WORKER'S COMPENSATION

February 2020

TAYLOR WELLONS POLITZ DUHE

New Orleans, LA. Baton Rouge, LA. Jackson, MS

IN THIS ISSUE:

Corey Pierce, Attorney

Born and raised in Shreveport, LA, Corey L. Pierce earned his law degree from LSU's, Paul M. Hebert Law Center in 1996. Corey practices in the areas of business litigation, personal injury defense, and workers' compensation defense. Corey has served as Regional Litigation Counsel for the Social Security Administration and as an Administrative Law Judge for all Louisiana state agencies, and he has represented in state and federal courts major insurers, municipalities, parish governments, the Louisiana Department of Environmental Quality and Department of Transportation and Development. Corey was previously the general counsel and vice president of operations for a Maryland corporation specializing in mental health and foster care services with offices in Maryland, Louisiana and California.

SECOND INJURY FUND ORDERED TO APPROVE SETTLEMENT, BUT NOT IN A LUMP SUM

Employer's compensation insurer initiated benefits after a 1999 work injury. In 2000, the insurer filed a claim with the Second Injury Board (SIB). The SIB approved the claim, and specifically notified the insurer that in the event of a future settlement, the SIB reserved its right to reimburse the settlement amount "on a lump sum, quarterly, or semi-annual basis…" In July of 2016, the SIB refused to approve a proposed full and final settlement request made by the insurer. The SIB suggested that the material submitted did not support the requested settlement. Instead, the SIB replied that it would simply continue to pay the claim as an "ongoing claim." The insurer appealed to the 19th Judicial District Court. The court held that the SIB's denial, without specific explanation or reason for failing to approve the settlement, was unreasonable. The district court ordered the SIB to grant settlement authority in the specific amount requested, $256,663.90. The SIB appealed to the First Circuit Court of Appeal, claiming that the district court erred in ordering the settlement authority, and ruling that the insurer could demand a lump sum reimbursement. The First Circuit held that the insurer may appeal the SIB's denial of a lump sum settlement, and agreed that the district court properly ordered the SIB to authorize the settlement. However, the court held that the SIB was not required to pay the future settlement in a particular manner. *LA Workers' Compensation Corp. v. LA Workers' Compensation Second Injury Fund Board*, 2019-0672 (La. App. 1 Cir. 1/10/12).

NEW MISSISSIPPI COMPENSATION RATE

The new maximum compensation rate for injuries occurring on or after January 1, 2020 is $505.43, and the lifetime disability maximum for a workers' compensation claim is $227,443.50.

CONCUBINE AND UNBORN CHILD AWARDED DEATH BENEFITS

This case arose out of an accident in which the employee suffered fatal injuries. At the time of the incident, the deceased was engaged to and living with L. Perez, who was pregnant with the decedent's unborn child. Perez made a claim for death benefits on her and the unborn child's behalf. With regard to the child's claim, Perez sought benefits from the time of the employee's death rather than from the date of the child's birth. The employer disputed the claims of Perez because she was a "concubine" not married to the decedent, and because R.S. 23:1253 "clearly" stated that "Regardless of dependency, no payments shall be made to the concubine of the deceased employee…" The employer further asserted that the child's claim could only begin from the moment of his birth. The workers' comp judge found that Perez was entitled to death benefits despite R.S. 23:1253, and that the child was entitled to death benefits from the date of the worker's death, not the date of the child's birth. On appeal, the Third Circuit affirmed both of these holdings. Regarding Perez's entitlement to benefits, the Third Circuit went through a long discussion of statutory interpretation, including the importance of where commas are placed, etc., to ultimately reach the decision that this particular concubine was entitled to death benefits because she was a dependent "family member" living with the decedent. (But by definition, a "concubine" is someone "living with" the other person.) The court concluded that its interpretation was one that comports with the principles of reason, justice, and convenience behind the Workers' Compensation Law. Specifically, the court found that it would be unreasonable to conclude that Perez was not a member of the family, entitled to death benefits. *Latasha Perez, individually and OBO Unborn Child of Travis Chiokai v. Irby Constructions Co.*, 2019-454 (La. App. 3 Cir. 1/29/20).

COURT REVERSES APPROVAL OF SURGERY BECAUSE CLAIMANT DEPRIVED EMPLOYER ITS RIGHT TO A PRE-SURGERY SMO

The issue in this case concerned an employer's entitlement to a pre-surgery SMO in cases where spine surgery is recommended. After a Form 1009 appeal, the Medical Director approved a spine fusion surgery. The employer filed suit challenging the approval because it was rendered before it could obtain an SMO. The employer took this position because claimant had failed to appear for three scheduled SMOs, and the administrative code provides that the employer is entitled to an SMO when certain surgeries, including spine surgery, are recommended. Claimant finally appeared for the SMO on the fourth time it was set. The SMO doctor concluded that claimant had unrelated pre-injury lumbar degenerative changes and the subject disc pathology was not causing pressure on the symptomatic nerve root. He also opined that claimant did not have any spinal instability to necessitate a fusion. The pre-surgical psychologist further opined that claimant was not a good surgical candidate. But, the SMO report was issued after the Director had already approved the surgery. The judge affirmed the Med Director's decision on grounds that there was no "clear and convincing" evidence that the decision was contrary to the Guidelines. The Third Circuit Court of Appeal reversed this ruling, concluding that the claimant effectively denied the employer its right to a pre-surgery SMO by missing three appointments, and further concluding that the Medical Director should have considered the SMO report before rendering a decision. The employer had also sought a court-appointed IME. The OWC judge denied the IME, and this was affirmed on appeal. *Greene v. Town of Lake Arthur,* No. 19-232 (La. App. 3d Cir. 1/8/20).

CLAIMANT'S LACK OF CREDIBILITY TIPS SCALE IN EMPLOYER'S FAVOR IN UNWITNESSED ACCIDENT CASE

Claimant appealed a ruling that she filed to prove a work accident within the course and scope of her employment. Claimant testified that she popped her wrist when lifting a full 5 gallon bucket on December 18, 2016. Her son-in-law corroborated her testimony, by testifying he was in another room when he heard claimant yell. He then observed the dropped bucket on the floor and a knot on the top of claimant' wrist. Claimant testified she notified her supervisor an hour later. Her supervisor testified that she did not report a work-related accident until seven months later, when she was laid off. The medical evidence did not support claimant's allegations. Rather, she had documented complaints three days before the alleged accident, which she attributed to arthritic problems due to weather. Her surgeon testified that he could not tell if her condition was chronic in nature or related to trauma. The case took a twist, as claimant accused her supervisor of sexual harassment after the alleged accident. The owners of the business later received a phone call from someone identifying himself as the son-in-law, he stated that Claimant was "just making everything up." Although the son-in-law testified differently, the court found that claimant was not credible, noting that she lied about her dual receipt of Social Security Disability income while still employed. The Second Circuit Court of Appeal affirmed the judge's ruling, as the OWC judge was in a superior position to evaluate claimant's credibility and determine if she discharged her burden of proof. *Grant v. McConnell Painting Corp*, No. 53,100 – WCA (La. App. 2d Cir. 01/15/20).

TWPD

TAYLOR WELLONS POLITZ DUHE

BATON ROUGE, LA	NEW ORLEANS, LA	JACKSON, MS
(225) 387-9888	(504) 525-9888	(769) 300-2988

For more information about our firm, please visit our website

WWW.TWPDLAW.COM