



CLAIMANT WAS DENIED SEB BECAUSE HIS POST-ACCIDENT WAGE DECLINE WAS CAUSED BY EMPLOYER'S FINANCIAL PROBLEMS

The claimant, who worked for General Motors (GM) since 1991, suffered a severe injury to his right leg in June, 2006. He underwent emergency surgery to save his leg and received a titanium rod implant. He underwent several months of physical therapy and he was released by his orthopedist to return to work on November 27, 2006. On the date of injury he was earning \$26.68 an hour in the environmental department cleaning major equipment and sweeping work areas. When he initially returned to work in November, 2006 he was placed in a job within his physical restrictions at the same rate of pay. In February, 2007 he underwent surgery to repair his Achilles tendon, another injury he sustained in the work accident. In late April, 2007 he was released to return to work at light duty status. He returned to work in his same department driving a motorized sweeper. In October 2007, he received a raise to \$28.71 an hour. In 2005 to 2008 the claimant worked a fairly significant amount of overtime. In the year prior to the accident, claimant earned \$104,708. In the year after the accident, he earned \$92,475. The next year (2008) he earned \$96,927. It was undisputed that claimant had a disability rating due to his injury, however, he had continued to work at GM and his work history showed that he was a steady and reliable employee who did not appear to be hampered by his injury in performing the job functions.

Sometime in June 2008 the economy began to decline and so did GM. GM eliminated its environmental department, work was reduced to one (1) eight hour shift, and overtime was essentially eliminated. Claimant filed suit in September of 2009. At trial in September, 2010, claimant was still employed with GM, and acknowledged that GM always placed him at jobs within his physical restrictions, but he claimed he was not making the same money he had before the accident due to limited shifts and no overtime. It was claimant's position that had he not injured his leg, he would have had the opportunity to work longer shifts and overtime, which would have increased his salary. In 2009 GM shut down several operations and for several months there was no production at any GM plant. GM then filed for bankruptcy on June 1, 2009. GM contended that the claimant's decline in wages was a consequence of the economy and GM's financial difficulties and not from his work related injury and subsequent disability. The claimant argued that under *Allen v. Shreveport*, 618 So.2d 386 (La. 1993), a "general economic downturn" is not a consideration in the payment of SEB. The workers' compensation judge (WCJ) in the Shreveport division distinguished the *Allen* case pointing out that the claimant in *Allen* proved that after his injury his hourly wages significantly decreased, while the claimant in the subject case never sustained a loss in his hourly wages. Rather, his hourly wages increased after the accident. The WCJ went on to find that the claimant did not demonstrate that he could not find employment elsewhere that would be less than 90% of his pre-accident wages with GM and rejected the claim for SEB. The WCJ further

held that claimant was paid wages “in excess of his pre-injury wages for more than a 2-year period after the end of a period of total permanent disability (November 27, 2006),” barring any further payment of SEB under R.S. 23:1221(3)(d)(i).

The Second Circuit Court of Appeal held that claimant failed to prove an injury resulting in his inability to earn 90% of his pre-injury wage. The court heavily focused on the recent Supreme Court case of *Poissenot v. St. Bernard Parish Sheriff's Office*, 2009-2793 (La. 1/9/11), 56 So.3d 170. In that case, the Supreme Court made it explicitly clear that a claimant must prove that the work injury, not some other cause, resulted in an inability to earn 90% of his pre-injury wages. The Supreme Court pointed out that when a claimant returns to his pre-injury job and is terminated for reasons beyond the employers control and unrelated to the claimant's injury, “this strongly suggests a lack of causation between the injury and the wage loss.” *Patterson v. General Motors Company*, (La. App. 2 Cir. 9/21/11).

SURVEILLANCE VIDEO DEPICTING CLAIMANT IN ACTIVITIES HE TOLD HIS DOCTORS HE COULD NOT PERFORM WAS INSUFFICIENT EVIDENCE OF FRAUD

Claimant, an overnight stocker at Super 1 Grocery Store in Alexandria, LA, injured his back on April 23, 2005 in a lifting incident. Claimant continued to work for several days following, but then was unable to continue work because of his back pain. He sought medical treatment at the emergency room, went to physical medicine and rehabilitation specialists, and a pain management physician. After paying benefits for a year, the employer obtained surveillance over the course of many months. The employer also obtained second medical opinions (SMOs) with a psychiatrist and an orthopedic surgeon. After benefits were terminated, claimant filed a 1008 seeking indemnity benefits, payment for a power wheel chair, payment of behavioral pain management expenses, and penalties and attorney fees. The employer denied that the claimant suffered any ongoing injury or disability, and further contended that he had forfeited his right to benefits based on fraud. The matter was tried and the Alexandria workers' compensation judge (WCJ) found in favor of the claimant, awarding TTD benefits, continued medical care, and denied the employer's claim that the claimant committed fraud under R.S. 23:1208.

In support of its fraud defense, the employer offered video surveillance to indicate that the claimant was able to perform more strenuous activities than he told his doctors he could perform. The WCJ found that although the video established that claimant had apparently exaggerated his symptoms and limitations, because it showed him doing things he claimed he could not do, “the evidence did not present significant credibility issues,” and claimant's actions were not sufficient to establish fraud under R.S. 23:1208. The appellate court found that the WCJ's ruling was supported by the deposition testimony of Dr. Dole, the claimant's pain management physician, who testified that his medical opinion regarding the claimant was not changed by learning that the claimant used a push mower to cut his grass, used a riding lawnmower, rode a motorcycle or dune buggy, lifted a piece of veneer plywood, lifted a tire, lifted an aluminum wheel into his van, went fishing, and picked up paper in his yard. *Harrell v. Brookshire Grocery Company*, (La. App. 3 Cir. 9/7/11).

COURT REJECTS INTOXICATION AND FRAUD DEFENSES DESPITE FAILED DRUG TEST AND CLAIMANT'S UNTRUTHFUL STATEMENT IN HOSPITAL DENYING USE OF "STREET DRUGS"

Claimant had his foot nearly amputated in a work accident. While at the emergency room immediately after the accident, claimant was asked by the emergency room staff if he used "street drugs." Claimant denied any such use; however, a urine drug screen was positive for marijuana in excess of 50 ng/mL, the legal threshold for intoxication. This level precluded any question of claimant having inhaled the marijuana secondarily. Employer denied the claim on grounds of intoxication, and a 1008 Disputed Claim was filed. The WC Judge awarded claimant TTD benefits retroactive to the date of injury, as well as past medical bills. The WC Judge specifically found the drug screen had not been verified or confirmed in accordance with La. R.S. 23:1081(9), which requires verification or confirmation by gas chromatography, gas chromatography-mass spectroscopy, or some other comparably reliable, analytical methods. No other evidence that would support a finding that claimant was intoxicated was admitted. Claimant maintained he had smoked marijuana at a party two weeks prior to the accident, leading the WC Judge to conclude that claimant was not impaired on the day of the accident. The WC Judge also found claimant's false statement with regard to his use of "street drugs" to be immaterial and irrelevant, as the drug screen was to be administered regardless of claimant's answer. As such, the WC Judge did not believe the statement was of sufficient weight to justify the forfeiture of rights under La. R.S. 23:1208 fraud. The WC Judge did, however, believe that the evidence constituted sufficient weight to reasonably controvert the claim, and therefore declined to award penalties and attorney fees.

On appeal, the employer argued that the WC Judge erred given the evidence of claimant's intoxication at the time of the accident. Specifically, the employer argued that since claimant failed the drug screen, the statutory presumption of intoxication under La. R.S. 23:1081(5) should apply. The court of appeal noted that under La. R.S. 23:1081(9), drug testing *shall* include verification or confirmation by gas chromatography, gas chromatography-mass spectroscopy, or other comparably reliable, analytical methods. As no evidence of verification or confirmation was admitted at trial, the court of appeal affirmed the WC Judge's ruling that the drug screen could not be used to create a presumption of intoxication. The appellate court also refused to overrule the WC Judge regarding the finding that claimant had not committed 1208 fraud. The appellate court noted that claimant was under the influence of Morphine, was in severe shock and distress from the accident, and was unable to even sign his own signature on the hospital's consent forms when he denied using "street drugs." *Beck v. Newt Brown Contractors, LLC*, 46,523 (La. App. 2 Cir. 9/21/11).

STATUTE DEFINING TRUCK DRIVERS AS INDEPENDENT CONTRACTORS UPHeld DESPITE SIGNIFICANT EVIDENCE OF CONTROL EXHIBITED OVER INDEPENDENT DRIVER

Claimant and her husband, truck drivers, were hired in 2007 by an independent contractor ("IC") that supplied trucks and drivers to a delivery service ("DS"). The couple drove to Atlanta, GA to pick up a truck, then to Akron, OH to attend the DS's orientation seminar. Claimant underwent a physical and drug test in Akron, where she received a certificate. At no time did claimant sign a contract with the DS, though she did sign an "Independent Contractor

Agreement” with the IC that designated her as an independent contractor and obligated her to the IC’s “Agreement for Leased Equipment and Independent Contractors Services” with the DS. The “Agreement for Leased Equipment” specifically stated that neither the IC nor any of its employees or agents would be considered employees of the DS. However, claimant was required to wear a shirt emblazoned with the DS’s emblem, drive a truck bearing the DS’s logo, and was in constant radio contact with the DS. Claimant drove for no other company from 2007 forward, received “suggested routes” from the DS, and understood that if she ever declined three loads in a row, the IC would terminate her employment. Claimant injured her back in January, 2008 while loading her truck, and maintained she was no longer able to work as a truck driver.

The IC and the DS were both sued for compensation benefits. Each defendant filed an exception seeking immediate dismissal of the suit. The basis for the requested dismissal was La. R.S. 23:1021 (10), which provides that an owner operator and the drivers it provides are not the employees of any common carrier or exempt hauler when the owner operator has entered into a written agreement with the carrier or the hauler in which the owner operator identifies itself as an independent contractor, claimant was not its employee. Specifically, the DS pointed out that claimant had an agreement with the IC in which claimant identified herself as an independent contractor, and the IC had a contract with the DS stating that none of the IC’s employees were employees of the DS. Claimant argued such reasoning ignored the reality of the relationship between claimant and the DS, especially given the right of control exercised by the DS over the claimant. The trial judge agreed with DS and dismissed the suit. Claimant appealed.

The Louisiana Second Circuit found the statute was clear, unambiguous, and directly on point, as claimant met the definition of an owner operator under La. R.S. 23:1021(10) because she provided “trucking transportation services under written contract to a common carrier, contract carrier...which transportation services under written contract to a common carrier...which transportation services include the lease of equipment or a driver”. Further, claimant signed an “Independent Contractor Agreement” with the IC clearly identifying her as an independent contractor and agreeing to abide by the terms of the “Agreement for Leased Equipment” between the IC and the DS, which the court of appeal found satisfied the requirement that the owner operator identify itself as an independent contractor in a written agreement with the common carrier. In making this ruling, the appellate court stated that “...1021(10) now elevates one evidentiary item—a contract designating a trucker as an independent contractor—to exclusive status, disregarding the panoply of factors normally consulted when a court must decide whether a relationship is employment or an independent contract.” *Council v. FedEx Custom Critical, Inc.*, 46,558 (La. App.2 Cir. 9/21/11).



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