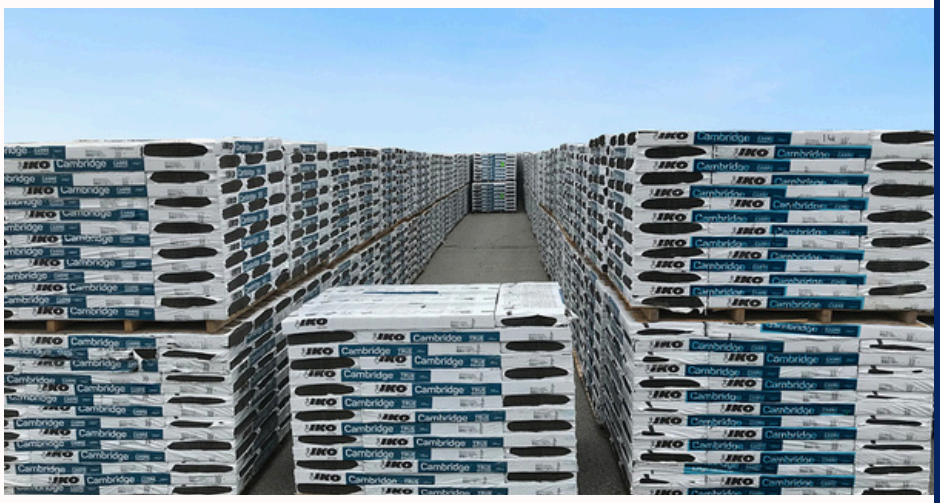
TAYLOR WELLONS POLITZ & DUHE

APRIL 2025

LOUISIANA WORKERS' COMP NEWSLETTER

RECENT CASES AND NEWS



CLAIMANT FAILS TO PROVE OCCURRENCE OF UNWITNESSED ACCIDENT

Claimant alleged he injured his back, neck and feet while unloading bundles of shingles from a flatbed truck while at a worksite. More specifically, claimant testified that he would unload 2800-pound pallets of shingles from the flatbed, bundle by bundle by himself, with each bundle weighing 40-45 lbs. There were no witnesses to the alleged accident. Claimant alleged he drove back to the employer's office after the accident and reported it to his supervisor, which was overheard by two co-employees. Claimant never returned to work again, and later filed suit for benefits. The employer denied the accident occurred or that it was ever reported as alleged by claimant, contending that the lawsuit was its first notice of the accident. At trial, the employer put on witnesses who testified that claimant would have never been required to manually unload roofing materials from the flatbed truck, but instead that the materials would have been loaded and unloaded by a forklift.

Additional testimony was presented that the employer had no record of claimant making any deliveries to a job site on the day of the alleged accident. Finally, the claimant's supervisor testified that he recalled claimant returning to the office on the day of the accident reporting that he was quitting, without any mention of an accident, and that claimant did not appear to be in any pain or display any evidence of injury. Employer's supervisor testified that claimant was agitated after he had been asked to return to a supplier to pick up materials he failed to get on the first trip, and that was the reason he abruptly quit. Other evidence the court found significant was that claimant's inconsistent deposition and trial testimony regarding how long it took him to unload a truck load of materials and how many loads he did per day. If believed, claimant would allegedly have worked up to 32 hours per day. In the end, the court found that there was far too much evidence casting doubt on the claimant's version of the unwitnessed accident, and the case was dismissed. Fish v. Lion Insurance Co., et al, 24-CA-477 (LA App. 5 Cir 02/26/25).

Attorney Spotlight

Charles Duhe

Chip Duhe was born and raised in Baton Rouge, Louisiana. Setting aside his aspirations to become a football coach, Chip obtained his undergraduate and law degree from Louisiana State University. Traveling back to his law review tenure, Chip began his focus exploring issues involving workers' compensation and general casualty. He has litigated hundreds of cases in every court in the state. His trial experience uniquely ranges from a straightforward workers' compensation case to complex litigation matters involving catastrophes at refineries along the Mississippi River. Today, Chip remains well-respected in all aspects of the law by the judges before whom he appears, his colleagues and the firm's clients. Because of his expertise in these areas and his personal skills, Chip was selected to become a mediator for MAPS throughout the state. In his spare time, Chip is best known for his tireless work as a basketball referee for the Baton Rouge Basketball Officials Association. Chip is a frequent lecturer for various trade groups and is a member of the Baton Rouge, Louisiana state and American bar associations.

COURT ACCEPTS DOCTOR'S AFFIDAVIT THAT "CLARIFIED" HIS PRIOR MEDICAL REPORT TO DEFEAT EMPLOYER'S MSJ

The employer filed a Motion for Summary Judgment contending that the claimant had not proven entitlement to temporary, total disability (TTD) benefits before the date claimant underwent surgery for the injuries sustained in the accident. The employer argued that there was zero medical evidence that claimant was unable to work or unable to earn at least 90% of his average weekly wage before the surgery date and, thus, claimant would be unable to carry his burden of proof. The employer cited reports from its occupational work clinic stating that claimant could return to regular duty as tolerated, along with subsequent reports from claimant's treating doctor that did not contradict claimant's ability to work. Specifically, reports from claimant's doctor provided claimant with a "permitted work release" with the further notation that the doctor would "re-assess work status with follow-up encounter" after completion of certain diagnostics or next evaluation, but the doctor never actually changed the status before the surgery date. In opposition to the MSJ, Claimant submitted an affidavit from his treating doctor, in which the doctor stated: "A review of my medical records … provides a phrase of the following 'Patient permitted work-release' re-assess work status with follow-up. In essence, I am stating that [claimant's] work status is temporary disability until the next evaluation. As such, [claimant] was temporary disable [sic] until the next office evaluation." The employer argued that this "self-serving" affidavit from the doctor that contradicted his medical record should not be admissible to defeat the MSJ. The workers' comp judge allowed the affidavit in evidence, but concluded that it was self-serving and prepared only after the MSJ was filed. The comp judge granted the employer's MSJ. The court of appeal disagreed and reversed the MSJ ruling. The appeal court held that the doctor's affidavit was not self-serving, as he was in the "best position to clarify and/or explain unsworn statements regarding his treatment of claimant made in his own medical records." A ruling like this will make it more difficult to prevail on a summary judgment as long as a doctor is able to "clarify and explain" prior reports that are not so favorable to the claimant on first impression. Kendrick v Brown and Root, 24-CA-361 (LA App. 5 Cir. 02/26/25).

SURVEILLANCE DOES NOT WORK THIS TIME...COURT HOLDS THAT CLAIMANT DID NOT COMMIT FRAUD DESPITE SURVEILLANCE VIDEO

Claimant was injured in a work accident in August of 2015. Claimant underwent a lumbar fusion surgery, a total hip replacement surgery, and other treatment while receiving benefits until January of 2020 when benefits were terminated on grounds of fraud. The employer alleged that fraud was proven primarily by surveillance video showing that claimant gave false deposition testimony about his activity level and the need for a walking cane. The employer alleged that claimant falsely stated that he needed a cane to walk and climb stairs, that he needed an electric scooter to grocery shop, that he could not lift a case of bottled water, and that he barely left home. During the summer of 2019, claimant also reported to his surgeon and pain management doctor that he needed a cane for mobility. Surveillance was conducted during six days in August and November of 2019. The videos showed claimant away from his home on five of the six occasions, and showed him walking down seven steps at his house, walking in a parking lot up steps at a PT clinic, walking in a bank parking lot, walking in a Walmart parking lot into the store, and walking out of Walmart pushing a cart containing two grocery bags and two cases of bottle water. Claimant was never seen using a cane in the videos. The investigator wrote in a report that claimant had carried the cases of bottled water when he arrived home, although the video only showed the claimant lifting the case of water from the shopping cart and into his car. Describing the surveillance as “short surveillance videos”, the court addressed whether it proved fraud. Regarding the cane usage issue, the court seemed to accept the claimant’s argument that the employer misunderstood what he was trying to convey regarding cane “usage” versus cane “necessity”. In this regard, the court pointed out that claimant testified in deposition that he did not need the cane if he only walked “short distances” and when he was taking his pain medication.

The judge noted that the videos only showed claimant "walking short distances" and there was no evidence he did not take his pain medication. Thus, the court found no fraud based on claimant's deposition testimony that he needed a cane. Regarding the issue of lifting the cases of bottled water, the court concluded that a single false statement that did amount to fraud, concluding that it did "not believe that this single instance rises to the level of fraud or misrepresentation…" The court then took the opportunity to caution employers on the reliance of surveillance videos as evidence of fraud. The court stated that "a surveillance video must be viewed with a critical yet, bearing in mind that the person making the video has been hired by a party who desires to have the subject of the video depicted in the worst light" and that a "video can be edited" and that the investigator "can simply not record activities which would be supportive of the subject's position." Cembel Industries v Smith, 2024-CA-0348 (LA App. 4 Cir. 02/11/25).

COURT AWARDS PENALTIES AND ATTORNEY'S FEES BEFORE TRIAL ON THE MERITS WHEN EMPLOYER FAILED TO AUTHORIZE CLAIMANT'S COP

Claimant was electrocuted causing severe burns and blisters on his hands and feet. A few days later when wound care treatment began, he was diagnosed as having 2nd degree burns to the right and left shoulders, right and left arms, right and left wrist and hand and 3rd degree burns to his left toe. Later, after a diagnosis of bilateral carpal tunnel syndrome and bilateral ulnar neuropathy across the elbows by claimant's physical medicine doctor, Dr. Gerald Leglue, the comp carrier determined that these injuries were not caused by the electrocution. After the comp carrier denied Dr. Leglue's request for a surgical evaluation of claimant's carpal tunnel injuries, it scheduled a medical conference with the doctor.Dr. Leglue explained to the nurse case manager that the carpal tunnel conditions were acute and directly related to the accident, because the electricity running through the nervous system can cause damage to the nerves, and EMG/NCS testing confirmed this conclusion.Despite this explanation, the carrier continued to deny coverage. Claimant filed suit and requested an expedited hearing to have his COP approved to treat his carpal tunnel, and sought penalties and attorney fees. The employer/carrier argued that claimant was not entitled to an expedited hearing because he had already been provided initial medical treatment, and further argued that penalties and attorney's fees were not awardable in an expedited hearing. The court disagreed on both points, concluding that the employer/carrier offered no evidence to contradict Dr. Leglue, and that an employer may be subject to penalties and fees after a summary proceeding in which the court orders the employer to approve an initial evaluation by claimant's choice of specialist to treat a work injury. Newman v. Concordia Electric Cooperative and LWCC, 24-630 (LA App. 3 Cir. 02/05/25).

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The success we have seen is because of the way we built our practice. It's about more than routine strategies. It's about creative resolutions to difficult legal questions. It's about how we treat our clients and each other and how we work together to build the best possible defense for every single case. It's

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