TAYLOR, WELLONS, POLITZ & DUHE

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

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CLAIMANT FOUND PERMANENTLY DISABLED DESPITE AN FCE STATING THE CONTRARY AND APPROVAL OF JOBS BY CLAIMANT'S OWN PHYSICIAN

Claimant was 57 years old when he suffered shoulder, neck and back injuries in 2005 while working as a logger. He underwent rotator-cuff repair surgery and approximately six months after surgery, he reached MMI. An FCE showed he was capable of light to medium duty level work. A subsequent aggravation resulted in additional restrictions, but the treating orthopedic physician still considered him capable of working. He was limited lifting to lifting 20 pounds with both hands and was not allowed to work at "shoulder level or higher." The Vocational Case Manager hired by the employer identified crew member and prep cook positions at fast food restaurants and a diner, and a line server at a cafeteria, all of which were approved by the claimant's physician. Indemnity was terminated. Claimant filed suit alleging he was permanently and totally disabled. The employer submitted the following evidence (1) an FCE showing claimant could work, (2) reports from claimant's treating physician that he was able to work, including the physician's approval of jobs, and (3) testimony at trial from a licensed vocational counsel that claimant was not totally disabled. On the other hand, claimant presented the report of a vocational "expert" of his choosing stating that claimant was permanently, totally disabled. This report was submitted to the defense 30 days before trial. The court ruled in favor of claimant, citing the following factors. Claimant could read at a 2nd grade level and perform math at a 3rd grade level. He was a convicted felon (aggravated oral sexual battery). He suffered from hypertension, high cholesterol and a prior angioplasty procedure. He did not have access to a vehicle. The jobs located required almost continuous standing, and claimant, who was 61 years old at time of trial, testified he could not stand for more than 45 minutes at a time. He could not lift anything with his left hand and took pain medicine and muscle relaxers twice every day.

Another issue in this case concerned the admission of claimant's expert vocational report. Overruling a hearsay objection and a challenge to whether claimant's "expert" met the criteria of a "licensed professional vocational rehabilitation counselor" under La. R.S. 23:1226, the report was admitted into evidence. The appellate court affirmed the ruling admitting the report and likewise affirmed the ruling assessing the employer with the costs incurred by claimant in obtaining the report. **NOTE**: The case does NOT stand for the proposition that a claimant is entitled to his/her own choice of vocational rehabilitation expert. But if the claim is litigated and the claimant chooses to hire his own expert, the costs can be assessed against the employer at trial just like any other cost that may be awarded to claimant. *Brown v. A M Logging*, 2010-1440 (La. App. 1 Cir. 8/4/11)

DISABILITY CAUSED BY FAILURE TO AUTHORIZE TREATMENT WOULD NOT GIVE RISE TO INDEMNITY CLAIM MORE THAN TWO YEARS POST ACCIDENT

The claimant was involved in a June 27, 2004 motor vehicle accident. He was not physically injured, but the other motorist was killed. Because of the fatality, the claimant suffered a mental or emotional injury and underwent extensive psychiatric care. Some disputes arose as to the employer's payment of the psychiatrist's bills and, in October 2004, claimant filed a 1008 alleging failures to pay for psychiatric care and indemnity benefits as disputes. A judgment in February 2006 held the employer was obligated for medical treatment prescribed by the psychiatrist, but did not award indemnity. Almost five years post-accident, claimant filed another 1008 alleging failures to authorize medical treatment and an entitlement to indemnity based on aggravations due to (1) subsequent aggravating "incidents" while driving and (2) the employer's failure to authorize medical treatment. The employer responded with objections on grounds of res judicata (based on the February 2006 judgment) and statute of limitations. The WC Judge dismissed the suit on both grounds. The appellate court reversed the ruling on res judicata because the law allows for modifications of a workers' compensation judgment because of changes in medical condition or disability status. Regarding the statute of limitations ruling, the claimant argued that the statute of limitations period did not apply to "the time for enforcing a judgment or collecting damages for the contempt." Essentially, the argument was that the prior judgment required the employer to provide medical/psychiatric care, the employer failed to do so, and, as a result, the claimant became disabled. The appellate court rejected this argument and, instead, applied the plain language of R.S. 23:1209; the failure to assert a claim for a developing injury is "forever barred" unless the claim has been filed within two years from the date of the accident. The case reaffirms the principle that even where there are subsequent aggravations resulting in disability, if the aggravation occurs more than two years after the accident (any no indemnity has been previously paid), a claim for indemnity is untimely. *Pal v. Stranco, Inc.,* 2010-1507 (La. App. 1 Cir. 8/3/11).

DOCTOR SPEAKS OUT AGAINST RELIABILITY OF DISCOGRAMS AND COURT REFUSES TO ORDER THE TEST

Claimant was employed as a line leader at a chicken plant operated by House of Raeford (Raeford). It was undisputed that she was injured at work when she fell down stairs on January 8, 2009. Claimant continued working until March 18, 2009 when she was restricted by her physician. Disputes arose, and claimant was awarded benefits and penalties after a trial. Perhaps the most notable aspect of this case was that Dr. Karl Bilderback performed an SMO of the claimant and addressed the medical necessity of a recommended discogram. Dr. Bilderback stated he could not recommend the lumbar discogram of the claimant's spine because the procedure no longer appeared to be a medically supported test for the evaluation of back pain. He noted that while discograms had been used in the past to evaluate patients with low back pain for surgical intervention, studies had recently questioned the use of a discogram as a preoperative indication for spinal fusion. Claimant's treating physician, Dr. Brown, admitted that discograms are a controversial procedure and the court appeared to take this into consideration when determining that the discogram was NOT necessary for the treatment of the claimant's work related injury. *Ford v. House of Raeford*, 2011 WL 3477038 (La.App. 2 Cir. 8/10/11).

WORKERS' COMPENSATION JUDGE CANNOT ASSESS THE CRIMINAL PENALTY IN THE FRAUD STATUTE, BUT CAN ASSESS A "CIVIL" FINE ALONG WITH FORFEITURE OF BENEFITS, AND HAS DISCRETION TO ORDER RESTITUTION

The First Circuit Court of Appeal affirmed the ruling of a Workers' Compensation Judge finding that the claimant committed fraud in violation of R.S. 23: 1208 with her failure to disclosure extensive prior medical treatment. The judge ordered forfeiture of further benefits and ordered the claimant to pay a civil penalty of $500 to the Kids Chance Scholarship Fund. However, the trial judge refused to order the assessment of restitution or criminal penalties as requested by the employer. The Court of Appeal held that a workers' compensation judge has no jurisdiction to hand down criminal convictions and penalties under the Louisiana Workers Compensation Act. (The local district attorney or attorney general's office must initiate these prosecutions.) In addition, the Court held that while the compensation judge does have authority to order restitution of benefits received by the claimant, that authority is discretionary and in this case the trial judge did not abuse her discretion in refusing to order restitution where in the claimant had filed for bankruptcy. *Amacker v. Washington Correctional Institute*, 2010-CA-2316 (La.1 Cir. 7/14/11).

CLAIMANT'S DISHONESTY REGARDING PRIOR BACK CONDITION AND FRAUD IN ATTEMPT TO OBTAIN UNEMPLOYMENT BENEFITS DID NOT CAST SUFFICIENT DOUBT OR SUSPICION ON UNWITNESSED ACCIDENT CLAIM

The Second Circuit Court of Appeals affirmed a Workers' Compensation Judge finding that claimant was entitled to benefits, medical expenses, a penalty, and attorney fees as a result of an unwitnessed accident that allegedly caused a back injury. Claimant alleged he hurt his back on August 5, 2009 when he lifted heavy, wet pallets while working as a floor man at the Foster Farms poultry processing plant. Claimant advised his supervisor that he felt a sharp pain in his back and needed to go to a doctor. The supervisor allegedly advised him to take some Tylenol and wait for the nurse and warned claimant that if he clocked out without first being evaluated by the nurse that he would be fired. Under company policy, any employee injured at work must immediately report it to his supervisor and then to the nurse. The claimant left the plant without being evaluated by the nurse and went to the emergency room. The emergency room record contained no notation of a work accident, but indicated that symptoms started a year earlier. Further, medical records regarding treatment on the day following the accident do not mention a work accident. Claimant's excuse at trial was that the doctors forgot to write in the reports that he mentioned hurting his back while working. (There was no indication that the doctors were deposed.) Further, claimant falsely reported in pre-hire questionnaire that he had not had any prior back injury. Finally, the evidence showed that claimant had fraudulently accepted unemployment benefits to which he was not entitled. The Appellate Court determined that the workers' compensation judge's finding was reasonable despite this evidence, because there was no evidence to cast serious doubt

upon claimant's version of the accident, which was eventually reported within several weeks of the incident. *Davenport v. Foster Farms, L.L.C.*, 46,430 (La.App. 2 Cir. 7/13/11)

MISSISSIPPI CASE: CLAIMANT NOT ALLOWED TO COMBINE WAGES FROM SEPARATE, BUT RELATED, EMPLOYERS OWNED BY THE SAME PERSON

Claimant worked for two businesses owned and operated by the same person. One company, Northeast, performed tree cutting and trimming services and the other, Jay's, performed stump and debris removal services. Both companies sometimes worked separately, but often they worked on the same job site together. The two companies had separate payrolls, separate workers compensation insurers, and claimant would receive separate checks from each. On May 23, 2003, claimant fell while repelling down a tree. He contended that the two companies were one employer for the purposes of calculating his AWW. Claimant focused on the fact that both companies were operated out of the same location, they used the same phone number, they shared equipment, and numerous employees worked for both. The Appellate Court upheld the Commission's ruling which provided that the reasons for the owner operating two related businesses that complimented one another are legal, legitimate, and understandable. Further, the businesses had different names, different insurers, and different areas of expertise. They rejected the allegations that this was a case of "dual employment" or "joint service" because claimant fell in the process of trimming a tree which fits squarely within the activities of Northeast. The appellate court recognized that while the current statute may not be fair because it encourages an employer to use part-time workers in dangerous jobs to reduce their potential compensation for lost wages, and pay less in insurance, the statute provides no solution that would be just and fair to all parties and the problem can only be corrected by legislation. *Kukor v. Northeast Tree service, Inc.*, (Miss. Ct. Appeals 7/26/11).

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