TAYLOR, WELLONS, POLITZ & DUHE

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

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2ND CIRCUIT COURT OF APPEAL AGREES WITH 3RD CIRCUIT AND RULES THAT PPO CONTRACT WAS ILLEGAL

In two consolidated appeals involving a dispute between the healthcare provider, Musculoskeletal Institute of Louisiana and two different employers, McDonald's Corporation and Rollin's Inc., Musculoskeletal Institute of Louisiana was trying to recoup the amounts discounted from their medical bills based on a PPO network agreement. The healthcare provider asserted that it was reimbursed at a rate below the Workers' Compensation fee schedule because of the PPO network agreement. Adopting the findings of the 3rd Circuit in the matter of *Central Louisiana Ambulatory Surgical Center, Inc. v. Payless Shoesource, Inc.*, 2010-86 (La.App.3d Cir. 7/28/10), 2010 WL 3026527, a case that was reported in our September newsletter, the 2nd Circuit agreed that the employer's use of the PPO contract to additionally lower the reimbursement owed to the healthcare provider violated the spirit and intent of the Louisiana Workers' Compensation Act. The 2nd Circuit however reversed the award of penalties and attorney's fees and in so doing also found that although the PPO contracts were invalid, they did offer an articulable basis for the employers to pay the additionally discounted amounts. Furthermore, since this was a novel issue before the court, the court found that the employer's reasonably controverted the healthcare providers' claims in the case and reversed the award of penalties and attorney's fees. *Musculoskeletal Institute of Louisiana v. McDonald's Corporation (La. App. 2 Cir. 9-22-10).*

SETTLEMENT RELEASING EMPLOYER FROM ALL CLAIMS PRECLUDED EMPLOYEE FROM PURSUING CLAIM FOR UNRELATED SECOND INJURY THAT OCCURRED ON SAME DATE AS FIRST INJURY

Employee's claim for benefits arising out of a neck injury which occurred the same day that he was bitten by a spider was ruled to be resolved when he accepted a settlement and that settlement was properly approved by the workers' compensation judge to include all claims for benefits that he possessed up to the time of the settlement. The pro se claimant alleged that he sustained two separate injuries on the same day, December 9, 2004. The first injury occurred when he was cleaning out a storage shed and was bitten by a spider on his left hand. He allegedly also suffered two ruptured discs in his neck on that day from heavy lifting. The plaintiff settled his claim with the employer at a settlement conference on March 13, 2009, but the neck injury had not yet been asserted. During that conference, the claimant alleged that the workers' compensation judge did not tell him that he was settling all of his claims against the employer and that he did not intend to settle his

neck injury claim. The 1st Circuit Court of Appeal held that because the settlement documents stated that claimant was releasing the employer from any and all claims for benefits that had arisen prior to the date of the settlement conference, the neck injury claim was precluded although it had not been asserted. Once the procedural requirements have been complied with and an order approving a compromise settlement has been entered by the workers' compensation judge, it is conclusive and cannot be set aside except for fraud, misrepresentation or ill practices. The court noted that the failure of a workers' compensation judge to have a settlement discussion with an unrepresented employee may give rise to a cause of action for nullity of the settlement, but in this case, the claimant had not alleged that such a discussion did not take place. Instead, the claimant alleged that the workers' compensation judge did not inform him that he was settling his claim for benefits arising from a neck injury sustained on the same day as a spider bite injury. *Kevin D. Smith v. Isle of Capri Casino & Hotel*, (La. App. 1 Cir. 9/10/10).

TREATING DOCTOR SAYS CLAIMANT IS RELEASED TO FULL DUTY WITH NO RESTRICTIONS AFTER A PINKY FINGER INJURY, AND DOES NOT NEED PAIN MANAGEMENT—COURT ACCEPTS THE DOCTOR'S DISABILITY OPINION BUT NOT HIS TREATMENT OPINION

Claimant sustained a "slightly displaced fracture" on his pinky finger on May 30, 2008. The treating doctor, Dr. Bilderback, put the finger in a plastic splint and prescribed medication on June 2. On June 11, claimant reported a pain level of 10 out of 10. Dr. Bilderback found this to be an exaggeration based on examination. Claimant was next seen in June 25, about one month post-accident, and reported pain at a level 5. An MRI was ordered. On August 18, Dr. Bilderback observed that the fracture had healed, and that claimant had normal range of motion in his finger with no edema or ulnar nerve pathology. Claimant was given a FULL release on that date. Dr. Bilderback's records noted that plaintiff was "very resistant to returning to work." Plaintiff obtained a second opinion on October 14, who found that claimant was at MMI and ordered an FCE, which was performed on November 3-4. The FCE found that claimant could perform light/medium duty work, and did not need further therapy. Claimant underwent an impairment evaluation on November 17, and the doctor found an 8% impairment to the finger and 1% to the hand. The doctor found no evidence of swelling despite complaints of swelling, and found no evidence of RSD. In December, plaintiff's second opinion doctor referred him to pain management because the doctor refused to prescribed pain medication claimant requested for a 7-month old injury. Claimant saw the pain management doctor on June 5, 2009, a year after the pinky injury, and reported pain at a level 10. The pain management doctor stated that claimant could "possibly" have RSD and recommended medication, physical and occupational therapy, and nerve blocks. NONE of the doctors ever stated that claimant was totally disabled from working. Following the FCE and opinion of Dr. Bilderback, the employer offered a job and terminated benefits. The claimant did not return and filed suit. Incredibly, the WC judge awarded TTD benefits and ordered approval of the pain management treatment, despite the fact that the prior treating physician had found that pain management treatment was contraindicated and that the claimant should not be treated with narcotic pain relief. The 2nd Circuit found that the workers' compensation judge was manifestly erroneous in finding that the claimant was entitled to TTD benefits, noting the obvious evidence that no physician, not even the pain management doctor, provided any opinion that the claimant

was totally disabled. However, on the issue of entitlement to pain management treatment, the 2nd Circuit agreed with the WC judge and affirmed the award of treatment. The interesting point about the appeal court's opinion is that it referred to the often-quoted principle of law that the treating physician's opinion should be accorded greater weight than that of a doctor who examines the claimant once or twice, but chose not to follow it. Although the treating doctor and another doctor found no reason for the alleged ongoing complaints of pain, and that no further treatment was needed, the appeal court affirmed the WC judge's decision to reject these opinions in favor of the opinion of a pain management doctor who saw claimant one occasion a year post-accident. *Hodge v. Manpower Temporary Services* (La.App. 2 Cir. 9/22/10).

COURT ACCEPTED OPINION OF DOCTOR WHO SAW CLAIMANT ON ONE OCCASION, AND RULED THAT CLAIMANT WAS PERMANENTLY DISABLED DESPITE CONTRARY OPINION OF CLAIMANT'S TREATING ORTHOPEDIC DOCTOR WHO TREATED CLAIMANT 4 YEARS AND APPROVED 11 JOBS

A 61 year old construction supervisor for Tulane hurt his back on September 5, 2003. He was paid TTD benefits for the next 4 years during which time he underwent two surgeries (a laminectomy in 2003 and a fusion in 2004) and ongoing treatment by his orthopedic doctor, Dr. James Butler. In May 2007, Dr. Butler opined that claimant was capable of engaging in sedentary employment and approved 11 jobs identified by the vocational case manager. Based on the job approvals, benefits were terminated. Claimant admitted that he could drive his pickup truck, shop with his wife, do limited cooking, walk on a treadmill for short periods of time, and help cut his grass if he took breaks, but refused to apply for any of the jobs because of back pain and numbness in his legs and feet. Dr. Butler reported that there was evidence of symptom magnification, as corroborated in an FCE. The WC Judge denied the claim for disability benefits based on Dr. Butler's opinion and release to work. However, the 4th Circuit Court of Appeal reversed based on the following. Claimant testified that because of back pain he was required to lie down, "off and on," for 8 hours every day, and the court noted that none of the jobs identified specifically allowed for the employee to lie down as needed. The evidence also showed that claimant's fusion from the 2004 surgery was not completely solid—which Dr. Butler acknowledged when stating he could still perform sedentary work. Finally, the evidence showed that claimant was also receiving treatment for several unrelated medical conditions that affected his work ability, including high blood pressure, diabetes, unrelated leg and knee problems, and urological problems. The 4th Circuit relied primarily on the opinion of an orthopedic doctor, Dr. Ploger, who examined claimant on <u>ONE occasion</u> and held that because of claimant's pain, age and multitude of unrelated conditions, he was unemployable. However, Dr. Ploger admitted that he never asked claimant what activities he performed around the house. He also admitted that claimant's leg numbness could have been attributable to his diabetes, and that he did not do any testing to confirm. Finally, Dr. Ploger agreed with Dr. Butler that there was evidence of symptom magnification. Despite these apparent weaknesses in the weight and validity of Dr. Ploger's opinion, the court accepted it over Dr. Butler's opinion who had the benefit of operating on claimant and treating him for 4 years. The 4th Circuit acknowledged the general rule that the testimony of the treating physician is afforded greater weight than a physician who examines the patient only once or twice. However, the it also noted that the treating

physician's testimony is not irrebuttable and that the trier of fact is required to weigh the testimony of all medical witnesses. *Duplessis v. Tulane University Medical Center* (La.App. 4 Cir. 8/25/10).

COURT REJECTS CLAIMANT'S TESTIMONY CONCERNING OVERTIME AND "MOONLIGHTING" WAGES EARNED WITHOUT DOCUMENTARY SUPPORT

Claimant filed suit disputing the average weekly wage calculation utilized by the employer as the basis for TTD benefits. Claimant was an hourly worker, and the employer's records for one of the weeks used in the calculation showed that claimant worked only 12.5 hours, although records for the other three weeks showed that he worked full weeks with overtime. Claimant alleged that he worked a full week with overtime in all the weeks and the employer's records were in error. The employer admitted that the actual time cards had been destroyed, and that it had payroll records that had been transcribed from the original time clock records. The employer did have check records showing that claimant was only paid for 12.5 hours for the week in question. The claimant did not have any documentary proof of his claim, just the testimony of he and his wife that he worked a full week with overtime for the week in question, just the other three weeks. The court ruled in favor of the employer due to claimant's lack of documentary proof. The claimant also alleged that the AWW should have taken into account income from his landscaping business because his work injury resulted in lost income from that job. Again, he offered no documentary proof of what he earned because he was paid in cash, and did not report the income to the IRS. His only proof was his testimony, plus testimony of his wife and a friend who did the landscaping work with him. Again, the court ruled in favor of the employer due to lack of any physical evidence from the claimant. *Hunter v James Machine Works, Inc*. (La. App. 2 Cir. 9/22/10).

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