

LOUISIANA APPELLATE COURT DECISIONS – WORKERS’ COMPENSATION

NOVEMBER 2016

Supreme Court

Mire vs. OLOL, 2016-CC-1411 (La. 11/15/16)

Prescriptions/1010 Process

Supreme Court denies writs in multiple cases re appellate court decision that prescriptions are not subject to the 1010/1009 process.

First Circuit

Second Circuit

Third Circuit

Rouly vs. Perero Companies, Inc. and LUBA, WCA 16-385 (La. App. 3 Cir. 11/2/16)

PTD, Aggravation of Prior Injury, Interruption of Prescription/Solidary Obligors

Affirmed WCJ’s decision finding claimant permanently and totally disabled, reversed grant of prescription exception on medicals, and remanded for further proceedings.

Claimant suffered a compensable accident in 2003, which was not disputed. However, he had previously suffered a compensable injury in 1990, suffering burns and multiple other injuries in a helicopter crash. He received a cervical fusion and multiple other surgeries as a result of the 1990 accident, and was still suffering from PTSD at the time of the 2003 accident.

In 2006, the claimant and the respective employers entered a consent judgment agreeing that the 2003 employer was liable for all indemnity and medical benefits related to that accident, while the 1990 employer was responsible for ongoing treatment of claimant’s PTSD caused by the helicopter crash.

In 2013, having paid 520 week of indemnity, the 2003 employer terminated benefits, prompting a disputed claim. The employer disputed claimant’s ongoing disability and asserted that medical benefits had prescribed. Following trial on the merits, the WCJ found that the 2003 accident aggravated claimant’s PTSD and that he was permanently

and totally disabled as a result. However, the court also concluded that his claim for medical benefits due to the 2003 accident had prescribed.

The court of appeal affirmed the award of PTD. The court noted the WCJ's finding that while claimant's orthopedic injuries did not preclude him from performing sedentary work, the aggravation of his PTSD, combined with his age, education level, work history, and unsuccessful vocational rehabilitation, clearly indicated his inability to return to the workforce. However, the court reversed the trial court's finding that medical benefits had prescribed, stating that the 2003 employer was solidarily liable with the 1990 employer due to the aggravation of claimant's PTSD and chronic pain syndrome. Since the former employer had continued to pay medicals, that interrupted prescription as to the 2003 employer's responsibility for same, notwithstanding the 2006 consent judgment.

Hypolite vs. LWCC, WCA 16-387 (La. App. 3 Cir. 11/2/2016)

1208 Fraud

Affirmed WCJ's decision dismissing claim for fraud based on claimant's false statements to his doctor, and collection of income from a personal business while receiving TTD.

Claimant allegedly injured his back at work. He complained of "10/10" pain to his doctor, which significantly restricted his activities. However, surveillance video showed him performing multiple activities conflicting with his statements, including walking, bending, lifting, etc., which the court found sufficient to support the WCJ's decision.

Jack vs. Union Tank Car Company, WCA 16-510 (La. App. 3 Cir. 11/2/2016)

SEB/Suitable Employment, Sham Rehabilitation

Affirmed WCJ's decision awarding SEB and finding that modified employment was not suitable, but denying that the employer engaged in "sham rehabilitation" for the purposes of awarding penalties and attorney fees.

Claimant injured his back in 2011 and received TTD. He ultimately required back surgery. Thereafter, he was released to light or sedentary duty by his doctor, and an FCE was "positive for light duty." The employer offered claimant a sedentary position as a security guard, checking visitors in and out. Claimant was allowed to sit in a metal chair, but otherwise, the employer made little effort to make the job comfortable. E.g., claimant was not provided with any protection from the elements, was not allowed to use a radio, etc. He attempted to perform the job on three separate occasions, but complained that it aggravated his symptoms and increased his pain. His complaints were validated by worsening diagnostic test results in his medical records.

The WCJ concluded that claimant had met his burden of proving that he was unable to perform the job due to significant pain. She found that claimant's testimony regarding increased pain was credible, noting the employer's limited effort to accommodate him. Accordingly, claimant proved that he was unable to perform the security guard position due to his pain, and was entitled to SEB. Nonetheless, while noting the employer's limited effort to make the job comfortable for claimant, the court rejected the contention that the job was a sham and denied claimant's request for penalties and attorney fees. The court of appeal affirmed on all counts, finding no manifest error.

Simmons vs. LUBA, WCA 16-523 (La. App. 3 Cir. 11/2/2016)

SEB/Credit for Corporate Earnings and Equipment Rental Payments, Penalties and Attorney Fees

Affirmed WCJ's award of SEB and penalties, but remanded for further proceedings regarding the amount of attorney fees.

Claimant and his wife owned a contracting company which was set up as a "S" corporation. Claimant injured his ankle on the job. He received medical benefits but continued working for two years, until he required surgery for the injury. Thereafter, the corporation's insurer began paying TTD based on an agreed AWW of \$750. Claimant subsequently returned to work in a supervisory capacity for the company, but was unable to perform the labor he did previously. Accordingly, he paid himself a salary of \$200 per week. The carrier initially paid SEB based on that amount. However, it eventually terminated indemnity benefits contending (1) that the corporation's undispersed income should be counted as income, and (2) that equipment rental paid by the corporation to claimant should also be counted as income. It also sought a credit for a portion of SEB, based on claimant's testimony that he may have received more than \$200 after he returned to work. The WCJ rejected the carrier's position and awarded claimant ongoing SEB based on his \$200 per week salary, along with penalties and attorney fees.

The court of appeal affirmed. It rejected the carrier's contention that the company's undispersed earnings could be attributed as income, noting that the company was a corporation rather than a sole proprietorship. Likewise, citing established jurisprudence, the court held that the equipment rental was a return on capital and not income for purposes of calculating SEB.

The court also affirmed the WCJ's award of penalties and attorney fees. However, regarding the latter, the court noted that the claimant had initially failed to provide certain information requested by the carrier to validate his wage claim. Thus, the carrier's initial refusal to pay indemnity was reasonable. The court concluded that the claimant was only entitled to attorney fees for the period after the information was provided and the carrier had sufficient time to review it. Since the claimant's attorney

did not indicate the dates on which he performed the work itemized in his statement, the court remanded the matter to the WCJ for further proceedings in that regard. Claimant's attorney received an additional \$1,500 for work on the appeal.

Iberia General Hospital vs. St. Mary Sugar Cooperative, WCA 16-532 (La. App. 3 Cir. 11/2/2016)

Medical Billing

Affirmed WCJ's award of underpayment, penalty, and attorney fee to a hospital for lab work.

In a compensable claim, the claimant received lab work at the petitioner hospital. The hospital sought reimbursement of 90% of the billed charges. The payor reimbursed a lower amount based on the CPT code fee allowed for non-hospital providers. The WCJ found that the administrative rules were clear and that the hospital was entitled to the outpatient reimbursement of 90% billed charges. Accordingly, he awarded the amount of the underpayment, plus a \$2,000 penalty and \$3,000 in attorney fees. The court of appeal affirmed and awarded an additional \$2,000 in attorney fees.

Richard vs. Office of Risk Management, WCA 16-227 and WCA 16-228 (La App. 3 Cir. 11/30/2016)

Claimant, a civil service employee, was injured in 2005. He initially participated in the civil service "buy back" program, whereby he returned his indemnity checks to the state and used accrued leave in order to receive his full salary and preserve certain benefits. In addition, he initially received disability retirement benefits funded through the state, before converting to service retirement in 2008.

In 2012, the state obtained a judgment allowing it to take an offset for the claimant's retirement benefits. The judgment was based on the erroneous assertion that claimant remained on disability retirement. In 2014, the claimant filed a motion to nullify the 2012 judgment based on the error. The state filed a motion to modify the 2012 judgment to reflect the error. The matters were consolidated and following trial on the merits, the WCJ granted claimant's request to nullify the judgment, and awarded \$13,000 in attorney fees. In the alternative, the court modified the judgment to reflect that the state's credit ended in 2008, when claimant's retirement converted from disability to service retirement.

The court of appeal affirmed the nullification of the 2012 judgment, and reversed the judgment to the extent it granted the state's request to modify the 2012 judgment. The court found that the 2012 judgment was based on fraud or ill practices, and therefore, was properly annulled rather than modified. The court affirmed the award of attorney fees per La. C.C.P. art. 2004(C), as within the trial court's discretion, and awarded an additional \$4,000 for work on appeal.

Fourth Circuit

Burgess vs. Sewerage and Water Board of New Orleans, 2015-CA-0918 (La. App. 4 Cir. 11/23/2016)

Choice of Pharmacy

On remand from the Louisiana Supreme Court, in light of the decision in *Lafayette Bone & Joint Clinic vs. Louisiana United Business SIF*, the court affirms its original decision that the employee has the right to choose his pharmacy. The court noted the split among the circuit courts concerning choice of pharmacy, but determined that Lafayette Bone & Joint failed to address the issue, and was distinguishable since it involved physician dispensing of medication.

Fifth Circuit