

WORKER'S COMPENSATION

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TWPD

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Heidel Schneider has been a member of TWPD's workers' compensation team since 2010 defending workers' compensation claims for employers and carriers. Heidel is a partner in TWPD's Baton Rouge office, and has handled workers' compensation cases for almost 20 years. Heidel attended LSU Law School, where she was a CALI award recipient for Media Law. Before law school, she attended LSU and earned degrees in political science and economics.

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LA: REQUEST FOR NON-SKILLED SITTER SERVICE REQUIRES A FORM 1010

Claimant filed a 1008 Disputed Claim seeking approval for attendant care/personnel care services for up to 10 hours a day, five days a week as recommended by his treating neuropsychologist for a traumatic brain injury. Before filing the 1008, the treating neuropsychologist had requested approval for the sitter, but not on a Form 1010. The employer filed an exception asserting that the 1008 was premature because no Form 1010 had been submitted requesting the services. Claimant argued that the 1010/1009 process was not necessary as there are no treatment guidelines for brain injuries and because the sitter was "nonmedical" to which the guidelines do not apply. The workers' comp judge agreed with the claimant, but the First Circuit Court of Appeal reversed. The appeal court held that while attended care/personal care services in the form of a non-skilled sitter may be classified as "non-medical treatment," it is still "treatment in accordance with the medical treatment schedule" and thus the 1010/1009 process must be followed. The Court correctly noted that LAC 40:1.3507-3511 sets forth the policies, procedures, and reimbursement scheduled for requests for nursing, attendant care, or home health services; therefore, the requests for the services must be presented to the Medical Director before filing a 1008. *McCain v. Lewis Companies, Inc.*, 2019-0416 (La. App. 1 Cir. 2/6/20).



MS: HIGHER POST-INJURY WAGE TRIGGERED PRESUMPTION OF NO LOSS OF WAGE EARNING CAPACITY

Claimant suffered a neck injury in 2012. She had previously undergone a neck surgery in 2010 and returned to work with no restrictions. After the 2012 work injury, claimant was diagnosed with an acute herniated disc and underwent another surgery. She was placed at MMI in 2013 and restricted to light duty, with no lifting over 20 pounds. Claimant then returned to work for her employer, with a pay increase, but was tasked with operating a different machine than she had in her job at the time of the 2012 accident. Claimant testified she suffered from chronic pain and required assistance from another employee in her new job. At a hearing before the AJ, the claimant's vocational expert testified that claimant suffered a 14% loss of pre-injury jobs with the employer, 25% loss to past occupations, and a 38% loss for all job titles in a competitive labor market. A rebuttal vocational expert for the employer, testified that while loss-of-access is one factor to consider in a loss-of-wage-earning-capacity analysis, another factor is whether claimant successfully returned to work, and claimant had satisfied this factor by successfully returning to work in her same pre-injury wages for her same employer. The AJ ruled that claimant suffered a 10% loss of earning capacity. The Full Commission reversed, because claimant had returned to work at a higher post-injury wage, which triggered the rebuttable presumption of no loss of wage earning capacity. The Commission determined the claimant did not overcome this presumption. The Court of Appeal affirmed the Commission. *McKenzie v. Howard Indus. Inc.*, No. 2018-WC-01756-COA, (Miss. Ct. App. Feb. 11, 2020).

LA: PENALTIES AND FEES AWARDED ALTHOUGH SUIT WAS NOT REQUIRED TO HAVE BENEFITS REINSTATED

Employer agreed to pay claimant TTD benefits in a Consent Judgment in 2006. In 2018, claimant filed a Motion for Penalties and Attorney Fees for alleged failures to pay indemnity benefits. Benefits were terminated May 15, 2017 and reinstated effective June 27, 2017 (42 days). Benefits were also terminated August 22, 2017 and reinstated September 18, 2017 (28 days). Suit was not filed until after benefits had been reinstated in both instances. The judge awarded a \$3,000 penalty for the failure to pay indemnity benefits, and 5,000 in attorney fees. Claimant appealed the \$3,000 penalty award contending that it was inadequate. The Third Circuit found that a review of the record did not include any reference to whether there was intent on the Employer's behalf to discontinue benefits, and that no litigation was required to have the benefits reinstated. The Court thus ruled that there was no abuse of the "great discretion" afforded to the OWC in awarding \$3,000 in penalties for the discontinuance of indemnity benefits. *Louvier v. U-Haul Companies*, 2019-493 (La. App. 3 Cir. 2/19/2020).

LA: EXTENSIVE HISTORY OF PRE-EXISTING CONDITION OUTWEIGHED PRESUMPTION OF CAUSATION

On September 6, 2016, claimant saw her primary care physician for pain in her left shoulder, which she had experienced for longer than six months. The employee returned to the doctor on November 15, 2016 at which time she was diagnosed with a frozen shoulder and an MRI was recommended. The next day, November 16, 2016, claimant allegedly injured her left shoulder at work attempting to stop a large mirror from falling. She returned to her primary care physician, who determined that her shoulder remained frozen and, again recommended an MRI on her left shoulder, "as previously scheduled." Claimant returned to work on light-duty but later stopped working after seeing an orthopedist and the employer could no longer accommodate her. On December 19, 2016, claimant was informed that her claim was denied. An MRI confirmed the frozen shoulder condition, and an acute rotator cuff tear. The orthopedist recommended shoulder surgery, but released the employee to full duty work. On February 21, 2017, the employee was terminated and on April 17, 2017, she filed a 1008 Disputed Claim for surgery, penalties, and attorney fees. The judge found that claimant did not meet her burden to establish that her left shoulder condition was casually related to the work accident. The judge noted that the nature of the employee's pre-existing condition was so extensive it could not find that the employee met her burden of proof and denied the claim. On appeal, claimant asserted that the judge erred (1) in finding that she did not meet her causation burden and (2) in failing to apply the presumption of causation. The appeals court affirmed the compensation judge. The appeals court additionally determined that the employee was not entitled to the presumption of causation because the medical evidence revealed that claimant had an extensive history of left shoulder pain before the work accident. *Phillips v. Kirkland's Corp.*, 2019-0420 (La. App. 1 Cir. 2/18/20).



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