



LEGITIMATE DISPUTE REGARDING THE PRECISE AWW IS NOT JUSTIFICATION TO REFUSE PAYMENT OF ANY INDEMNITY BENEFIT

Employee, a member of the New Orleans' Saints practice squad, was injured at work and was determined to be disabled. Due to a dispute as to the proper AWW, the employer did not pay any indemnity benefits. The trial court agreed that the dispute as to the proper AWW was reasonable, thus not entitling the employee to penalties and attorney fees. The 5th Circuit Court of Appeal, reversed, stating: "The Saints failed to pay any benefits to [claimant] following his injury, although he was clearly entitled to workers' compensation benefits. Regardless of the dispute concerning the calculation of the average weekly wage, the Saints could have paid benefits to [claimant] using its own wage calculations pending the final resolution of this matter before the court." Accordingly, the court awarded penalties and attorney fees for failure to pay the undisputed portion of the indemnity benefits. *Hoffman v. New Orleans Saints*, 10-391 (La. App. 5th Cir. 1/25/11).

COURT DENIED CLAIM THAT A MODIFIED JOB EXCEEDED EMPLOYEE'S RESTRICTIONS WHEN SHE DID NOT EVEN ATTEMPT THE JOB

Employee was injured when a filing cabinet fell and hit her hip. She was released to work with restrictions by her treating physicians. Employer documented offering employee a modified job position which had been approved by her treating physician. Employee refused to attempt the modified job, claiming that the job entailed duties outside of the doctors' restrictions. Both the trial court and 1st Circuit Court of Appeal held that because employee did not even try to job, she could not claim the job exceeded her restrictions and, therefore, the employer's termination of indemnity benefits was proper. *Coleman v. Walter Industries, Inc.*, 2010-1145 (La. App. 1 Cir. 2/11/11).

NOTE: This case highlights the importance of getting the doctor's approval of an offered job.

VIDEO TAPE OF EMPLOYEE OPENING STORE, EMPTYING TRASH AND SANDING NOT SUFFICIENT TO PROVE EMPLOYMENT OR FRAUD

Video tape was obtained of employee performing activities that would generally be taken as "work" for an auto garage while allegedly unable to work and while employer was paying indemnity benefits. During the investigation, the garage owner told the investigator that employee would look at the investigator's car. The garage owner testified at trial, however, that despite the fact that the employee was present during working hours, and may have done some things, he was not an employee and was not paid. Employee also testified to that effect. The trial court found

employee and the garage owner credible witnesses and found no evidence of fraud. The Court of Appeal affirmed.. *Broussard v. Country Club Auto Repair*, 2010-1116 (La. App. 3rd Cir. 2/2/11).

PENALTIES AND FEES AWARDED BECAUSE EMPLOYER FAILED TO OFFER PROOF OF SOME OTHER CAUSE FOR DISPUTED INJURY

While helping a co-worker lift a 150 lb. driveshaft of a truck, claimant alleged an accidental injury to his arm/elbow on February 23, 2009. He claimed he notified his co-worker, but the co-worker testified that he did not learn of the injury until two days later, which was when claimant first sought medical treatment at a hospital emergency room. The objective medical evidence at that time of the elbow injury was swelling and a contusion, but no fracture. Two days later, claimant saw another doctor who diagnosed tendonitis. Six weeks later on April 11, claimant went back to the emergency room and was diagnosed with epicondylitis. Claimant sought no further treatment until June, at which time he was diagnosed with post-traumatic shoulder discomfort, lateral and medial epicondylitis and upper extremity complex pain syndrome. He was then deemed disabled from working. The claims adjuster testified that she decided to deny the claim because of inconsistencies among the statements by claimant, and co-workers, and information in the medical records. The workers' compensation court awarded judgment in favor of claimant, and also awarded penalties and attorney's fees based on the adjuster's unreasonable denial of the claim. The Court of Appeal affirmed and held that "it was unreasonable for [the employer] to deny [claimant] was injured, absent indication of some other cause of the objective findings." **NOTE:** This case highlights the difficulty in denying a claim, even when there are conflicting stories especially between claimant and the only eyewitness, when there is no other explanation for the objective findings of injury. *Rougeau v Gottson Construction Co.* (La. App. 3 Cir. 2/9/11).

PENALTIES AND FEES AWARDED DESPITE "FLIP FLOP" BY CLAIMANT'S OWN TREATING DOCTOR ON WHETHER DISPUTED INJURY WAS WORK-RELATED

Claimant sustained an unwitnessed accident that caused an elbow injury and also an alleged neck injury. The neck injury was the only disputed injury at trial. The employer's choice of orthopedic physician stated that claimant's neck injury was not related to the alleged accident. Initially, claimant's treating physician disagree, BUT changed his mind shortly thereafter and agreed with the employer's doctor that the neck injury was not related. After claimant's treating orthopedist performed surgery regarding the elbow injury, and it failed to alleviate claimant's complaints of neck pain, the doctor changed his opinion again to his original opinion that he neck injury was related to the accident. Claimant was seen by yet another orthopedic physician at the employer's request, who agreed with the employer's first choice of doctor that the neck injury was not related to the alleged work injury. Finally, the employer asked claimant to be examined by a neurologist, who wanted additional testing, which was denied by the employer. The Court of Appeal (2nd Circuit) affirmed the trial court award in favor of claimant, and awarding penalties and attorney's fees despite the fact that two doctors stated the injury was not work-related, and claimant's doctor agreed although for a limited time. The court focused on the fact

that at the time the final decision was made to deny neck treatment, the treating doctor's opinion was that the injury was work-related. The court was also not impressed with the employer's refusal to approve testing recommended by its own neurologist. *Hofler v J.P. Morgan Chase Bank* (La. App. 2 Cir. 01/26/11).

MIGA STATUTE TRUMPS WORKERS' COMPENSATION STATUTE REGARDING SUBROGATION REIMBURSEMENT

The Mississippi Supreme Court recently ruled that the Mississippi Insurance Guarantee Association ("MIGA") was entitled to full reimbursement from a UM carrier, which paid a settlement to the claimant in a third party tort suit. Following an automobile accident, the claimant filed a third party tort suit and recovered \$10,000.00 from the tortfeasor's auto insurance and settled with her UM carrier for \$60,000.00. After the claimant began receiving compensation benefits, the workers' compensation carrier became insolvent, and its claims were assumed by MIGA. After MIGA began paying the claimant benefits, it learned of the third party settlement, and petitioned the Commission for suspension of benefits until the claimant's accrued claims exceeded the amount she collected in settlement. The Administrative Judge held that MIGA was entitled to the offset of \$70,000.00 recovered by the claimant in settlement. The full Commission reversed, holding that MIGA was not entitled to any credit for the UM payments, because the applicable workers' compensation statute precludes subrogation against UM carriers on grounds they are not "third parties" within the meaning of the statute. After both the Circuit Court and the Court of Appeals affirmed this ruling, the Supreme Court decided to hear the case, and ruled that the workers' compensation statute was inapplicable, because once MIGA assumed the claim from the insolvent compensation carrier, the MIGA statute became the controlling provision of law. The controlling MIGA statute specifically provides that all other insurance be exhausted prior to recovery from MIGA, and that any amounts payable on a claim covered by the MIGA Act will be reduced by any amounts recovered by other insurance. Therefore, while UM benefits are generally "off limits" to subrogation recovery in compensation claims, that is not the case when the carrier becomes insolvent, and the claim is assumed by MIGA. *Miss. Ins. Guar. Ass. v. Blakeney* (Miss. Jan. 3, 2011).

POST-INJURY JOB SEARCH NO LONGER BE REQUIRED IN CLAIM FOR TOTAL LOSS OF USE OF A SCHEDULED MEMBER

The Mississippi Court of Appeal held that a claimant was entitled to an award for a total loss of use of her leg, because she could not perform the "substantial acts of her usual employment," despite the fact that she admitted that she did not attempt to seek any other employment following the injury. The claimant became employed with Ellisville State School in 2003 as a caretaker for the disabled. Her employment prior to that time consisted of various jobs in the food service industry and the caretaker industry. Other than these two industries, she was employed part-time for four months as a secretary. In 2005, the claimant twisted her knee at work while lifting a patient, and it was later determined that she had a torn meniscus. As a result of that injury, she later required a total knee replacement.

Following MMI, the claimant's doctor assigned her a 7% impairment rating, and issued permanent restrictions of no prolonged standing or walking and no lifting over ten pounds. The Administrative Judge ruled the claimant could no longer perform the substantial acts of her usual employment (food service industry or caretaker industry), and the claimant was awarded benefits for 175 weeks, representing a total industrial loss of use of her leg. The Commission reversed this finding, particularly considering the claimant's admission that she did not perform a post-injury job search, and held that the claimant only sustained a 50% loss of industrial use. After the circuit court affirmed the Commission's decision, the Mississippi Court of Appeal reversed and reinstated the Administrative Judge's ruling. The Court of Appeal held that a claimant is not required by law to perform a post-injury job search in order to recover benefits for total industrial loss of use. Instead, the claimant merely has to show that she can no longer perform the substantial acts of her usual employment. Because the claimant was given permanent work restrictions, and testified that she could not perform jobs in either the food service industry or the caretaker industry, the court found that she was entitled to benefits for total industrial loss of use. *Cole v. Ellisville State School* (Miss. App. Oct. 19, 2010).

NOTE: This case conflicts with previous Commission Orders in similar cases and also conflicts with the Court of Appeals' own statement from 2002 in *Wagner v. Hancock Med Ctr.*, 825 So. 2d 703, that "an unexcused failure to show an effort to explore other employment opportunities more suited to the claimant's post-injury condition is fatal to a claim for permanent disability." However, the language in the *Wagner* case refers to permanent disability collectively, and does not distinguish between scheduled member injuries and injuries to the body as a whole. **THERE IS A POSSIBILITY THAT THIS CASE MAY BE HEARD BY THE MISSISSIPPI SUPREME COURT. IF SO, WE WILL PROVIDE AN UPDATE IN AN UPCOMING NEWSLETTER.**



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