TAYLOR WELLONS POLITZ & DUHE

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LOUISIANA AND MISSISSPI WORKERS' COMP NEWSLETTER

RECENT CASES AND NEWS

COURT REJECTS INTERVENING INJURY DEFENSE

Claimant injured his right leg and forearm in a work accident on August 26, 2022. He underwent surgery in February of 2023 for a right hamstring muscle repair and fascia repair. He was released to return to work in April 2023. On May 5, 2023, claimant was helping a friend move a washing machine, and reinjured his right leg. Claimant returned to his surgeon, and was again taken off work completely for further treatment. He sought reinstatement of indemnity benefits and approval for further treatment. The employer denied the new claim on grounds that the injury caused by the washing machine incident was an intervening accident outside the course and scope of his employment.

The employer pointed to testimony from the surgeon to the effect that claimant "could have suffered the same torn hamstring simply by moving the washing machine." A repeat MRI showed that he prior hamstring repair was still intact, and that claimant had sustained a strain and increased pain.The trial court rejected the intervening accident defense, and held that the employer was liable for further indemnity, medical care, and penalties and attorney's fees. The 3rd Circuit Court of Appeal affirmed on all counts. The 3rd Circuit held that the key inquiry is "the relationship between the second injury and initial, work-related injury." The court cited testimony from the surgeon that claimant was "predisposed to injury by his work-related accident" and that the strain/aggravation caused by the washing machine incident was a "natural or expected consequence of his original" injury. Concluding that the original injury "predisposed" the claimant to this new injury, the court held that the original injury was the cause of the new strain and symptoms. Brunner v NAES Corporation, 24-294 (LA App. 3 Cir 01/29/25).

U.S. DEPT OF LABOR ADJUSTS PENALTIES FOR 2025 UNDER THE LHWCA

The Department of Labor published a final rule on January 10, 2025, adjusting penalties under the Inflation Adjustment Act for 2025. The final rule is on the Federal Register website. The rule makes the following adjustments to penalties assessed by the Office of Workers' Compensation Programs (OWCP) under the Longshore and Harbor Workers' Compensation Act:

Section 14(g) of the LHWCA, 20 C.F.R. § 702.236: Failure to Report Termination of Payments
The penalty amount has increased from $356 to $365. Section 30(e) of the LHWCA, 20 C.F.R. § 702.204: Penalty for Late Report of Injury or Death. The maximum penalty amount has increased from $29,221 to $29,980.

CLAIMANT DID NOT COMMIT FRAUD DESPITE FALSELY TELLING DOCTOR THAT HE WAS FIRED DUE TO HIS WORK RESTRICTIONS

While on work restrictions due to a work accident, the Claimant told his orthopedic doctor that the employer fired him because of his work restrictions. Claimant ultimately admitted under oath that he knew he was fired for bullying, and further admitted that the employer had always accommodated his restrictions. The employer argued that this false statement was an effort by claimant to get the doctor to place him on a no work status. Claimant argued that his statement to the doctor was simply his initial "feeling" that work restrictions were the real reason for his firing, and not an effort to fraudulently collect workers' compensation. The workers' compensation judge agreed with the claimant, holding that his statement to the doctor was not made directly to obtain benefits and was inconsequential to the issue of benefits. The 2nd Circuit Court of Appeal agreed with the comp judge, although seemingly reluctantly. The 2nd Circuit pointed out that claimant had already been receiving medical care for over two years, that he did not misrepresent the facts of his injury or treatment, and thus his false statement about the circumstances of his termination "can be viewed as inconsequential or collateral to the issue of obtaining benefits." Resolution of this issue did not resolve the entire claim, and the case was remanded back to the trial court for further proceedings.After rendering the ruling rejecting the fraud defense, the appeal court made an unusual comment that the comp judge should "take [claimant's] testimony with a measure of caution" in "future proceedings ". Southern v. Servpro, et al, 55,874 (LA App. 2 Cir. 8/28/24).

SURVEILLANCE WORKS!...COURT FINDS CLAIMANT COMMITTED FRAUD BASED LARGELY ON SURVEILLANCE VIDEO

Claimant severely injured his neck and back on February 23, 2019. Approximately six months later, he underwent a seven-level decompression and fusion of his thoracic spine. He continued with post-operative care in the several years following the surgery.Claimant's treating surgeon and employer's SMO doctor disagreed on claimant's condition, MMI and work status in late 2021 and early 2022. A state-appointed IME was performed in April of 2022. The IME doctor determined that claimant was at MMI and that an FCE would be appropriate. The IME doctor also stated that claimant was not in need of any further formal treatment for his neck or back. An FCE was finally performed on August 17, 2023. The FCE provider noted that claimant used a walking cane before the evaluation, throughout the majority of the FCE, and after the FCE. He demonstrated a "slow cadence" and with "decreased single left leg stance time." Claimant told the FCE provider that he fell on a weekly basis. In his deposition, claimant testified that he could not drive long distances, that he was unable to carry his young child, had significant left side weakness, and had the potential to fall "like a goat" at any time. To test these complaints by claimant, the employer had surveillance conducted on August 1, two weeks before the FCE, and on the day of the FCE. Surveillance on August 1 lasted five hours. During that time, clamant was seen driving around time conducting numerous errands without using any walking aid or cane. He was seen carrying a gallon-sized jug of liquid and a bat containing other bottles in his left hand, and then lifting both the jug and bag over his head with his left hand to place them in the back of his pickup truck. During the August 17 surveillance on the day of the FCE, claimant was seen entering and exiting the FCE facility using his cane and walking slowly. After the FCE, claimant is seen driving from Lafayette, La to Opelousas, La, and then carrying his young son in his left arm without using his walking cane. He then drove his truck back to Lafayette to a doctor appointment for his son, again carrying his son in his left arm with no walking cane. After this appointment, claimant drove to his home in Merryville, La. Suffice to say, the work comp judge had little difficulty in finding that claimant had committed fraud as shown by the multiple instances on video that contradicted his alleged disability status. The 3rd Circuit appeal court affirmed. Medley v Bennett Timber Company, 24-164 (LA App. 3 Cir. 11/27/24).

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