Louisiana Workers' Compensation Decisions
November 2017

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Supreme Court

First Circuit

Poole vs. Guy Hopkins Construction and LUBA, (La. App. 1 Cir. 11/1/17) [EE – M. Miller; ER/IN – W. Waltner; WCJ – Laramore]

MODIFICATION OF JUDGMENT/PTD STATUS

Affirmed WCJ's denial of claimant's motion to convert/modify prior SEB award to PTD.

Claimant suffered a compensable injury in 2003, for which he underwent multiple surgeries including a 2009 spinal fusion. In 2013, the WCJ modified a 2006 judgment and converted claimant's indemnity status to SEB (at full TTD rate). Specifically, the court noted that two physician's including the court appointed IME had concluded claimant could return to some form of work. In 2014, the WCJ signed another judgment recognizing that the employer had paid the 520 weeks of SEB allowed by law. Claimant continued to receive medical and vocational benefits.

In June of 2015, claimant filed a disputed claim to modify the prior judgment and declare him permanently and totally disabled. Following two days of hearings, the WCJ granted the employer's motion for involuntary dismissal under La. C.C.P. art. 1672(B). Specifically, the trial court found that claimant failed to prove PTD status by clear and convincing evidence, or any other change in circumstances warranting modification. The court concluded that the claimant was not credible and that there were "jobs out there" which he could perform.

The court of appeal affirmed. It noted that medical records failed to show any significant change or worsening in claimant's condition since 2012. Moreover, the IME physician found claimant capable of performing various jobs listed by the vocational rehabilitation consultant. In addition, the record supported the WCJ's opinion regarding claimant's lack of credibility. Applying a manifest error standard of review, the court concluded that the WCJ's decision was reasonable and supported by the record.

Fee vs. Pineville Forest Products, (La. App. 1 Cir. 11/1/17) [EE – T. Williams; ER – J. Wilson; WCJ – Laramore]

STATUTORY EMPLOYMENT/SUMMARY JUDGMENT

Reversed WCJ's grant of summary judgment, finding genuine issues of material fact regarding whether defendant was claimant's statutory employer under two-contract rule.

Claimant was seriously injured when he was struck by a limb while working for B&W Logging. B&W was insured by Timberman's, which paid benefits until going bankrupt in September of 2015. In November of 2015, claimant filed a disputed claim against Southern Packaging, contending that the company was his statutory employer. In December of 2015, he filed a separate dispute against Pineville Forest Products, contending that Southern Packaging had hired Pineville, a timber dealer, which had subcontracted the work to B&W. Southern and Pineville filed motions for summary judgment.

The WCJ denied Southern's motion but granted Pineville's, prompting claimant's appeal. The court noted some conflicts between the testimony of the claimant and his wife, and representatives of Southern and Pineville, but attributed the differences to claimant's brain injury.

The court of appeal reversed. The court cited R.S. 23:1061, but noted that there were no written contracts between the parties. Accordingly, only the two-contract theory of statutory employment could apply. In that regard, the court found that the witness testimony created factual issues that precluded summary judgment. It concluded that in granting the motion, the WCJ had improperly weighed the evidence and made credibility determinations.

Big 4 Trucking, Inc. vs. New Hampshire Insurance Company, (La. App. 1 Cir. 11/1/17) [EE/IN1 – F. Whitely; IN2 – E. Liuzza; WCJ – Thompson]

PRESCRIPTION

Reversed WCJ's grant of insurer's prescription exception regarding claim for contribution.

Employee suffered a compensable injury in March of 2014. The employer's insurer, New Hampshire Insurance Co., paid indemnity benefits through 4/25/14, and medicals through 8/12/14. Employee suffered another compensable accident with the same employer on July 2, 2015, by which time employer was insured through Natiowide Agribusiness Insurance Company. Nationwide paid $22,500 in indemnity, and $53,000 in medicals as a result of that accident, and eventually settled the claim for an additional $245,000 on June 17, 2016.

On August 9, 2016, the employer filed a disputed claim against New Hampshire, contending that the 2015 accident was an aggravation of the 2014 injury, and New Hampshire was therefore liable *in solido* for benefits. The petition was amended on November 28, 2016, to add Nationwide as a plaintiff. New Hampshire filed an exception

of prescription, contending that more than one year had passed since it's last payment of medical and indemnity benefits to the employee. The WCJ granted the exception.

The appellate court reversed. Citing R.S. 23:1209, the court held that the same prescriptive periods relative to the employee applied to cross-claims for contribution. However, the court rejected New Hampshire's assertion that a blanket one-year prescriptive period applied to all contribution claims. Instead, the court concluded that claims for contribution regarding medical benefits and SEB are subject to a three year prescriptive period commencing from the last date on which benefits were paid.

Ziegler vs. Slidell Memorial Hospital, (La. App. 1 Cir. 11/2/17) [EE – T. Prout; ER – J. Rabalais; WCJ – Thompson]

SEB/SUMMARY JUDGMENT

Reversed WCJ's grant of summary judgment in favor of defendant employer, finding genuine issues of material fact as to whether jobs were available to claimant nursing assistant.

Claimant injured her shoulder while repositioning a patient, and underwent surgery for a torn rotator cuff. Her doctor eventually concluded she "may be suitable for some types of work." A second medical opinion concluded that claimant had reached MMI and could perform medium level duty with accommodations. The vocational rehabilitation consultant identified potential jobs and sent descriptions to claimant's physician for approval between February 29 and June 20, 2016.

In July of 2016, the employer terminated claimant's indemnity benefits, prompting a disputed claim. The employer filed a MSJ, citing ten jobs identified by voc rehab and approved by her doctor, which were within her geographical area and paid 90% or more of her pre-injury wage. The WCJ granted the motion.

The appellate court reversed. The court first noted that two of the jobs were not approved by claimant's doctor until after her benefits were terminated, and could not serve as a basis for the employer's decision. The approval of two other jobs was qualified or questionable. The court also concluded that there were outstanding issues concerning claimant's pre-injury wage. Accordingly, it was unclear whether the remaining jobs paid 90% of the pre-injury wage. Therefore, based on issues of material fact, summary judgment was improper.

Second Circuit

Elmuflihi vs. Central Oil & Supply, et al., (La. App. 2 Cir. 11/1/17) [EE – D. Street; ER1 – T. Eppling; ER2 – N. Johnson]

EMPLOYMENT RELATIONSHIP, COURSE AND SCOPE

Affirmed WCJ's decision dismissing claim against premises owner/lessor, and awarding benefits against owner of convenience store operating on premises.

Claimant worked as a cashier for defendant Northside. Defendant Central Oil leased the premises to Northside, and also supplied the store with oil and gas for sale on consignment. Claimant was driving away from the store after closing, taking a co-worker home, when he was shot and seriously injured by an unknown assailant. He filed a disputed claim for benefits, claiming that Northside was his direct employer and Central Oil was a statutory employer.

Northside denied that claimant was in the course and scope of his employment. Central denied that claimant was its employee. The WCJ granted Central's motion for summary judgment. The appellate court dismissed an appeal of that decision as not immediately appealable. Following trial on the merits, the WCJ concluded that claimant "was in the act of leaving" at the time of the shooting, and therefore in the course and scope of his employment. She awarded all reasonable medical expenses, along with TTD for two weeks post-accident, and ongoing SEB at the TTD rate thereafter.
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The court of appeal affirmed. The court rejected claimant's contention that Northshore and Central were engaged in a joint venture. Acknowledging that the lease and consignment agreements were detailed, the court observed that such was standard industry practice and noted that both Northshore and Central denied any intent to enter into a joint venture. Finding no factual issue, the court affirmed summary judgment for Central.

Regarding Northshore, the court concluded that the WCJ was not clearly wrong in rejecting claimant's unsupported testimony that he earned $700 per week, in favor of
The defendant's evidence that claimant earned $200 per week, plus $450 per month for room and board, equating to an AWW of $312.50. (The court found that claimant failed to raise Northshore's failure to secure insurance in the trial court.)

Finally, on the issue of course and scope, the court agreed that the claimant had just finished closing the store and was "in the act of leaving" when he was shot. "*In this case, the claimant was an employee of a convenience store. He testified that his normal workday was from 1:00 p.m. until 11:00 p.m. On the night he was injured, he closed the store at 11:00 p.m., per his usual routine. The claimant sustained significant injuries as a result of being shot by an unknown assailant, on his employer's premises, as he was leaving to go home. We find that the WCJ did not err in finding that the claimant's injuries occurred in the course of and arose out of his employment with Northside.*"

<u>Third Circuit</u>

Leger vs. B.O.P. Controls, Inc. and LWCC, (La. App. 3 Cir., 11/2/17) [EE – W. Casanova; ER/IN – J. Berthon; WCJ – Morrow]

SETTLEMENT

Affirmed WCJ's approval of settlement after employee's death.

Employee died unexpectedly due the day after a full and final settlement of $60,000 was submitted to the OWC for approval, but prior to execution of the approval order by the WCJ. The death was unrelated to the claim, and the employer withdrew from the settlement. Decedent employee's son subsequently filed a dispute to enforce the settlement. Following a hearing, the WCJ approved the settlement and employer appealed.

The court of appeal affirmed. The court noted that under R.S. 23:1272(B), WCJ's have no discretion and must approve settlements provided that (1) the attorney has explained the rights and consequences to the employee, and (2) the employee understands the rights and consequences of the settlement. Noting that both requirements were met and that the settlement was submitted prior to the employee's death, the court concluded the "ceremonial," albeit post-mortem, approval by the WCJ was valid.

Guzman vs. Jago Solutions, LLC, (La. App. 3 Cir. 11/2/17) [EE – W. Beaumont; ER – J. Waltz; IN – K. Landry; WCJ – Palermo]

EXCEPTION/ NO RIGHT OF ACTION, EXTINGUISHMENT BY CONFUSION

Reversed WCJ's grant of no right of action exception.

Claimant filed a disputed claim seeking benefits as the result of a fall. The employer and its workers compensation insurer, through separate counsel, filed various peremptory exceptions. The employer LLC asserted, *inter alia*, that it had been dissolved, was no longer a juridical entity, and lacked procedural capacity to be sued. Thereafter, the insurer filed an exception of no right of action and extinguishment of debt by confusion, asserting that as a member of the former LLC, the claimant personally assumed all obligations of the LLC after its dissolution. Accordingly, any obligation for workers compensation benefits was extinguished by confusion.

Following a hearing, the WCJ granted the exceptions and dismissed the claim. Claimant appealed, asserting that the WCJ erred by allowing evidence in support of the exceptions, and by allowing the defendants to urge affirmative defenses at the hearing.

The court of appeal reversed, noting evidence outside of the petition may not be considered regarding exceptions of no cause, nor may the excepting party raise affirmative defenses (e.g. extinguishment by confusion) at the hearing on the exception.

Dorsey vs. Protemp Staffing Solutions, (La. App. 3 Cir. 11/15/17) [EE - S. Auzenne; ER – C. Farr; WCJ – Bushnell]

APPEALS/TIMELINESS

Remanded matter to OWC for the limited purpose of a contradictory hearing to determine if pro se claimant timely fax-filed a motion for new trial, thus extending the delay to file an appeal, with the hearing transcript to be supplemented in the appellate record.

LUBA vs. Babineaux, (La. App. 3 Cir. 11/15/17) [EE – D. Bankston; ER – E. Waltner; WCJ – Morrow]

MODIFICATION OF PTD STATUS, 1208 FRAUD

Affirmed WCJ's denial of motion to modify disability status, and denial of 1208 fraud.

Self-employed electrical contractor suffered a compensable injury in 2000 and was ultimately adjudicated PTD in 2012. In 2014, the employer/insurer filed a new disputed claim contending that claimant was no longer PTD and that he had committed fraud by working while receiving benefits. Video surveillance and other evidence showed claimant engaging in various supervisory-type duties and performing small electrical jobs on a gratuitous basis. Medical evidence showed and claimant acknowledged that a 2011 surgery had improved his symptoms somewhat, but that he still complained of back pain and remained totally disabled by his doctor. A friend testified that claimant performed some supervisory duties for his electric company, but that his work was not billed to the customer. Claimant was not paid, but did receive "deer, fish, and fuel."

Following trial, the WCJ found no change in circumstances and no fraud. The court of appeal affirmed. The court noted that under R.S. 23:1310.8, the party asserting a change in circumstances bears the burden of proof. It found that the employer did not present evidence of any wages that could be earned from claimant's nominal activity, or that he could perform them on a regular basis. Applying a manifest error standard and noting that the WCJ had observed claimant's condition for over a decade, the court concluded that the WCJ's conclusion re his disability status was not clearly wrong. The court rejected any contention that claimant had to "reprove" his PTD status by clear and convincing evidence. Finally, the court found not manifest error re the denial of the employer's 1208 fraud claim.

Coolidge vs. Butler, (La. App. 3 Cir. 11/22/17) [EE – P. Benoist; ER – C. Watson; WCJ – Jones]

APPEALS

Where the WCJ failed to set an appeal bond, the court granted the claimant's motion to dismiss the employer's appeal as premature, but remanded the matter to the OWC to set a bond in accordance with R.S. 23:1310.5.

Sandifer vs. Calcasieu Parish Public Works, (La. App. 3 Cir. 11/22/17) [EE – T. Townsley; ER – E. Waltner; WCJ – Bushnell]

1225 OFFSET

Affirmed WCJ's denial of employer's request for an offset based on employer funded portion of disability benefits received by the employee.

Claimant suffered a compensable back injury in 2005. He underwent surgery but was eventually diagnosed with failed back syndrome and deemed PTD by his physicians. A trial was held to determine claimant's disability status and whether the employer was entitled to an offset based on disability benefits paid to the claimant. Re the offset, one witness testified that the employer funded 48.85% of the payments. However, the actuary for the fund (PERS) testified that "it is impossible to determine the percentage of contributions the employer makes to the trust to fund disability benefits for an individual employee because the employer contribution rate is paid by the total salary of all employees." The WCJ found that the employer failed to carry its burden of proof re the offset, and assessed a $2,000 penalty and $20,000 in attorney fees for improper taking of the offset.

The employer filed a motion for new trial seeking to remove the penalty and attorney fees, asserting that it had sought but never taken the offset. The WCJ granted the motion re the penalty, and reduced the attorney fees to $12,500.

The court of appeal affirmed, finding that the employer failed to meet its burden of proving the percentage contribution for the individual employee. The court stated: "*The Parish … could not provide information which was not undisputed or uncontradicted testimony. The testimony provided by Ms. Tulley is disputed and contradicted by the testimony of the PERS actuary, Mr. Curran. The trial court found that Ms. Tulley provided a percentage for the overall employer contribution to PERS but found this to be an estimate and not exact. The trial court clearly relied on Mr. Curran's testimony which noted that the funds are so co-mingled that it is impossible to determine the contribution for an individual employee such as Mr. Sandifer.*"

The court also affirmed the award of attorney fees, based on the employer's failure to stipulate to PTD status, and awarded an additional $5,000 for work on the appeal.

Fourth Circuit

Fifth Circuit

Perdomo vs. RKC, LLC, and LWCC, (La. App. 5 Cir. 11/29/17) [EE – S. Wanko; ER/IN – J. Berthon; WCJ – Bishop]

SEB/UNDOCUMENTED WORKERS

Reversed WCJ's reduction of indemnity benefits, with two judges concurring in the result.

Claimant suffered a compensable injury. Defendants initially paid indemnity benefits at the weekly rate of $420, but then reduced the payments to $323.33 based on an alleged earning capacity of $145 per week. Claimant challenged the reduction, contending (1) that he was undocumented and could not obtain the jobs on which defendants relied, and (2) the jobs were inappropriate because they were not approved by his physician. Following trial on the merits, the WCJ concluded that the reduction was proper and rejected claimant's assertion that his undocumented status vitiated the otherwise appropriate job relied on by the defendants.

The court of appeal, via Judge Johnson with two judges concurring in the result, reversed and reinstated benefits at the rate of $420. The court noted that the issue was *res nova* in Louisiana, but cited decisions from other jurisdictions that were on point. "*Defendants in this matter failed to present any evidence that Mr. Perdomo was eligible to work in the United States or that he fraudulently represented he could legally work at the time he was hired. Thus, like the employer in Gonzalez, supra, because Defendants failed to show that RKC properly complied with the requirements of the IRCA, 8 U.S.C. § 1324a and La. R.S. 23:992, we find that RKC is imputed with having knowledge of Mr. Perdomo's undocumented status upon hiring. Since RKC knew of Mr. Perdomo's undocumented status, it also had knowledge or should have known of Mr. Perdomo's ineligibility for rehiring in the event of an injury within the scope and course of his employment. Accordingly, Defendants should fairly bear the responsibility for Mr. Perdomo's current predicament. Thus, placing the burden of proving job availability for Mr. Perdomo on Defendants is consistent with the purpose of the IRCA."* The court declined to award penalties and attorney fees.

[Note Chaisson, J.'s concurrence, finding that the reinstatement of benefits was proper because defendant failed to prove suitable employment was available per the S. Ct.'s criteria in *Banks*. Leblanc, J., sitting pro tempore, "concurs in part with reasons assigned by Judge Chaisson."]