



### **ONE BEATS THREE: COURT ACCEPTS SURGERY OPINION OF CLAIMANT'S ORTHOPEDIC DOCTOR OVER THREE OTHER ORTHOPEDIC DOCTORS, ONE OF WHOM WAS COURT-APPOINTED**

Claimant injured her back in February of 2004 lifting a bucket while standing on a ladder. She received conservative treatment for the next 4 years without relief of symptoms. Claimant filed a 1008 in January of 2008 seeking approval for a back surgery (a microdiscectomy) that was recommended by Dr. Chris Cenac, Jr., orthopedic surgeon. Defendant had denied the necessity of the surgery based on the opinions of orthopedic physicians, Dr. Delmar Walker and Dr. Michael A. LaSalle. Both of these orthopedic doctors recommended weight reduction and exercise, and believed that surgery would not be beneficial in absence of these measures. Because there was a dispute about surgery, the workers' compensation court appointed another orthopedic doctor, Dr. James C. Butler, to render an opinion. Dr. Butler questioned whether surgery would provide claimant with relief, and instead recommended conservative treatment. Faced with three opinions that surgery was not appropriate, and one contrary opinion, the workers' compensation judge ruled that the surgery was reasonable and necessary, and ordered the employer to pay for it. The judge noted that claimant had undergone conservative treatment for many years without much improvement. The employer appealed the judgment, and the court of appeal affirmed the judge's ruling, stating that the judge was "not clearly wrong" for choosing Dr. Cenac's opinion over the opinion of the other three orthopedic doctors. *Ford v. Sodexo, Inc.* 2010 CA 0182 (La. App. 1 Cir. 8/2/10)

### **PPO CONTRACTS RULED ILLEGAL, BUT EMPLOYER NOT LIABLE FOR PENALTIES AND FEES**

Central Louisiana Ambulatory Surgical Center, Inc. (CLASC) filed ten disputed claim for the underpayment of medical bills regarding services provided to ten injured workers who were employed by various employers. The employers paid CLASC according to PPO contracts that discounted payment to CLASC by 20%. The fees charged by CLASC had already been discounted pursuant to the La. Workers' Compensation Fee Schedule before application of the PPO discount. The trial court ruled in favor of CLASC on each of the ten claims, finding underpayment ranging from \$137 to \$2,200. Additionally, the trial court awarded a single attorney fee for all the claims, but awarded a \$2000 penalty on each of the claims. The employers appealed to the Third Circuit, arguing the trial court erred in concluding that the PPO discounts were not authorized by the Louisiana Workers' Compensation Act, and challenging the fee and penalty awards.

The Third Circuit held that the Act specifically prohibits manipulation of its mandatory provisions, and that employers are not allowed to avoid those provisions through PPO contracts. The court specifically stated that the PPO agreements, if found valid, would usurp the rates and fee schedules established by the Act. The court held that not only do the PPO contracts limit the employer's liability for medical care, they also "threaten the foundation of the workers' compensation system." The Third Circuit did find, however, that based on the existence of the PPO contract, the employer "reasonably controverted" the claim, and as such, CLASC was not entitled to any penalties or attorney's fees. *Central Louisiana Ambulatory Surgical Center, Inc. v Payless Shoe Stores, Inc.*, 2010-86 (La. App. 3 Cir. 7/28/10), 2010 WL 3026527.

### **STRESS IN PERFORMING POST-KATRINA WORK NOT CONSIDERED AN "ACCIDENT"**

In a claim for death benefits, the Louisiana Fourth Circuit held that work-related activity during the aftermath of Hurricane Katrina does not constitute an "accident" in and of itself. In that case, the family of a New Orleans police officer who died shortly after undergoing surgery to repair a perforated bowel on November 19, 2005 filed a claim for death benefits alleging that the officer's death was caused by work conditions following Hurricane Katrina. *Doyle v. City of New Orleans Police Department*, 2009-1683 (La. App. 4 Cir. 8/10/10), 2010 WL 3168230.

### **UNDOCUMENTED WORKERS ARE ENTITLED TO COVERAGE**

A construction laborer fell from a roof while performing roofing work for his employer. The injured worker was unable to recover benefits from his employer as it had failed to pay its workers' compensation premium and its policy was cancelled. The employee then attempted to recover workers compensation benefits from a statutory employer. The statutory employer denied the relationship and further claimed that the employee was precluded from receiving compensation benefits as he was an undocumented worker at the time of the accident. The claimant remained in the country after his work visa expired. After sorting out the coverage and statutory employer issue the judge awarded the employee indemnity benefits, all medical expenses related to the work accident pursuant to the fee schedule and vocational rehabilitation, in addition to penalties and attorney fees. This decision was upheld by the Third Circuit reasoning that they had already determined that a direct employer owed an undocumented worker compensation benefits in *Artiga v. M. A. Patout, and Son*, 95-1412 (La.App. 3 Cir. 4/3/96), 671 So.2d 1138, finding that there is no express statutory provision excluding undocumented workers from workers' compensation coverage. The statutory employer failed to establish why this rule should be applicable only to direct employers. *Rodriguez v. Integrity Contracting*, 38 So.3d 511, 2009-1537 (La.App. 3 Cir. 5/5/10).

**AWW OF A SEASONAL EMPLOYEE PAID A COMMISSION  
IS CALCULATED USING FORMULA APPLICABLE TO COMMISSIONS**

The claimant worked on a commission basis as a truck driver during sugar cane grinding season. He was paid a commission on each load of sugar cane he hauled as a truck driver. Because he was paid a commission, the court held that the average weekly wage and indemnity rate had to be calculated using the formula for commissions, rather than the formula for seasonal. *Lumpkin v. ABEL Trucking of Louisiana, LLC*, 2010-0054 (La.App. 3 Cir. 6/2/10).

**AN EMPLOYER MAY FILE A 1008 EVEN WHEN PAYING ALL BENEFITS  
TO CHALLENGE THE COMPENSABILITY OF A CLAIM –  
NO PENALTIES OR ATTORNEYS FEES AWARDED**

Some workers' compensation courts in this state have refused in years past to hear a claim if there is technically no dispute, i.e. a claim in which the employer has and is paying all benefits, but wants to find out if perhaps it should not be paying benefits under some defense it may have. In this case, the employee began his career with the Bossier City Fire Department in 1972 where he worked for several years before working for the Bossier Sheriff's Office, Corrections division. He retired from the Fire Department in 1993 with chest pains and high blood pressure. Once working for the Sheriff's Office he continued to suffer with breathing problems, swollen legs, high blood pressure, hyperlipidemia, Type 2 diabetes and mild obesity. After paying the employees medical benefits for four (4) years the City filed a 1008 requesting a declaratory judgment as to the cause of the employee's heart and lung disease and sleep apnea. The compensation judge denied the former fire fighters claim for penalties and attorney fees finding that the employer should not be assessed with penalties in a case in which it filed the Disputed Claim to raise the question as to medical causation and attempting to establish that any indemnity claim was prescribed. The Appellant Court upheld the ruling of the Workers' Compensation Judge finding that while it is unusual for the employer to initiate the claims process, they believe that this was a better alternative than terminating benefits unilaterally – a decision that probably would have been viewed as arbitrary and capricious. *City of Bossier v. Colvin*, 36 So.3d 1207, 45, 278 (La.App. 2 Cir. 5/19/10)



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