entire period her benefits were paid on the weekly schedule used for TTD benefits. The adjuster failed to issue any formal notice to the claimant or the Office of Workers' Compensation notifying of the change from TTD to SEB and/or the stoppage of benefits. (Note that WC Form 1003, "Notice of Payment" form, reads as follows per the statute requiring that it be issued by the employer/insurer: "**NOTICE OF PAYMENT:** This form is to be completed by the Employer/Insurer and sent to the injured employee with the first check or within 10 days of suspension/modification and/or change to SEB. A copy must be sent to the Office of Workers' Compensation Administration within 10 days of the effective date.") The workers' compensation judge found that the failure to give the required notice violated the Workers' Compensation Act and seemingly for this reason alone assessed penalties and attorney's fees. The defendant argued that what had occurred was a "discontinuance" of benefits rather than a modification or suspension, and for that reason the penalties and attorney's fees assessment was in error without a finding of arbitrary and capricious conduct. The defendant argued the failure to simply submit a form was not "arbitrary and capricious." In response to that argument, the court of appeal found that the termination of benefits was in fact arbitrary and capricious without considering the issue of failing to submit a required form.

The court pointed out that the employer/insurer "is required to make a reasonable effort to ascertain an employee's exact medical condition before benefits are terminated," and cannot "blindly" rely on old "optimistic" medical reports if subsequent reports show potential ongoing disability. It was noted that there was no medical examination by the insurer within a reasonable time the benefits were stopped, and the most recent medical reports upon which the employer could possibly rely were from 2006, and even those records were "less than compelling" according to the court. Further, the evidence revealed that at the time benefits were stopped, claimant still required Lortab for pain, Xanax for anxiety, and Ambien for sleep. The court clearly suggested that this sort of ongoing symptoms and needed medication should have triggered a current medical examination to confirm that claimant was capable of employment before benefits were stopped, especially since the last report was three years old. The lesson from this case is to have some recent favorable medical before stopping benefits simply due to the passage of 520 weeks, AND to submit the required form. *LeBlanc v. Excel Auto Parts*, 2011-58, (La. App 3rd Cir. 6/11/11).

GUST OF WIND CONSIDERED A DISTINCT TRAVEL RISK FOR PURPOSES OF APPLYING THE COURSE AND SCOPE “THRESHOLD DOCTRINE”

After completing his day’s work, claimant was leaving the employee parking lot in his private vehicle and had entered a roadway leading to a public highway. Suddenly, a pipe gate propelled by the winds of Hurricane Gustav swung into the roadway, entered the windshield of claimant’s vehicle and struck him on the right shoulder and the back of his head. The employer denied the claim on grounds claimant was not in the course and scope of employment when the accident occurred, because he had clocked out, had left the premises, and was not on any mission for the employer but simply going home. In analyzing the issue, the court focused on the general rule that employees are not in the course and scope of employment when traveling to work or traveling home from work, which is known as the “going and coming” rule. The court also analyzed called one of the many exceptions to the “going and coming” rule, specifically the “threshold doctrine,” which applies if the employee was injured in an area immediately adjacent to his place of employment and that area contained a distinct travel risk to the employee. The court noted that the “threshold doctrine” generally involves a special risk attributable to the location of the work premises that is different from the risks to which the general traveling public is exposed or that is more aggravated in the area adjacent to the employer’s premises than elsewhere. Under this doctrine, an employee who meets with an accident off the employment premises while traveling to and from work, can recover if he or she successfully proves that (1) a distinctive travel risk exists for the employee in going to or coming from work, and (2) the risk exists immediately adjacent to his or her place of work. Though the evidence clearly showed that this accident occurred solely because of a gust of wind, which was obviously no a condition/risk confined to the distinct area immediately adjacent to the employment premises, the court found that the threshold doctrine applied, and the accident was thus in the course and scope of employment. The court of appeal did find that the employer was reasonable in denying the claim, and reversed the trial court award of penalty and attorney fees. *Williams v. Pilgrim’s Pride Corp.*, 2011-59 (La. App. 3 Cir. 6/1/11).

SUSPICIOUS CAR THAT “FREAKED OUT” A SECURITY GUARD NEAR 2:00 AM DID NOT GIVE RISE TO COMPENSABLE MENTAL/MENTAL CLAIM

Claimant was trained as an unarmed security guard. On early New Year’s January 1, 2009, claimant was working at her usual shift and assignment at a guard shack located at a grain elevator plant in Paulina, Louisiana. Her duties required her to observe anything unusual and report unusual activity to her supervisor. Around 1:50AM, claimant saw a driver of a gold car speed into the parking lot, stop under the only functioning light with the motor running, and shine the bright lights at the guard shack. Claimant was not expecting any vehicles in the lot as the plant was closed for the holiday. She was alone in a closed plant where only one out of five nearby lights functioned and she had no working flashlight. Though normally armed, she had chosen not to bring her gun. The vehicle remained under the light for approximately 18 to 19 minutes before speeding out and onto the road. Claimant was frightened and “freaked out.” She did not approach the car as required but called and reported the activity to her supervisor. The supervisor came to the guard shack and the police were called. When the police arrived,

claimant was visibly upset and crying. After the incident, the claimant sought treatment and did not return to her job. The claimant had treatment for preexisting mental problems. After the incident, she was prescribed antidepressants and anxiety medications. Two physicians diagnosed the claimant with post traumatic stress disorder (PTSD) as a result of her trauma from the incident. Another physician disagreed and with diagnosed depressive disorder or clinical depression, an anxiety disorder with clinically significant levels of anxiety, and a generic disorder reflecting psychotic problems. He concluded that depression and anxiety were related to multiple events, including the work incident. The trial judge found that the incident caused a compensable mental injury, on grounds that it was a sudden, unexpected and extraordinary stress as required by the statute, that aggravated claimant's preexisting psychological condition. The court of appeal reversed and rendered judgment in favor of employer. The appellate court reasoned that the extraordinary nature of the stress is determined from the point of view of the ordinary reasonable person of usual sensibilities, not from the subjective point of view of the claimant. The OWC judge failed to apply this "objective" standard. The appellate court found that the incident was not unexpected and extraordinary stress from an objective standpoint because the duties of a security guard involve reporting unusual activity and inquiring if a person needed assistance. A car speeding into the lot with the driver sitting there created stress that was neither unexpected nor extraordinary in the usual course of employment as a security *Fleming v. Garda Sec.*, 10-1021 (La. App. 5 Cir. 5/10/11).

INTOXICATION WAS CLEAR, BUT DID NOT CAUSE THE ACCIDENT AND \$2,000, NOT \$8,000, PENALTY APPLIED TO INCORRECT AWW CALCULATION

Claimant worked for H & H Metal Contractors which was a company in the business of erecting metal buildings. While claimant was performing his duties, a gust of wind blew some foil-backed insulation he was holding into a nearby power line, causing him to be electrocuted, fall, and rendered unconscious for some time. A drug screen was performed and claimant tested positive for marijuana and opiates. The employer contended that claimant's intoxication at the time of the accident precluded his recovery of benefits. The employer submitted into evidence its drug testing policy, a release signed by claimant concerning the disclosure of the test results, drug screens from prior to the accident that were "negative", and the post-accident drug screen from the Lake Charles Memorial Hospital with "positive" results for opiates and marijuana. The Court ruled that the claimant adequately rebutted the presumption that his intoxication caused the accident based upon the testimony that what happened was a "freak accident" that happened in a "split second." Therefore, the court ruled that the alleged intoxication was not a contributing cause of the accident and the claim was deemed compensable. Another issue in the case concerned an improper calculation of the average weekly wage resulting in improper benefits paid for a while. The trial court awarded \$8,000 in penalties due to multiple incorrect indemnity payments. The court of appeal reversed this award and held that the maximum penalty of \$2,000 was appropriate for the improper AWW calculation, rather than multiple \$2,000 penalties for each improper benefit payment resulting from the single calculation error. *Russell v. H & H Metal Contractors, Inc.*, 2011-27 (La. App 3rd Cir. 6/1/11).

SALESMAN SEATED IN CHAIR IN WAITING AREA WHILE CAR WAS BEING REPAIRED AFTER HIS WORK DUTIES ENDED WAS IN COURSE AND SCOPE

Claimant was an outside salesman for a chemical company, and his job required “very flexible hours,” sometimes beginning in the very early morning hours as claimant would travel to customers locations for meetings. Claimant used his personal vehicle in his job, and the employer provided a gas card and a \$550 per month allowance for use of the car. Claimant personally paid for all repairs to his vehicle, and used the monthly allowance for this purpose when needed. On the day of the accident, claimant began his day at 4:00 am when he traveled to a customer location for a sales call. After completing his work on that day, still in the early afternoon, claimant drove to an auto parts business and bought a tension pulley for his car, then drove to a tire service business in another town to have the pulley installed on the car. While at the tire service business, claimant was sitting in a chair in the waiting room, and the chair collapsed, aggravating a prior back injury. The employer denied the claim on grounds that the accident did not occur during the course and scope of employment. The employer argued that claimant’s job usually began very early in the morning as claimant admitted, and that he was finished with his job after about 7 hours, before the time of the accident at around 2:30 pm. Employer further argued that the risk of a chair in a public waiting room collapsing was no greater for this employee than for a member of the general public, which meant the risk was not an employment risk. The trial court found in favor of claimant, and the court of appeal affirmed. The court held that the automobile in this case was an “essential tool of the employee’s work” and the employer certainly required that it be in good working condition. In effect, the court held that the employer actually required the claimant to be at the tire service business when the accident occurred. Thus, it occurred during the course and scope of employment. *Mayes v Deep South Chemical, Inc.* 11-91 (La. App. 3 Cir. 6-1-11).



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