

Louisiana Workers' Compensation Decisions

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Supreme Court

First Circuit

Stupp Bros. vs. Alexander, (La. App. 1 Cir. 2/20/18) [EE – M. Sorrells; ER – C. Archey; WCJ – Laramore]

ACCIDENT, CAUSATION/AGGRAVATION, 1208 FRAUD

Affirmed WCJ's finding that claimant suffered a compensable accident which aggravated pre-existing disc conditions in her neck and back, rejecting employer's assertion that psychological testing indicating "malingering" constituted a violation of R.S. 23:1208.

Claimant, an administrative assistant, felt a "tear" in her back while moving a printer at work. She immediately reported the incident to a supervisor, who sent her to a company doctor. She reported low back pain radiating to her thighs. The attending doctor diagnosed a lumbar strain, and released claimant to work with OTC medications. Claimant, who had two prior low back surgeries, never returned to work.

After an MRI showed a L5-S1 disc extrusion, claimant began treating with a neurosurgeon, reporting constant low back pain radiating to her legs. She also reported neck and shoulder pain radiating to her hands, which started a few days after the accident. A cervical MRI showed a herniation at C3-4. Claimant's doctor recommended cervical surgery, which was denied pending an SMO and because claimant had not received active therapy per the guidelines.

The SMO's neurological exam was normal, and he found the MRI results to be "largely chronic" and "nonspecific." He also noted significant depression and anxiety contributing to claimant's symptoms, and suggested that she had not yet exhausted appropriate conservative care. As such, surgery was premature.

The treating neurosurgeon continued to recommend surgery and noted deterioration of claimant's condition. An IME generally agreed with the treating doctor's interpretation of the MRI's and concluded that claimant could be a surgical candidate, but suggested additional conservative treatment before surgery.

Claimant's neurosurgeon continued to report that her cervical condition was worsening. After reviewing a cervical MRI, the SMO amended his report to note a "slight" worsening

at C6-7, stating that if claimant was beginning to have worsening objective signs of myelopathy, “then I would absolutely agree that cervical surgery is necessary.”

A psychiatric evaluation documented malingering and somatic system disorder, with a high risk for a poor surgical result. Claimant’s choice of neuropsychologist largely disagreed. Her neurosurgeon testified that regardless of psych evaluations, she could not fake the MRI findings that warranted cervical surgery.

The employer initiated benefits immediately, but filed a dispute under R.S. 1314(E), contending that claimant did not sustain an accident, that her neck injury was not caused by the accident, and that she had forfeited benefits due to fraud based on malingering. Following trial, the WCJ rendered judgment for the claimant, finding *inter alia* that she suffered a compensable accident which aggravated pre-existing injuries in her neck and back, that she was entitled to the cervical surgery as a variance from the MTG, and that she had not committed fraud.

The appellate court affirmed. It agreed that the finding of malingering by defendant’s neuropsychiatrist did not amount to fraud, stating: “*Following our exhaustive review of the record and exhibits in this matter, and considering the obvious credibility determinations made herein, we find no manifest error in the OWC hearing officer’s ruling.*”

Likewise, applying the Louisiana Supreme Court’s *Bruno* standard, the court found no manifest error in the WCJ’s finding of a compensable accident which aggravated claimant’s pre-existing neck and back conditions. Finally, the court found no error in the decision to grant a variance and approve the cervical surgery. Reviewing the medical evidence, the court found that the WCJ weighed the various medical opinions and selected between two permissible views of the evidence. Thus, there was no manifest error. [Note – the cervical surgery was denied as unrelated, such that no 1009 was required].

Hamilton vs. GCA Services Group, Inc., (La. App. 1 Cir. 2/21/18) [EE – T. Williams, ER – L. Louapre; WCJ – Laramore]

INDEPENDENT MEDICAL EXAMINATION (R.S. 23:1123)

Reversed WCJ’s judgment to the extent it precluded an IME from addressing whether claimant had reached maximum medical improvement.

Claimant suffered a compensable injury. Her neurosurgeon recommended surgery, disabled claimant from working, and concluded she had not reached MMI. Defendant’s SMO concluded that the work accident aggravated claimant’s pre-existing cervical and lumbar spondylosis, but found that she could return to work as a custodian with lifting restrictions and should have reached MMI.

Defendant requested an IME through OWCA Medical Services. Claimant filed a motion to limit the scope of the IME to work capacity, prohibiting the IME from assessing other issues including MMI. Defendant argued that MMI was included in the “condition of the employee” under R.S. 23:1123. The WCJ granted the motion.

On appeal, the court reversed the WCJ’s decision to the extent it prohibited the IME from addressing MMI. It noted that MMI is a potential trigger for termination of TTD benefits under R.S. 23:1221. The court concluded that MMI is “closely-related to condition and ability to work,” and falls within the purview of §1123.

Second Circuit

Johnson vs. Northwest Louisiana War Veterans Home, (La. App. 2 Cir. 2/28/18) [EE – Greg Unger; ER – David Gilmer; WCJ – Smith]

SUPPLEMENTAL EARNINGS BENEFITS, PENALTIES

Affirmed WCJ’s award of SEB, penalties, and attorney fee

Claimant suffered a compensable injury in 2013 when a bed side rail collapsed. She eventually required hand surgery in 2014. She received TTD for several months post-surgery, then returned to modified work, and eventually recovered her pre-accident capacity. Claimant underwent a second hand surgery in January of 2016, more than one year after her last TTD payment. The surgeon directed her to limit activity, and then progress as tolerated. In response to a letter from claimant’s attorney, the workers’ compensation claim manager asked the physician for more specific information regarding claimant’s restrictions. She did not receive a response and did not follow up with the doctor.

Instead, based on FMLA documents enumerating restrictions on “pushing, pulling, lifting,” etc., the employer concluded that claimant would be totally disabled from 1/25/16 to 4/18/16. Therefore, she was not entitled to SEB, and any claim for TTD had prescribed. Claimant filed a Disputed Claim. At trial she testified that she began therapy after the surgery, and was capable of doing some type of modified work from February to April, as she did after the first surgery. The WCJ concluded that the medical records were ambiguous, but that claimant was credible regarding her ability to perform modified duty during the disputed period. She awarded SEB, plus a \$2,000 penalty and \$3,200 in attorney fees.

The court of appeal affirmed finding no manifest error. In affirming the penalty and awarding an additional \$750 attorney fee for work on appeal, the court noted that it was incumbent on the payor to follow up on its request for additional information from the physician.

Third Circuit

Vaughn v. Dis-Tran Steel, LLC, (La. App. 3 Cir. 2/7/18) [EE– J. Beck; ER – S. Zimmer; WCJ – Braddock]

ACCIDENT, INTOXICATION, PENALTIES/ATTORNEY FEES

Affirmed WCJ's decision awarding TTD, medical benefits, penalties and attorney fees, and rejecting intoxication defense.

Claimant allegedly suffered a concussion when a co-worker inadvertently struck him in the back of the head and knocked him unconscious. The employer admitted the incident but denied that claimant suffered a compensable injury. In addition, it asserted claimant was intoxicated and under the influence of Percocet. Following trial, the WCJ rejected the intoxication defense, awarded TTD retroactive to the date of accident, authorized claimant's choice of neurologist and a brain MRI, and awarded \$4,000 in penalties and \$7,500 in attorney fees, with legal interest.

The appellate court affirmed. Regarding intoxication, the court noted that the presumption of intoxication in R.S. 23:1081 applies to "nonprescribed controlled substances." Since claimant had a prescription for Percocet, the employer was not entitled to a presumption of intoxication. Reviewing the competing evidence offered at trial, the court concluded that the employer had failed to prove that claimant was impaired or that his accident was caused by intoxication.

Reviewing claimant's testimony and medical records, the court also rejected defendant's contention that he failed to prove an accident/injury and disability. Co-workers had confirmed the occurrence of the alleged accident. Claimant was taken to the emergency room immediately afterwards, complaining of a headache and dizziness. He was eventually diagnosed with post-concussive syndrome and disabled from work. He had no prior history of headaches or trauma. Although one psychologist found claimant to be a malinger, another believed he suffered post-concussive syndrome. The court concluded that the WCJ's decision in favor of the claimant was not clearly wrong. [Note – in weighing the medical evidence, the court found that the WCJ properly rejected a questionnaire submitted to one doctor by a case manager, finding it was not "competent evidence" as envisioned by *Chaisson vs. Cajun Bag & Supply*, (La. 3/4/98) 959 So.2d 571].

Lastly, the court affirmed the WCJ's award of penalties for the denial of indemnity and the failure to approve a referral to a neurologist within sixty days. [No penalty could be awarded for failure to pay medical bills, since evidence of the bills was not introduced.] It noted that defendant had statements from co-employees evidencing the incident immediately, and did not have any evidence of the intoxication defense until more than

a year post-accident. The court awarded an additional attorney fee of \$5,000 for work on the appeal.

Jackson vs. Aramark Healthcare Services, (La. App. 3 Cir. 2/7/18) [EE – M. Miller; ER – J. Rabalais; WCJ – Palermo]

AWW, INDEMNITY/WEIGHT OF MEDICAL EVIDENCE/PRESUMPTIONS

Affirmed WCJ's denial of indemnity benefits based on IME, but reversed WCJ's failure to address alleged miscalculation of AWW, and awarded a penalty, attorney fee, and interest based on the miscalculation.

Claimant suffered compensable injuries when she fell down a flight of stairs. Employer initiated benefits, but then suspended medicals based on claimant's refusal to attend a neuropsychological exam, and suspended indemnity based on an IME opinion that claimant could return to work. (Medicals were eventually reinstated once the claimant attended the exam). Employee filed a disputed claim contending that her AWW was improperly calculated, and seeking reinstatement of benefits, penalties, attorney fees, costs, and interest.

Following trial, the WCJ ruled in favor of the employer, finding that indemnity benefits were properly suspended based on the IME report and other medical evidence, and that claimant's right arm and low back injuries were not caused by her accident. The judgment did not address the alleged miscalculation of AWW.

The appellate court found that the WCJ erred in failing to rule on the AWW (which it deemed a denial of claimant's request), since it was identified as an issue by claimant's attorney. It concluded that the employer had failed to include a recent raise in calculating claimant's AWW. Using the new pay rate (\$10/hr), the court calculated the proper AWW based on claimant's average regular X \$10, and average overtime hours X \$15, to establish a corresponding compensation rate.

The court rejected claimant's contention that the WCJ committed legal error by failing to award indemnity benefits based on the IME. Acknowledging a legal presumption that a post-accident disability is presumed to be caused by the accident, the court noted that the claimant had a prior history of multiple injuries and health issues. Reviewing medical records from multiple providers, it found that claimant's testimony that she was unable to work conflicted with the objective medical findings. Accordingly, the judgment denying indemnity benefits based on the IME report was not clearly wrong.

Likewise, the court rejected claimant's contention that the WCJ erred in finding that her right arm and low back complaints were not caused by her work accident. Again reviewing the medical evidence, the court noted various opinions that claimant's complaints were "likely due to her preexisting psychological condition and not her physical injuries."

Regarding the IME report, the court dismissed claimant's assertion that it failed to comply with R.S. 23:1317.1 and was not admissible. Noting the "vast discretion" of the WCJ and the more liberal evidentiary rules applicable to OWC claims, the court found no abuse of discretion by the trial court in admitting the report.

The court did reverse the WCJ's denial of penalties, attorney fees, and expenses, awarding a \$2,000 penalty and \$6,000 attorney fee based on the failure to properly calculate claimant's AWW. Likewise, the court awarded legal interest on the amount owed due to the miscalculation.

Duplechin vs. St. Landry Parish School Board, (La. App. 3 Cir. 2/7/18) [EE – R. Smith; ER – C. Joiner; WCJ – Palermo]

CAUSATION

Affirmed WCJ's decision denying benefits based on claimant's failure to prove that her underlying respiratory condition was aggravated by mold.

Claimant, a teacher, suffered respiratory problems which resulted in periodic and sometimes extended absences from work. Claimant subsequently discovered mold in her classroom, which she contended aggravated her condition. She eventually stopped working and sought workers compensation benefits based on an occupational disease. Following trial, the WCJ dismissed the claim, finding that claimant failed to prove causation.

The appellate court affirmed. The court rejected claimant's assertion that causation should be presumed based on medical records showing increased symptoms while she was teaching, noting that the records she referenced were not in the record. The court found that the evidence that was in the record failed to address causation and supported the WCJ's decision. "Given the paucity of evidence," the court concluded that the trial court judgment was not clearly wrong.

Fourth Circuit

Fifth Circuit

