



### **EMPLOYER GETS DOLLAR-FOR-DOLLAR CREDIT AGAINST INDEMNITY AND MEDICAL BENEFITS IF EMPLOYEE SETTLES TORT SUIT WITHOUT APPROVAL**

As recently as February 23, 2011, in *Mercer v. Nabors Drilling USA, L.P.*, 2010-1092 (La. App. 3 Cir. 2/23/11), the Third Circuit Court of Appeal was continuing to hold that an employer is *not* entitled to a credit for future medical benefits even when an employee settles a tort suit without approval of the employer. In March 2011, the Supreme Court recently handed down a decision that represents a **significant, favorable development** for employers in the area of an employer's credit for unapproved settlements of third-party tort suits. In this case, the employee came in contact with a live electrical wire, which caused significant injuries, and brought a tort suit against the utility provider. The employer intervened in the tort suit, which was later settled at mediation. The employer did not attend, but provided the mediator with the amount of its lien and agreed to accept that amount, minus one-third representing attorney fees. The employee settled the tort suit for over \$4,000,000. Thereafter, the employer moved to terminate benefits due to failure to secure written approval of the settlement. The WC Judge determined that the employer had given written approval and it was entitled to a credit for the balance of the settlement funds, but that the credit only applied to future disability and **not** the cost of his future medical treatment. The Third Circuit affirmed based on its prior decisions in this area of the law. However, the Louisiana Supreme Court applied the text of the 1989 revision to La. R.S. 23:1102 as written. In relevant part, that statute states, "If a compromise with such third person is made by the employee or his dependents, the employer or insurer shall be liable to the employee or his dependents for *any benefits under this Chapter* which are in excess of the full amount paid by such third person, *only after the employer or the insurer receives a dollar for dollar credit against the full amount paid in compromise...*" In short, the Court held the employer "should receive a credit against **all** future workers' compensation benefits, **including future medical expenses**, which are or may become due to claimant." *City of DeQuincy v Henry* (La. 3/15/2011).

### **WHERE AN EMPLOYER AGREES TO THE SATISFACTION OF ITS LIEN IN SETTLEMENT OF A THIRD PARTY TORT SUIT, THE "BUY BACK" PROVISIONS OF R.S. 23:1102 ARE SATISFIED**

The Supreme Court handed down another interesting holding in the *City of DeQuincy* case discussed above. When an employee settles his or her tort suit arising out of the work accident against the third party tortfeasor without the employer's written consent, the general rule is that the employee has forfeited his/her right to any further workers' compensation benefits. However, employee has the option to "buy back" the right to future compensation "upon payment to the employer or insurer of the total amount of

compensation benefits, and medical benefits previously paid to or on behalf of the employee, exclusive of attorney fees arising out of the compromise..." La. R.S. 23:1102. The Supreme Court reaffirmed the principle that where the employer's existing lien is satisfied through the settlement of the third party suit, the failure of the employee to secure written approval of the settlement is moot because the "buy back" provision of R.S. 23:1102 has already been satisfied. *City of DeQuincy v. Henry*, (La. 3/15/2011)

### **FRAUD DISCOVERED AFTER A CONSENT JUDGMENT CANNOT BE ASSERTED AS A DEFENSE**

The employer entered into a consent judgment and dismissal of a pending 1008 Disputed Claim for Compensation on April 16, 2008. Based on what can be determined from the reported decision, at some point thereafter, the employer discovered that the claimant had made misrepresentations that could give rise to forfeiture of benefits under Revised Statute 23:1208. Specifically, the employer discovered and alleged that the claimant failed to report post-accident income and denied pre-accident back problems. However, these "misrepresentations" occurred *prior* to the judgment of April 16, 2008. The court of appeals held, on its own motion, that Res Judicata barred the litigation of these issues due to when they arose. *Kepeco Operating, Inc. v. Eubanks*, (La. App. 3 Cir. 3/9/11).

### **INTEREST ON SETTLEMENT AMOUNT NOT DUE DURING 30-DAY PERIOD TO PAY SETTLEMENT FUNDS**

The employee filed a disputed claim for compensation seeking indemnity, medical benefits, statutory penalties, and attorney's fees under La. R.S. 23:1201(F) after suffering a lower-back injury. The parties agreed to a settlement that was judicially approved on August 20, 2009. Within thirty days of judicial approval, the employer paid the amount due under the settlement to the claimant and an additional amount directly to the medical facility at which she had treated. Inventively, the claimant's attorney filed a later disputed claim alleging that the employer had *not* paid the full amount of the settlement within 30 days because no interest for the days between judicial approval of settlement and the dates on which payment was made. The attorney sought the twenty-four percent penalty under La. R.S. 23:1201(G). The issue was tried on cross-motions for summary judgment and the WC Judge held that interest was not due because the settlement agreement did not indicate the parties anticipated payment on the day of judicial approval or indicate payments would include interest. The court of appeals affirmed this ruling. *Hunter v. Maximum Group Behavioral Services, Inc.* (La. App. 4 Cir. 3/16/11).

**NOTE:** This case raises the concern that claimants might attempt to include payment of interest in settlement or consent judgment pleadings. Were they to do so, there could potentially be exposure for failing to satisfy a settlement within thirty days when the interest is not included through the date of payment, even if the underlying amount was paid within thirty days.

## **COURT REAFFIRMS PRINCIPLE THAT NOT ALL LIES, EVEN IF CAPTURED ON VIDEOTAPE, WILL RESULT IN A FINDING OF FRAUD**

Claimant injured her middle and low back in an accident in 2005, which turned into a complicated and long injury process. After several years, she was diagnosed with reflex sympathetic dystrophy and a spinal cord stimulator was recommended. At some point during the litigation of the claim, claimant's deposition was taken and she was asked about her physical capabilities. Additionally, the employer had obtained surveillance of the claimant. The surveillance video depicted claimant in several activities which she swore in deposition she was unable to do. In deposition, the claimant stated that the most weight she would lift is between 5 and 10 pounds. The video showed her lifting a chair with her husband that weighed about 50 pounds. When shown the video, claimant stated she did not recall stating she had never lifted more than 10 pounds, and also stated that she hurt the day after lifting the chair. In deposition, claimant stated she was unable to bend over sufficient to touch her toes. The video shows claimant bending over and touching her toes/shoes, and holding this pose for about 15 seconds. When shown the video, claimant admitted she can perform the maneuver, but stated it was painful to do so. In response to defendant's fraud evidence, the court stated that "although certain of these activities [shown on the video] may contradict [claimant's] deposition testimony, we do not find that these contradictions rise to the level of willful fraudulent actions intended by [the fraud statute]" and that "mere contradictions between an employee's testimony and surveillance video does not automatically result in [fraud]." *Wilczewski v Brookshire Grocery Company* (La. App 3 Cir. 03/16/2011).

## **COURT UPHOLDS THE CONSTITUTIONALITY OF STATUTE REQUIRING FORFEITURE OF BENEFITS WHILE INCARCERATED**

Claimant injured his back and legs while working for employer as part of an inmate work-release program. At the time of the incident, claimant was living in a halfway house. For about 4 weeks after the incident, claimant was totally disabled and during such time remained in the halfway house. Because of claimant's confinement in the halfway house, employer did not pay any indemnity benefits during the period of total disability relying on *La. R.S. 23:1201.4*, which provides that a claimant forfeits his/her right to compensation benefits during any period of incarceration unless claimant proves he/she has dependents who rely on a compensation award for support. Claimant filed suit and alleged that the statute was unconstitutional, especially as applied to him since he was part of a work-release program and resided in halfway house. The court upheld the constitutionality of the statute, even as to claimants who reside in a halfway house and are working for an outside employer. The court held that these individuals are still deemed "incarcerated." *Blackledge v Sol's Pipe & Steel* (La. App. 2 Cir. 03/23/2011).

## MISSISSIPPI: CLAIMANT AWARDED BENEFITS ALTHOUGH SHE WAITED THREE MONTHS TO REPORT THE ACCIDENT TO HER DOCTORS

At issue in this case was whether the claimant suffered a work-related back injury on November 19, 2005 when stepping out of her work vehicle. The employer presented evidence casting much suspicion on the claim. First, claimant did not tell her treating doctors about her work injury until March 2006. In fact, in her visit on December 20, 2005 she reported her back began hurting “a week ago” with no “specific injury or inciting event” to blame. Second, medical records indicated claimant had suffered from intermittent low-back problems for several years before the alleged accident. There was also a question about whether she related information about her injury to her employer prior to quitting her job over 2 months after the alleged injury. Despite these several inconsistencies, the court found that the claimant did suffer a work related injury on November 19, 2005. The court relied heavily on a coworker’s statement corroborating claimant’s testimony that she reported the alleged accident to a supervisor, as well as the often-cited principle “that the Workers’ Compensation Act is construed liberally, and doubtful cases are to be resolved in favor of compensation so that the beneficent purposes of the act may be achieved.” *Mississippi Security Police v. Patterson*, 2011 WL 880236 (Miss. Ct. App. 3/15/11).



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