TAYLOR WELLONS POLITZ & DUHE

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LOUISIANA AND MISSISSIPPI WORKERS' COMP NEWSLETTER

RECENT CASES AND NEWS

LACKING CORROBORATION FROM WITNESSES ON THE SCENE AND FROM MEDICAL RECORDS, CLAIMANT FAILS TO PROVE LOW BACK INJURY

Claimant, an EMT worker, alleged he sustained back and right knee injuries when he was hit in the face and fell to the ground as he and a co-worker were attempting to break up an altercation between two women.

Claimant admitted to suffering from a pre-existing low back condition, but alleged he had no symptoms impacting his ability to work before this accident. The employer argued that claimant's version of events was completely contradicted by other witness testimony; and that there was no medical evidence to support the allegation that claimant getting hit in the face caused any low back or right knee injury.

Claimant testified that he fell after being struck. However, the alleged fall was not corroborated by the testimony of his co-worker or firefighters who came on the scene, or by medical records after the incident. In fact, claimant gave multiple versions to his doctors regarding why he was suffering low back and leg pain. It was not until 19 months after the incident that the claimant told a doctor that he hurt his back after being struck by a combative female.

The court of appeal concluded that "serious doubt" existed regarding claimant's version of events,and thus the OWC judge was not manifestly erroneous in rejecting claimant's story. *Dufrene v LWCC, et al*, 2019-1202 (La. App. 1 Cir. 5/11/2020).

Attorney Spotlight

Charles J. Duhe Jr.

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.

FAILURE TO DISCLOSE PRIOR SHOULDER INJURY AND PRIOR ACCIDENTS AT DEPOSITION AND AT TRIAL UPHELD AS FRAUD

Claimant alleged that she tripped and fell sustaining injury to both knees, her right elbow and her lower back. Two months after the accident, claimant complained of left shoulder symptoms and shortly thereafter underwent left shoulder surgery. A dispute arose regarding a right shoulder surgery request, and suit was filed.

The employer's primary defense became fraud based on claimant's numerous false statements about her prior medical and accident history. Medical records revealed a history of pre-existing back pain, neck pain, shoulder pain, including a 2015 auto accident that resulted in back pain and bilateral knee surgeries. Records also revealed a settlement with State Farm arising out of a 2006 accident. Claimant falsely denied under oath any prior symptoms other than the two knee surgeries. She further denied ever having a claim against State Farm for the 2006 incident, but instead alleged that the settlement was only for injuries her daughter sustained. However, the settlement paperwork showed that claimant had physical therapy for both shoulders, as well as the neck and back pain from the 2006 incident.

The court had no hesitation in finding that the claimant's many false statements were willful and for the purpose of obtaining benefits, thus constituting fraud. *White v. WIS International*, 2017-747 (La. App. 3 Cir. 5/20/2020)

COMPLAINTS OF THORACIC PAIN REPORTED SIX YEARS AFTER WORK ACCIDENT NOT CAUSALLY RELATED TO THE WORK ACCIDENT

Claimant, a nurse, filed suit alleging her pre-existing thoracic back pain was aggravated by a December 12, 2012 work accident. The sole evidence of this claim was a note by claimant's pain management doctor in a letter he wrote dated October 2, 2018 stating: "[Claimant] sustained a trip and fall work accident on 10/2/2012. She had a work-related lifting injury when moving a heavy patient on 12/12/12. She sustained injuries to her cervical, thoracic and lumbar spine."

At trial, claimant admitted that none of the five neurosurgeons nor orthopedists she had seen since the 2012 incident had treated her for thoracic pain, and that none of her medical records identified a thoracic injury. The court-appointed IME, Dr. Karen Ortenberg, reached the opinion that claimant's thoracic pain complaints were not related to any work accidents, and she did not require medical treatment, medical intervention or any diagnostic studies.

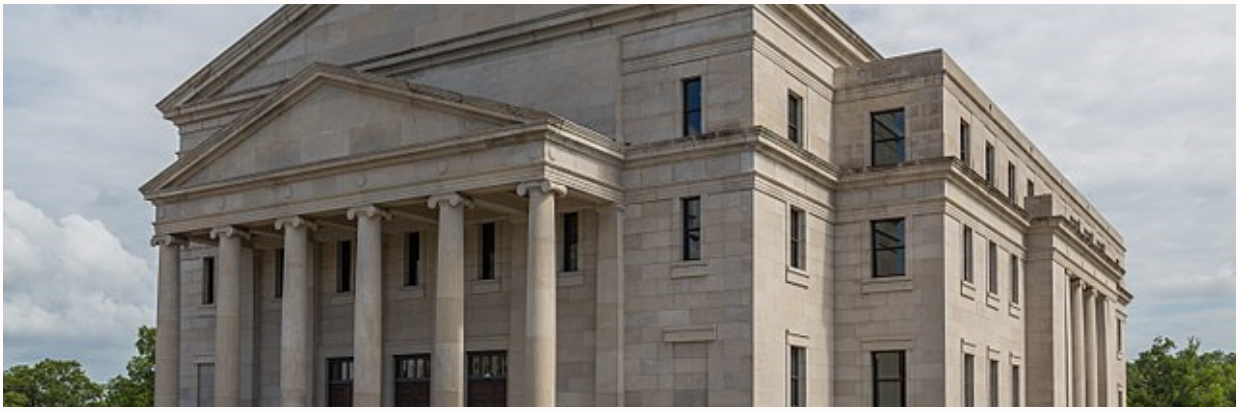
The OWC judge dismissed the thoracic injury claim, noting that the claimant had not called upon the pain management doctor to explain his findings at trial. The court of appeal affirmed the compensation judge, stating that it is within the judge's discretion as to the weight to be given to the testimony of the treating physicians. The one noted by the pain management doctor was deemed unconvincing in light of the silence as to any thoracic injury over six years by the numerous other doctors who examined claimant. *Rixner v. East Jefferson General Hosp.*, 19-595 (La. App. 5 Cir. 5/27/2020).1317283

MS: CLAIMANT'S POST-HEARING TERMINATION WAS "SUSPECT" AND, THUS, COMMISSION REVERSED FINDING OF NO LOSS OF EARNING CAPACITY

Claimant injured her back on July 18, 2016. She reached MMI on May 1, 2017, and was permanently restricted to light duty. She returned to work with her employer, at a higher wage, and her restrictions were accommodated.

The AJ determined that because the claimant had successfully returned to work and was still employed, she had not suffered a discernable loss of wage earning capacity. However, the AJ made a specific finding that should she lose her position, her loss of access would hinder her in any effort to find alternate employment." The employer terminated the claimant six months post-hearing, alleging the termination was due to a misrepresentation of her criminal history on her employment application.

The case was then reviewed by the full Commission. The Commission reversed the AJ's order finding that the claimant's post-hearing termination was "suspect at best," and the facts establishing a "successful return to work" had changed. The Commission ultimately determined the claimant had suffered a loss of earning capacity in the amount of $160.141 for 450 weeks. The Court of Appeals affirmed, noting that the employer was armed with the grounds for termination well before the AJ hearing, and terminated her only after receiving the benefit of her "successful return to work." *Howard Indus. Inc. v. Sicily Wheat*, No. 2019-WC-00526-COA, (Miss. Ct. App. May 5, 2020).



MS: SUPREME COURT REVERSES THE COURT OF APPEALS, AND REINSTATES THE COMMISSION'S DECISION IN FAVOR OF EMPLOYER

Claimant, who had a history of prior back pain, filed a claim and alleged that on March 21, 2015 she felt a "pop" in her back while pushing a medicine cart at work. Claimant's supervisor did not hear the "pop" but testified the claimant was visibly in pain that day. Two days later, claimant sought treatment from her family physician, and circled "no" on an intake form when asked if the injury was work related. She went to three other specialists, and again denied the injury was work-related. On one form, she wrote "at work, not an accident," and indicated that her "pain just began, I can't relate it to anything." Five months later, claimant's FMLA leave request was granted. Two months after that, claimant suddenly alleged the injury was work-related.

After the AJ found the claim compensable, the full Commission reversed on grounds of insufficient evidence. The Court of Appeals then reversed the Commission, stating that it incorrectly disregarded the claimant's testimony regarding the "pop," and the supervisor noticing pain. The Court stated that evidence not affirmatively contradicted and not "inherently improbable, incredible, or unreasonable" cannot be arbitrarily and capriciously discarded. The Court suggested the claimant did not understand the meaning of "injury" on the intake forms, and that her failure to note her pain as an "injury" did not contradict her testimony. The Supreme Court reversed, and pointed out that "[w]hen a patient gives a history to a physician which is inconsistent with [her] allegations," it is a significant factor supporting denial. The failure to report the alleged work-related injury for more than seven months was significant. The Supreme Court emphasized that "[T]he Commission is the fact-finder and the judge of the credibility of witnesses…" and when evidence casts doubt on a witness' credibility, the Commission may reject the witness' story. Because the Commission's decision was supported by substantial evidence and is not clearly erroneous, it must be affirmed. *Jones v. Mississippi Baptist Health Sys., Inc.*, No. 2018-CT-00930-SCT, (Miss. May 7, 2020).

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