



CLAIMANT ALLOWED TO CHANGE CHOICE OF DOCTOR AND GET SURGERY WHEN ORIGINAL CHOICE OF DOCTOR STATED SURGERY WAS NOT NEEDED

The First Circuit upheld a decision to grant more weight to a physician who had seen the claimant once over the opinion of her treating orthopedic surgeon, despite the general rule that the opinion of a treating physician should be given more weight. The First Circuit went to great lengths to set forth the appellate standard for review of workers' compensation cases, stating that in order for an appellate court to reverse a trial judge's factual finding, it must find from the record that a reasonable factual basis does not exist for that factual finding or that the finding is clearly wrong. The First Circuit noted that even though the appellate court may feel that its own evaluations are more reasonable than the compensation judge, those evaluations will not be disturbed on appeal where conflict exists in the testimony. Simply put, where two permissible views of the evidence exists, the fact finder's choice between them cannot be found to be manifestly erroneous or clearly wrong. In this case, the trial judge noted that there was a dispute between two orthopedic surgeons, both chosen by the claimant, as to whether the claimant needed further surgery. The claimant's initial treating physician had performed surgery on his left shoulder and released him to return to work. When the claimant returned to that physician after some time noting continuing problems, he was told that he did have some tears, but they were due to age and that he simply have to live with it. The claimant was not satisfied with this opinion and went on his own to another orthopedist who rendered an opinion that the claimant needed surgery and that the need for surgery was related to the original accident. The Employer denied the approval for the claimant to change his orthopedic surgeon and denied the authority for the surgery.

The trial judge accepted the opinion of the second orthopedist who found that the claimant needed surgery over the opinion of the claimant's initial treating physician and the appellate court upheld that decision, finding that the judge had wide discretion to determine which expert's opinions were the most credible. The appellate court found that the trial judge's decision to afford more weight to the doctor who determined that surgery was necessary and that it was related to the original accident would not be disturbed on appeal because that opinion was amply supported by the evidence. The appellate court also affirmed the decision to permit the claimant to change orthopedic surgeons because the claimant felt that his initial orthopedist was not working in his best interests. The court found that the initial visit with the new orthopedist was the responsibility of the claimant, whereas the Employer would bear the responsibility for all subsequent treatment because the Court was allowing the change in physician. The appellate court noted that the WCJ was within its discretion in ordering the change in physician because the claimant testified that his initial physician was "passing him off" and was not working in his best interests.

The WCJ also ordered the Employer to pay for the surgery recommended by the claimant's newly chosen orthopedic surgeon. *Dawson v. Terrebonne General Medical Center* (La.App. 1 Cir. 5/19/11)

TWPD SUCCESSFULLY DEFENDS A CHEMICAL EXPOSURE CLAIM

In a decision rendered by the First Circuit Court of Appeal in which Taylor, Wellons, Politz & Duhe represented the Employer, the court affirmed the workers' compensation judge's decision that claimant did not suffer from any disability or ongoing medical conditions as a result of a work-related chemical exposure. The claimant was helping to construct a scaffold in the acrylonitrile unit of a plant when a technician flushed a vessel in the unit and released either hydrogen cyanide or acrylonitrile into the area where the claimant was working with a crew of other carpenters. Claimant and other members of the carpenter crew were transported by ambulance to the hospital for examination. They were subsequently released after receiving treatment at the hospital. Upon returning to work the following day, the claimant continued to feel ill and complained of having headaches, trouble breathing and feeling weak. The employer transported the entire crew to a company doctor to be examined. After examining the entire crew, the company doctor released them to return to work, where they remained on the job for the rest of the day. The following day, the claimant went to see his family physician and never returned to work. Claimant subsequently filed suit seeking continued medical treatment, wage benefits and a determination of disability status. The issue decided by the appellate court was whether the trial judge erred in ruling that the claimant failed to prove that he was disabled or that his other medical problems were related to his work accident. The trial judge relied on a expert hired by the employer in the fields of occupational and environmental medicine who reviewed the documents relative to the incident and the medical records of the claimant's treating physicians and rendered an opinion that any problems that the claimant may have suffered as a result of the work-related accident would have been transitory and amounted to nothing more than irritative-type symptoms, given the level of release of chemical into the air, its concentration, and the fact that the claimant's acute symptoms resolved relatively quickly after the accident in question. The appellate court quoted large portions of the expert's testimony and determined that the trial judge's reliance on his opinion that the chemical exposure did not cause any of the lingering medical conditions of which claimant complained was not manifest error.

Jones v. International Maintenance Corporation (La.App. 1 Cir. 5/6/11).

ANOTHER REMINDER THAT UNTRUTHFUL STATEMENTS ON POST-HIRE MEDICAL QUESTIONNAIRES MUST BE SHOWN TO DEPRIVE THE EMPLOYER OF A SECOND INJURY FUND CLAIM TO WARRANT A FRAUD DEFENSE

The Third Circuit upheld an award in favor of a claimant despite the fact that claimant lied on a post-employment medical questionnaire, and despite the fact he denied he had been involved in an accident on a form signed at the end of the workday on which the alleged accident occurred. The employer paid benefits to the claimant, but later determined that claimant had lied on his

post-employment questionnaire when he denied any previous injuries to his hip and left knee, which can support a fraud defense for depriving the employer of knowledge of a pre-existing injury to support a second injury fund claim. The trial judge found that the employer acted arbitrary and capriciously in terminating benefits and found that benefits were not forfeited, because the employer did not prove that claimant's failure to admit to his prior injuries would have negatively impacted the employer's ability to make a Second Injury Fund claim if it knew of the prior injuries. Further, the alleged accident at issue was unwitnessed, and claimant completed a form when the workday was over indicating he had not been in any accident. However, claimant testified that he told his manager of the accident when it occurred, he was forced to fill out a form at the end of the day denying any work-related injuries that day or he would not receive his check. The employer also contended that claimant was a day laborer, but the court found that the claimant was properly classified as an hourly worker and that the employer had miscalculated the claimant's average weekly wage by not granting him the forty-hour presumption afforded by the statute. The court awarded penalties and attorney's fees due to the employer's termination of benefits and its failure to properly pay TTD benefits. What is important to remember from this case is that not every untruthful statement on a medical questionnaire will result in a forfeiture of benefits. The Third Circuit noted that the untruthful statement must directly relate to the medical condition for which a claim for benefits is made or it must affect the employer's ability to receive reimbursement from the second injury fund. *Burkett v. LFI Fort Pierce, Inc.* (La.App. 3 Cir. 5/4/11).

**CLAIMANT WAS NOT CREDIBLE IN HIS CLAIM THAT HE RETIRED FROM THE
WORKFORCE DUE TO INJURY RATHER THAN VOLUNTARILY AFTER PUTTING IN 35
YEARS OF SERVICE, THUS SEB IS NOT OWED**

The Fifth Circuit affirmed a judgment dismissing a retired police officer's claim that he was entitled to SEB, even though he had retired from the force. It was undisputed that the claimant was involved in a work-related injury on September 21, 2006 involving his left knee. After being released to fully duty in March of 2007, and performing full duty for fifteen months, claimant asserted that he had to retire from the police force because of his work-related injuries and that he was unable to earn 90% of his pre-accident AWW, thereby entitling him to SEB. In defense, the employer offered testimony from the chief of police that the claimant voluntarily retired from the force after 35 years of service. The trial judge found that the claimant was not credible when he testified that he retired because of his work-related injury because there was no medical evidence to support it. The appellate court refused to overturn those factual findings. The employee relied on a medical report from his treating physician that stated that his work injuries played a role in his decision to retire. However, the appellate court dismissed the importance of this report, noting that it was dated nine months after claimant's date of retirement. *Tusa v. City of Kenner Police Department* (La.App. 5 Cir. 5/10/11).

COURT DECLINES TO ACCEPT OPINION OF DOCTOR APPOINTED BY THE OFFICE OF WORKERS' COMPENSATION ON SURGERY ISSUE

The Fifth Circuit affirmed the decision of a compensation judge awarding the cost of surgery, epidural steroid injections, temporary total disability benefits, penalties and attorney's fees against an employer despite the fact that the IME doctor appointed by the Office of Workers' Compensation (OWC) found that claimant did not need surgery and could return to work. Claimant's treating physician had referred him to a neurosurgeon who determined that the claimant needed surgery. The employer's choice of physician (SMO) determined that the claimant did not need surgery. The employer applied to the OWC to appoint a doctor, which was done. The IME who also determined that the claimant did NOT need surgery. On the basis of the IME opinion, employer terminated benefits to the claimant and refused to authorize surgery. The trial judge held that the IME's opinion was "flawed" because the IME was not provided with all of the claimant's diagnostic tests. The appellate court refused to overturn the decision that the IME's opinion was flawed, despite the fact that evidence was introduced by the Employer at trial proving that the IME physician was subsequently provided with the missing films and subsequently issued a supplemental report indicating that the claimant had reached maximum medical improvement and did not need any further diagnostic tests or studies. In addition to issuing an award of surgery costs, and other benefits, the court also awarded penalties and attorney's fees for the employer's refusal to approve treatment and pay benefits on reliance of the SMO and IME. The appellate court found that since the employer had based its termination of benefits on the opinion of IME and the trial judge ruled that this opinion was flawed, the determination by the employer to terminate benefits was similarly flawed and was a basis to award penalties and attorney's fees. The appellate court ruled that the test to determine whether to impose penalties and attorney's fees on an employer depends on whether the employer had an articulate and objective reason to deny benefits at the time that it took action, based upon the facts existing and known to the employer at the time its decision as to benefits was made. *Washington v. The Shaw Group, Inc.* (La.App. 5 Cir. 05/10/11).

4TH CIRCUIT COURT OF APPEAL ESTABLISHES RULE REGARDING

STATUTE OF LIMITATIONS ON PENALTIES AND ATTORNEY FEE CLAIMS

The 4th Circuit finally had occasion to definitively address the issue of what statute of limitations period applies to claims for penalties and attorney's fees. There had been some confusion and disagreement over whether the period is one year or whether the period should be the same as the claim for benefits that gives rise to the penalty and attorney fee claim. For example, a claim for any type of indemnity benefits must be filed within one year if no benefits have been paid, but a claim for supplemental earnings benefits (SEB) can be timely asserted within 3 years from the date of the last payment of temporary, total disability if those benefits have been paid. If the SEB claim is made more than a year after the last payment, the question arises as to whether any accompanying penalty and attorney fee claim has expired after one year. It appears that all courts are now in accord that any claim for penalties and attorney's fees that accompanies an underlying claim for indemnity or medical benefits, and the other claim has not expired, then the penalty and attorney fee claim has also not expired. *Farley v City of New Orleans* (La. App. 4 Cir. 05/20/11).



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