



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

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COURT REJECTS "WORKING IN PAIN" CLAIM, BUT HOLDS THAT SEB SHOULD BE PAID WEEKLY

Claimant was injured and eventually underwent a lumbar laminectomy and discectomy, followed by two years of pain management treatment. One year into the pain management treatment, he was released to sedentary or light duty. The employer's vocational rehabilitation counselor identified a home-based telephone solicitor's position available for claimant. Although claimant originally accepted the job, he quit after three days allegedly because of substantial pain and being in a medicated state. At that point, the employer reduced benefits to SEB. The trial judge held claimant's indemnity benefits could not be reduced to SEB due to the "substantial pain" doctrine in the SEB statute and, therefore, awarded claimant TTD benefits. The 3rd Circuit Court of Appeal reversed, and pointed out that proof of substantial pain can be used to argue a claimant is entitled to SEB rather than no benefits at all. However, TTD benefits are only due when a claimant is physically unable to perform the job, regardless of the effects pain may have on their ability to work. TTD benefits are not owed when the claimant is physically able to do the job, but cannot do the job due to substantial pain. As all of claimant's treating physicians, as well as the State IME physician, opined claimant was physically able to perform the job, the 3rd Circuit found the employer was entitled to reduce TTD benefits to SEB by taking into consideration the hourly rate of the sedentary job for 40 hours. The dissenting opinion on appeal held that TTD was not owed, but that SEB was owed based on a zero wage earning capacity.

Another interesting aspect of the 3rd Circuit ruling was the court's holding on when the SEB was owed to the claimant. The court cited the workers' compensation statute that provides for payment of indemnity benefits at the same interval as wages were paid. In this case, the claimant was paid weekly. Therefore, the court held that the SEB was owed weekly, despite the SEB statutory provisions providing for monthly calculation of SEB. The court held that although SEB was calculated monthly, it was to be paid weekly. The court implicitly held that calculating based on a monthly wage does not mean payment is to be monthly. It bears noting here that the 3rd Circuit opinion on this point is not necessary the opinion of all the circuit courts, and it does not seem that the Supreme Court has made a specific pronouncement on the issue. It should also be noted that this holding is in the context of a factual scenario in which SEB was being paid although it was undisputed that claimant was NOT working. In a factual scenario in which claimant is working, a very good argument can be made that SEB is not paid until the end of the month for which SEB may be owed because there would be no way of calculating the amount owed until wages are submitted for the prior month. Contrarily, when it is known that a claimant is not working, there is nothing to wait for at the end of the month to make the calculation.

SEB will be calculated on zero wages or a hypothetical wage the claimant is choosing not to earn, and therefore, since that is a known figure, the calculation and payment can be made weekly.

A final issue in this case concerned the employer's attempt to change vocational rehabilitation counselors during the course of the case. The 3rd Circuit upheld the workers' compensation judge's finding that the employer was NOT entitled to change its choice of vocational rehabilitation counselor without a showing of good cause. *Carmouche v. Kraft Foods, Inc.* (La. App. 3 Cir. 4/13/2011).

**EMPLOYER NOT PENALIZED BY GRATUITOUS GESTURE OF PAYMENT:
COURT HELD CLAIMANT WAS NOT IN COURSE AND SCOPE ALTHOUGH SHE WAS
GETTING PAID BY EMPLOYER WHEN SHE GOT HURT**

Claimant was a sales representative. One of her main accounts was with a restaurant owned and operated by claimant's friend. Claimant and her friend had actually worked together for the employer several years prior to the accident. Claimant accompanied her friend to a mammogram appointment with the permission and approval of claimant's supervisors. Claimant was paid for that day, and was not charged for a day off. Prior to attending the appointment, claimant was injured while leaving a restaurant where she and her friend were having lunch. The workers' compensation judge found that claimant was not within the course and scope of her employment at the time of the accident. Specifically, the judge held that claimant was not on a special mission for her employer, but was on a personal mission, placing her injury outside of compensability under Louisiana's workers' compensation statute. The Second Circuit Court of Appeals noted that for a mission to qualify as a special mission, and be considered employment-related, as opposed to personal, the employee must be engaged in the direct performance of duties assigned by her employer. "Assigned" is defined as being requested, directed, instructed or required by the employer. As claimant was not requested, directed, instructed or required by her employer to make the trip, the court of appeals upheld the finding of the workers' compensation judge that claimant was not in the course and scope of her employment at the time of her injury. *Biscamp v. Sysco East Texas* (La. App. 2 Cir. 4/13/2011).

**COURT REJECTS CLAIMANT'S ARGUMENT THAT
LACK OF EDUCATION AND DIMINISHED MENTAL CAPACITY
WAS AN EXCUSE FOR HIS WILLFUL FALSE STATEMENTS**

The workers' compensation judge granted summary judgment dismissing the claim on a finding that the claimant committed fraud by making false statements for the purpose of obtaining benefits under LSA-R.S. 23:1208. Claimant, a truck driver, had sustained a minor abrasion to the cornea of his right eye when drilling mud that was being loaded into his truck splashed under his goggles. Claimant was treated by an optometrist, who released claimant to return to work, with restrictions, for the two-day period following the examination. Although claimant worked those two days, he continued to complain of pain. Despite additional treatment over the next several weeks and being released to return to full duty, claimant failed to return to work for over one month. He was then fired for absenteeism. Although claimant subsequently applied for unemployment benefits, the Administrative Law Judge found he was fired for cause.

Claimant then filed a Disputed Claim for Workers' Compensation benefits. During his deposition, claimant testified he had only been to an eye doctor once since being hired by the employer, and that visit was only for a routine eye examination; however, medical records from claimant's eye doctor showed that four times in the weeks immediately prior to the alleged accident, claimant complained of symptoms that were similar to those of which he complained subsequent to the accident. The workers' compensation judge granted summary judgment to the employer. On appeal, the Second Circuit considered whether the summary judgment evidence was sufficient to show that claimant willfully made a misrepresentation or false statement for the purpose of obtaining compensation benefits. Claimant argued it would be unfair to hold him responsible for making false statements because he did not understand the questions due to diminished mental capacity. Claimant argued that he did not receive a high school diploma, though he did receive a diploma for completing a program of special education. Claimant's diploma, however, did not indicate he was a special education student, nor was there any evidence that claimant suffered from a diminished mental capacity. The Court of Appeal also noted that claimant intentionally tried to conceal his pre-existing eye problems and the medical treatment he had received for it prior to the accident, and upheld the granting of summary judgment by the workers' compensation judge. *Johnson v. Pinnergy, Ltd.* (La. App. 2 Cir. 04/13/2011)

**TIMING IS EVERYTHING - KNOWLEDGE AT THE TIME OF DENIAL,
NOT SUBSEQUENT KNOWLEDGE WILL DETERMINE WHETHER THE CLAIM
IS REASONABLY CONTROVERTED**

Employee was hired and provided employer full knowledge of his prior back injuries including five lumbar surgeries. Three days after work accident lifting a board, claimant was seen in the emergency room, and there were serious questions as to whether the employee provided truthful information regarding prior injuries and treatment to the treating physicians. The trial court found no fraud despite the discrepancies. The 2nd Circuit Court of Appeal upheld the finding that no fraud was committed, and confirmed the award of attorney fees and penalties for the employer's denial of the claim despite the possibility that the employee's less than truthful statements to the doctors could be reasonable grounds to controvert the claim. Because the denial, as stipulated at trial, was made before the employee's failure to inform the treating physicians and was apparently based upon the employer's opinion that the employee was merely treating for his pre-existing condition, the award of fees and penalties was warranted. *Dombrowski v. Patterson-UTI Drilling Co.*, 46,249 (La. App. 2nd Cir. 4/13/11).

**PENALTIES AND FEES MAY BE IMPOSED ON AN EMPLOYER FOR FAILING TO FULLY
INVESTIGATE AN EMPLOYEE'S CLAIM, EVEN THOUGH CLAIMANT ASSERTED THAT
HE WAS NOT FILING A WORKERS' COMPENSATION CLAIM.**

Employee was injured when a tool struck him in the groin. Following the injury, the employee sought treatment from his family physician for complaints of pain, bladder control, and other problems. The employee was contacted by an insurance adjustor, but told the adjustor that he was treating with his family physician under his own insurance coverage and hedged whether he was treating for a work related injury.

Two months after the accident the employee was terminated and filed a 1008 Disputed Claim for Compensation against his employer. However, the employer denied his claim because it had already closed his compensation file due to the fact that the employee told three people, including the insurance adjustor, that he was not pursuing his treatment under workers' compensation. The Third Circuit ruled that the trial court did not err in awarding penalties and attorney's fees to the employee, noting a continuing duty to investigate. The Appellate Court stated: "An employer avoids the imposition of penalties and attorney's fees by satisfying its continuing obligation to investigate, assemble, and assess factual information prior to its denying benefits." The Appellate Court held that the filing of a 1008 should have prompted the employer to further investigate the employee's claim as to the nature of the injury and compensability of same despite the prior assertions that he was not seeking workers' compensation medical benefits. *Green v. National Oilwell Varco*, (La. App. 3rd Cir. 2011).

EMPLOYER ORDERED TO PAY FOR PSYCHIATRIC EVALUATION WITHOUT ANY DOCTOR REFERRAL—AND—COURT REJECTS FRAUD CLAIM ALTHOUGH CLAIMANT'S DOCTOR'S REPORTS CONTRADICT CLAIMANT'S TESTIMONY

Claimant suffered a serious hand injury that resulted in amputation of two fingers, and deformed two other fingers. After over a year of treatment including surgery for the finger injuries, claimant requested to be evaluated by a psychiatrist of his choosing. Claimant testified his deposition that he told his treating hand doctor that after the accident he suffered sleeplessness due to nightmares and cold sweats, as well as nervous shakes. Claimant also testified he told his doctor about symptoms of depression. On his last visit with the doctor, claimant stated he asked the doctor for a psychiatric referral but the doctor ignored him. The treating doctor had no record of any of these complaints in his records or request for psychiatric referral, and further testified that he found claimant to be highly motivated with no indications of psychological problems or depression. The doctor further testified that had such complaints been made, it is more likely than not that his records would have reflected the information, and that it would be unusual for him to omit such information. However, the doctor confirmed that he was testifying from his records and did not independently say for sure that claimant did not make the comments. In any event, there was no referral to a psychiatrist, thus prompting the claimant's 1008 Disputed Claim seeking approval for psychiatric care. The employer denied the claim, and further asserted fraud based on the doctor's testimony as proof that claimant made false statements concerning his complaints to the doctor. Finding that the employer was essentially attempting to prove a willful false statement based on the absence of a medical record notation, the court held that there was not sufficient proof of fraud. Further, the 1st Circuit Court of Appeal reversed the trial court ruling in employer's favor on the issue of approval of psychiatric treatment. The appeals court held that the only way claimant could make out a compensable claim for mental injury benefits is to have a psychiatric evaluation. Therefore, the court held the employer was liable for the initial evaluation. *Dangerfield v Hunt Forest Products, Inc.* (La. App 1 Cir. 3/25/11).



TAYLOR, WELLONS,
POLITZ & DUHE, APLC
NEW ORLEANS | BATON ROUGE

1515 Poydras St. Suite 1900
New Orleans, LA 70112
P: (504) 525-9888
F: (504) 525-9899

7924 Wrenwood Blvd. Suite C
Baton Rouge, LA 70809
P: (225) 387-9888
F: (225) 387-9886

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Ashbrooke Tullis
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Lynn White
Ryan Zumo
David Harpole
Jason Bone
Tanner Magee

pwellons@twpdlaw.com
ppolitz@twpdlaw.com
cduhe@twpdlaw.com
scowart@twpdlaw.com
dadams@twpdlaw.com
damato@twpdlaw.com
garceneaux@twpdlaw.com
gcursain@twpdlaw.com
ddaigle@twpdlaw.com
velmer@twpdlaw.com
shenry@twpdlaw.com
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atullis@twpdlaw.com
lvinson@twpdlaw.com
lwhite@twpdlaw.com
rzumo@twpdlaw.com
dharpole@twpdlaw.com
jbone@twpdlaw.com
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