



THE LOUISIANA SUPREME COURT RULES THAT PPO CONTRACT DISCOUNTS ARE NOT ILLEGAL

The Louisiana Supreme Court has resolved the issue of whether PPO contracts violate the Louisiana Workers' Compensation Act (LWCA) with a recent decision effectively reversing the decisions of a number of appellate courts holding that any agreement that provides for payment less than the fee schedule is invalid. The Supreme Court specifically rejected these earlier appellate court rulings invalidating PPO contracts in workers' compensation cases, and instead chose to follow the rulings of a number of Louisiana federal court decisions which have held that the LWCA does not prohibit a health care provider from agreeing to charge and from receiving discounted rates below the fee schedule for services they provide to workers' compensation claimants. Unfortunately, however, expect to see further PPO decisions affecting the workers' compensation arena because of certain notice provisions in the PPO statutes that were not followed by employers/insurers when PPO discounts were utilized in compensation patients. This Supreme Court decision simply stated that PPO contracts were not per se invalid in the compensation arena, but did not address whether the PPO statute had been followed properly in compensation cases. *Agilus Health v. Accor Lodging North America*, 2010-C-0800 (La. Sup. Ct. 11/30/10)

TESTIMONY REGARDING AN UNWITNESSED ACCIDENT THAT WAS NOT CORROBORATED BY CO-WORKERS OR MEDICAL REPORTS WAS NOT CREDIBLE

The Second Circuit Court of Appeal (Shreveport, La area appeal court) affirmed the decision of a Workers' Compensation Judge that a claimant was not credible in his testimony that he was injured when he sustained an accident when the tractor he was driving hit a hole and jarred his back. The claimant's testimony was deemed not credible primarily because claimant's co-workers could not corroborate the claimant's story. The court also cited the lack of medical evidence to support a finding that the claimant was injured when the tractor that he was riding in hit a hole. The Court specifically noted that the medical reports contained a history by the claimant that he injured his back at work lifting, bending and turning and bounding up and down on a tractor for the past five years. The Court further concluded that these descriptions did not meet the definition of an "accident" as set forth in Workers' Compensation Act. *Davis v. Claiborne Electric Cooperative, Inc.*, 45,806 (La App. 2 Cir. 12/15/10).

EMPLOYER NOT ENTITLED TO UPDATED SMO OF PERMANENTLY, TOTALLY DISABLED CLAIMANT WHEN THE ONLY REASON FOR THE REQUEST IS THE PASSAGE OF A CERTAIN AMOUNT OF TIME SINCE THE LAST SMO

Claimant was injured in a 1995 work-related accident, and the employer paid benefits for nine years. In 2004, the parties stipulated that the claimant was permanently and totally disabled (so the employer could take a social security offset), and a judgment was issued declaring the claimant to be permanently and totally disabled. In 2009, the employer requested that the claimant undergo an updated evaluation by its choice of physician. Claimant refused, and the employer filed a 1008 seeking to compel the examination. The compensation judge denied the employer's request and the employer appealed. In affirming the decision of the WCJ, the Second Circuit Court of Appeal noted that the Employer could seek a modification of the prior Judgment declaring permanent and total disability status based on a change in condition. However, since the employer did not make a showing that the claimant's condition had changed since he was adjudicated to be permanent and totally disabled, there was no showing that the request for an evaluation was reasonably necessary as required by law. The only reason given by the employer for the requested updated SMO was that it had been 3 ½ years since the last evaluation by its choice of physician. The Second Circuit rejected that reasoning and noted that since there was no evidence that the claimant's condition had changed, the employer failed to show that the updated SMO was reasonably necessary. It appears that the primary basis for the decision was that claimant was stipulated to be permanently and totally disabled, and that the court's holding was that the employer should file a motion to modify the judgment, and through that process seek an evaluation. *in Marathon Oil Company v. Bowling*, 45,814 (La. App. 2 Cir. 12/15/10).

**COURT REVERSES RULING IN FAVOR OF EMPLOYER
ON GROUNDS THAT CLAIMANT WAS A SOLO INDEPENDENT CONTRACTOR COVERED
BY THE LA WORKERS' COMPENSATION ACT**

Claimant filed a claim for workers' compensation benefits as a result of an accident on January 21, 2008 when he fell from scaffolding while performing carpentry work at the Degas House, a historic museum/guest house which is operated by Degas House, LLC. Defendant, Degas House, LLC and its sole member, David Villarubia, filed a Motion for Summary Judgment seeking to dismiss the claim on the basis that claimant was not an employee of Degas House and/or Villarubia. Claimant filed a cross Motion for Summary Judgment asserting that he was entitled to compensation benefits, either in his status as an employee of defendants or as a solo independent contractor covered by the Compensation Act because he was engaged in "manual labor" in the ordinary course of defendants' business. The court agreed with the defendants' claims, and dismissed the case. The Fourth Circuit Court of appeal reversed the decision of and found that the claimant was covered as an independent contractor engaged in manual

labor. The Fourth Circuit noted that the undisputed evidence utilized by the parties in support of their individual motions for summary judgment established that the claimant was an independent contractor who spent a substantial amount of his time in manual labor and that the work that he performed was an integral part of the defendants' trade, occupation and business. The Court noted that Villarubia hired claimant to replace some rotten boards of the building which contained Villarubia's office, from which he ran the day to day operations of the Degas House and from which he also managed his commercial real estate holdings.

The Fourth Circuit noted that the jurisprudence uniformly defined "manual labor" as work whose "physical" element predominates over the "mental" element of the work and naturally concluded that claimant, as a carpenter, was engaged in manual labor when he was injured. Therefore, the only real question to be answered by the Court was whether claimant was engaged in the defendants' trade, business or occupation at the time of the accident. In resolving that issue, the Court held that in order for the work performed by plaintiff to be considered part of the principal's trade, business or occupation, it must be essential to the ability of the principal to generate his goods, products, or services. In reaching its conclusion, the Court noted that the building that the plaintiff was working on housed Villarubia's various businesses and that the repair and renovation of that building was essential to the operation of Villarubia's businesses and "was part of defendants' day-to-day routine". *Steinfelds v. Villarubia*, 2010-0975 (La. App. 4 Cir. 12/15/10).

CLAIMANT DEEMED PERMANENTLY DISABLED DESPITE EVIDENCE THAT HE WAS CAPABLE OF WORKING AND DID WORK FOR WAGES DURING A SUBSTANTIAL PORTION OF THE CLAIMED PERIOD OF TOTAL DISABILITY

The Fourth Circuit Court of Appeal reversed, in part, the granting of a summary judgment in favor of the employer in a case involving whether the claimant was permanently and totally disabled. The employee claimed entitlement to permanent and total disability benefits, yet the Employer was able to prove that he worked for wages during a substantial portion of the claimed period of disability. The accident at issue occurred in 1991, and the employer paid 520 weeks of benefits. Benefits were terminated in 2001 on the basis that claimant was capable of working. In converting the Employee from TTD benefit status to SEB status in 2000, the employer relied on the opinions of four physicians who concluded that the Employee was capable of working. Further, the Employer presented evidence at the hearing on the MSJ that the Employee did work for wages during the years 2003, 2004, 2006 and 2007 and that he was involved in two subsequent non-work related automobile accidents which he admitted aggravated his pre-existing back injury. In defense of the MSJ, the claimant relied solely on the opinion of his treating physician, Dr. Manale, that he was permanently and totally disabled.

While the Fourth Circuit acknowledged that the claimant bears the burden of proving by clear and convincing evidence that he is permanently and totally disabled, it only affirmed the MSJ for the years 2003 through 2007 when it is undisputed that the Employee worked for wages for various charities. However, the Fourth Circuit reversed the MSJ for those years before claimant “re-entered employment for wages in 2003 and after he left such employment in 2007” as they found that a genuine issue of material fact existed as to claimant’s disability status during that time. In its lengthy discussion of the facts, the Fourth Circuit did acknowledge that the Employer offered vocational rehabilitation testimony that established that the Employee was cleared to work at various jobs in late 2000/early 2001 by one of the four doctors who had indicated that he could work. The Employee responded to these vocational rehabilitation efforts by indicating that he had applied for the jobs located by the vocational rehabilitation counselor but there were no job openings. *Keasley v. Transit Management of Southeast Louisiana*, 2010-0786 (La. App. 4 Cir. 12/7/10). *Keasley v. Transit Management of Southeast Louisiana*, 2010-0786 (La. App. 4 Cir. 12/7/10).

SUPREME COURT VINDICATES EMPLOYER’S RIGHT TO PROVIDE SURVEILLANCE VIDEO TO PHYSICIANS, AND TO TERMINATE BENEFITS BASED ON PHYSICIAN OPINIONS AFTER VIEWING VIDEO

The Louisiana Supreme Court reversed the rulings of both the workers’ compensation judge and the Third Circuit Court of Appeal who refused to give any credence to videotape surveillance obtained by the Employer and provided to the claimant’s treating physician and the SMO physician. The videotape surveillance changed the opinions of those physicians such that they determined that the claimant was no longer disabled, did not have RSD (a/k/a “complex regional pain syndrome”) and was capable of returning to work. In the lower court decisions, the WCJ and the Third Circuit completely disregarded the videotape surveillance as well as the changed opinions of both doctors because they found that the change in the opinions of the physicians was due solely to their review of the surveillance videotape. Claimant was awarded benefits, as well as penalties and attorney’s fees. However, the Louisiana Supreme Court ruled that the Employer acted appropriately in submitting the surveillance videotape to both physicians and was justified in terminating benefits based on the opinions of both doctors who concluded that because the claimant freely used her left hand in the videotape surveillance, she obviously did not have RSD and therefore had no disability and could return to unrestricted work. The Supreme Court noted that the claimant did not present any evidence which contradicted her treating physician’s opinion and the opinion of the Employer’s SMO that she could return to her pre-injury employment based on the activities which they viewed in that surveillance videotape, and she therefore failed in her burden of providing entitlement to benefits. The Supreme Court further ruled that there is no prohibition in statute or jurisprudence preventing an employer from showing surveillance video to a claimant’s treating physician or to and SMO doctor. The Supreme Court distinguished this

case from others which had found an Employer to have been arbitrary and capricious in discontinuing benefits based solely on the results of surveillance videotape, finding that the Employer in its case did not terminate benefits when it obtained the videotape and instead waited until it obtained medical evidence supporting its position that the Employee was no longer disabled from returning to work. *Iberia Medical Center v. Ward*, 2009-C-2705 (La. Sup. Ct. 11/30/10)



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