



**LOUISIANA APPELLATE COURT DECISIONS – WORKERS’ COMPENSATION**

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**Supreme Court**

**First Circuit**

**Second Circuit**

**Third Circuit**

Heathcote vs. D&D Drilling & Exploration, WCA 16-167 (La. App. 3 Cir. 9/28/16)

**Fraud, Summary Judgment**

Affirmed WCJ’s grant of summary judgment in favor of the employer/carrier, dismissing claim for death benefits based on fraud.

Claimant sought death benefits, contending she was the concubine of the deceased employee. In deposition, she repeatedly denied any other source of support in the months preceding the employee’s death other than the deceased employee’s wages. Additional discovery confirmed that she had received over \$12,000 from an attorney’s office in conjunction with the pending adoption of her unborn child. Defendant offered the affidavit of the adoption attorney in support of a motion for summary judgment. The WCJ granted the motion and dismissed the claim.

The court of appeal affirmed. The court rejected claimant’s contention that the WCJ had erroneously weighed her veracity, noting that claimant failed to offer any evidence to contradict the defendant’s evidence. It cited prior jurisprudence that a fraud defense under 23:1208 is appropriate for summary judgment, and agreed with the trial court’s conclusion that there was no material issue of fact that claimant had violated 1208.

## Fourth Circuit

Tolley vs. James Construction Group, 2015-CA-1323 (La. App. 4 Cir. 9/28/16)

### **Unauthorized Third Party Settlement, Buy Back, Credit, Mileage**

Claimant was injured in August of 2012 while driving a float in the course and scope of his employment. He was treated and released with no restriction. He returned several days later and was deemed non-occupationally disabled. The employer terminated him at that time for reasons unrelated to his employment. Claimant returned to his home in Florida. He saw a physician who disabled him from September 4-11, 2012, and referred him to an orthopedic surgeon. Claimant did not see an orthopedist until July 10, 2013, allegedly because he could not find a physician who would take Louisiana workers comp. That doctor disabled him due to his work injury and said he should not have been working. Claimant settled a third party claim for the accident on November 13, 2013, for \$8631.28 (\$15,000 minus costs and attorney fees), without authorization. The employer terminated benefits at that time pursuant to R.S. 23:1102. On March 14, 2014, claimant paid half of the net settlement proceeds to buy back his compensation rights and his benefits were reinstated.

Following a first trial, the WCJ awarded claimant continuing indemnity benefits retroactive to the accident date, along with medicals, 8K penalties, and attorney fees. However, the court did not rule on defendant's motion to strike certain evidence. Thereafter, following the WCJ's retirement, a different WCJ granted the motion to strike. A third WCJ then granted a motion for new trial, which was ultimately heard by a fourth WCJ.

Following the second trial, which was based on the written record of the first trial, the WCJ concluded that claimant's disability began on July 10, 2013. The court awarded TTD benefits through November 13, 2013, but denied benefits for the period from November 13, 2014-March 14, 2014, based on the unauthorized settlement. The court also denied claimant's demand for mileage based on insufficient proof that the claim was submitted.

The appellate court affirmed the trial court's finding in part, and reversed in part, as follows:

- The trial court correctly found that claimant's compensable disability developed on July 10, 2013, based on the absence of any medical evidence showing a compensable disability prior to that date.
- The trial court correctly awarded the employer a credit of \$8,631.28 (the full net amount of the third party settlement received by claimant after deduction of costs and attorney fees), rather than 50% of that figure.
- Claimant was not entitled to TTD benefits for the period from November 13, 2013- March 14, 2014, because he failed to pay the full 50% for buy back as

required by 23:1102. Claimant had tendered 50% of the total settlement minus attorney fees and costs. However, the statute required that he pay 50% of the settlement minus attorney fees only (requiring an additional payment of \$371.86). The court did not address whether claimant would be entitled to the disputed period once he paid the outstanding amount owed.

- In light of the failure to pay the full buy back amount, claimant was not entitled to penalties for delays in paying TTD after March 14, 2014.
- The WCJ erred in finding insufficient proof of claimed mileage expenses, in light of claimant's testimony and a letter documenting the request for reimbursement for two trips from Florida to Louisiana. The court remanded the matter to the WCJ to award the mileage and assess penalties and attorney fees based on defendant's failure to pay it.

Orozco vs. Aries Building Systems, 2016-CA-0187 (La. App. 4 Cir. 9/28/16)

### **Employment Relationship**

Reversed WCJ's finding that claimant failed to prove decedent had a compensable employment relationship with the defendant employers.

Decedent was killed while moving trailers from a naval base. At the time, he was paid by a business called "Filser," which was a subcontractor for another business named "Aries." Filser was run by decedent's father, who did not speak English. Decedent served as a middle man for his father in many aspects of the business. However, he did not invest in the business and his earnings did not correspond with any profits or losses of the business. Decedent reported his income as a sole proprietor/construction contractor. Decedent's father denied that he and his son were partners, and asserted that the son was an independent contractor.

Nevertheless, noting that decedent was very involved in the "business side" of Filser, the WCJ concluded that he was a partner with his father. Accordingly, the court found that claimant failed to prove a compensable employment relationship between the decedent and either Filser or Aries.

The court of appeal reversed. It concluded that the absence of any written or verbal partnership agreement, whereby decedent and his father shared in the profits and losses of Filser, was fatal to the WCJ's finding of a partnership. Continuing, the court addressed the WCJ's conclusion regarding employment, first noting the presumption of employment under R.S. 23:1044. Recognizing that the presumption is rebuttable, the court concluded that the trial court failed to apply the correct analysis in determining whether defendant's had rebutted the presumption of employment. The court remanded the matter to the WCJ with instructions to apply the required analysis to assess whether claimant was an employee or an independent contractor engaged in manual labor.

## **Fifth Circuit**

Mangiaricina vs. Avis Budget Group, 16-CA-211 (La. App. 5 Cir. 9/22/16)

### **Modification of Judgment, Medical Fee Schedule, Third Party Payments**

Affirmed WCJ's decision, modifying judgment to specify that medicals owed by the employer were subject to the workers' compensation fee schedule, and that the employer was entitled to a credit for medicals paid by a third party health insurer.

Claimant suffered a compensable accident. Defendant denied a shoulder surgery recommended by her treating physician, contending the surgery was due to a preexisting injury. Claimant had the surgery via her health insurance. Following trial, the WCJ found the surgery to be compensable and ordered defendant to pay all related medicals. The decision was affirmed and the Supreme Court denied writs.

More than thirty days after the writ denial, defendant then filed a motion to modify and stay the judgment, asserting that the parties could not agree on what constituted satisfaction. Specifically, claimant contended she was entitled to the retail charge for the treatment, while defendant asserted it only owed the fee schedule amount. In addition, defendant claimed a credit for the medicals paid by claimant's health insurer pursuant to R.S. 23:1212. Claimant asserted that the WCJ could not modify a judgment that was final. The WCJ granted defendant's motion, modifying the judgment to state that the medicals were limited to the fee schedule and granting the credit under 23:1212.

The appellate court affirmed, finding that La. C.C.P. art. 1951 provided the WCJ authority to clarify the judgment provided that it did not alter the substance of the decision. The court concluded that the WCJ's decision simply explained what was already in the existing judgment. The court rejected claimant's position that the earlier decisions, rejecting the \$750 cap provided in R.S. 23:1142, precluded application of the fee schedule.

### **Other Decisions of Note**