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## **CLAIM FOR DEATH BENEFITS WAS TIMELY DESPITE NO DISABILITY CLAIM PREVIOUSLY FILED BY EMPLOYEE**

In 2018, a widow filed a claim for death benefits within one year of the death of her husband which she alleged was a result of his exposure to asbestos while working for the Employer until 1989. In 2001 and 2003, the Employee was diagnosed with occupationally related asbestosis and had joined as a plaintiff in asbestosis litigation in Arkansas that ultimately settled.

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The employer sought dismissal of the claim on grounds that the statute of limitations had expired because the claim for death benefits was derivative of the husband's underlying claim, and the husband never filed a claim after being advised he was diagnosed with the work-related illness many years earlier. The 1st Circuit Court of Appeal rejected this argument and found that there was no explicit language in the Louisiana Workers' Compensation Act that an employee's disability claim had to be timely filed before the filing of a dependent's/spouse's death benefit claim. As the widow's claim for death benefits was filed within one year of her husband's death, it was held to be timely under the occupational disease statute, La R.S. 23:1031.1. *Rowland v. BASF*, 2020 CA 0278 (La. App 1 Cir. 3/29/2021).

## Attorney Spotlight



### Heidel Schneider

Heidel Schneider grew up in Slidell, Louisiana as the eldest of six children. She attended Louisiana State University and earned her Bachelor of Arts in Political Science and Economics. For the past twenty years, she has successfully litigated Louisiana workers' compensation claims. She is admitted to all Louisiana courts, and the US Fifth Circuit Court of Appeals. Heidel has lectured with the National Business Institute regarding the handling of workers' compensation claims. When she is not practicing law, she enjoys camping, hiking, and spending time with her family.



## **ACCIDENT FOUND, BUT NO AWARD OF PENALTIES AND ATTORNEY FEES WHERE ACCIDENT WAS REPORTED SEVEN MONTHS LATE**

Claimant alleged that he felt a sharp pain in his lower back when he stood up after completing a weld on Friday, September 8, 2017. He did not immediately report the incident or seek medical treatment. The next week, claimant called his supervisor and reported that he was not feeling well and had hurt his back, but did not indicate that it was work related. Employee also told Human Resources that his back injury was not work related, and was referred to Employer's short-term disability provider. Claimant did not indicate in his intake paperwork for short-term disability that the back injury was work related. At the time of the accident, claimant had been treating with a pain management doctor for a degenerative lumbar spine condition. One week after the accident, the pain management physician's record shows that claimant had a "significant flare" of pain but no "specific injury". Six months later after his short-term disability benefits ended, claimant asked his Employer about other possible sources of income including workers compensation benefits. This was the first notice to the Employer of an alleged work accident. The Trial Court found that claimant was involved in a work-related accident due to changes in claimant's MRI findings, and awarded penalties and attorney fees. The First Circuit affirmed the finding of an accident, but reversed the award of penalties and attorney fees. The Appellate Court found that the Employer reasonably controverted the claim and had established an objective reason to deny his claim. *Jackson Headley v. Textron Systems*, 2020 CA 1174 (La. App. 1 Cr. 4/26/2021).



## **CLAIMANT FAILED TO PROVE THAT THE ACCIDENT INJURING HER KNEE CAUSED HER LATER REPORTED BACK INJURY**

Claimant injured her right knee in a March 2016 work accident. Medical benefits were paid. Two months later, she reported left hip, low back and left leg pain. The employer denied paying for treatment for these injuries.

Claimant was referred to an orthopedic surgeon for the low back/leg/hip complaints, and ultimately underwent a lumbar discectomy in March of 2018. Claimant filed suit in March of 2018 due to the employer's failure to pay indemnity and medical benefits for the lumbar spine. In response, the employer sought dismissal of the claim for indemnity benefits on grounds it had expired because more than a year elapsed before claimant filed suit. The court agreed and held that the claim for indemnity was untimely. Regarding the claim for medical benefits, which has a 3-year statute of limitations, the court held that claimant provided no medical opinion from any doctor causally relating her low back issues to the work accident; but merely introduced medical records reflecting treatment received for the low back issues. The court further held that claimant's self-serving testimony regarding her back pain was insufficient to meet her burden of proof and to overcome the medical opinion of the Employer's medical provider, who did not find Claimant's low back issues causally related to the March 2016 accident. Thus the court also denied the medical claim. *Jones v. Progressive Baptist Church of Louisiana and Church Mutual Insurance Company*, 2020-314 (La. App. 3 Cir. 3/31/21).

# WORKERS' COMP INSURER ORDERED TO PAY DAMAGES TO ITS INSURED EMPLOYER FOR BREACHING ITS DUTY TO DEFEND THE EMPLOYER

The Third Circuit Court of appeal affirmed a district court (not workers' comp court) ruling that an insurer's duty of good faith and fair dealing owed to its insured, as set forth in the Louisiana Insurance Code (R.S. 22:1973), applies in workers' compensation cases. In this instance, the court held that the insurance company's delay of six months in assigning defense counsel to defend the employer insured was a breach of its duty to defend, and awarded damages and penalties. The primary disputes were (1) whether the insurance statute applied in workers' comp cases and (2) the manner in which damages were calculated. In the underlying work comp claim, an employee of the Cox Filo law firm asserted an occupational disease claim and sued the firm and LWCC, its insurer. LWCC notified Cox Filo of an alleged conflict of interest, and stated that outside counsel would be needed. After three months with no new counsel assigned, Cox (via its managing attorney), answered the 1008 and took other action in the claim, which allegedly took him away from his more profitable personal injury work. Cox Filo sued LWCC alleging it breached its duty to defend the firm, and thus owed damages and penalties under R.S. 22:1973. On the first issue, the courts examined the statute and found that it provides a cause of action for actual damages in favor of an insured against its insurer for breach of its duty to defend. The court then pointed out that there was no language in the statute exempting workers' comp insurers; there was only one exemption, and that was for health and accident insurers. Therefore, the statute applies because it would be the legislature's prerogative to exclude workers' comp insurers. On the damages issue, the court held that the damages were the value of lost profits to the firm when its managing attorney had to spend approximately 70 hours to defend the comp claim instead of handling his more profitable work. The value of the attorney's time was calculated by using his average revenue generated from his personal injury work for a five-year span, offering values of over \$2100 per hour. The damage award was \$150,083.50, plus a penalty of double damages per the statute, resulting in an award exceeding \$450,000. *Cox, Cox, Filo, Camel & Wilson, LLC v. LWCC*, 2020-408 (La. App. 3 Cir. 3/31/21).



## **MS: COURT OF APPEALS AFFIRMS COMMISSION'S DECISION REGARDING PERMANENT IMPAIRMENT, AND APPORTIONMENT**

The claimant, a 63 year old cashier for Kroger, suffered a repetitive motion injury to her left shoulder from repeatedly scanning groceries. Ultimately, her treating physician placed her at MMI with a 3% impairment rating and light duty restrictions per her FCE. Because she could not return to work in her pre-injury position, she returned to work for Kroger in a light duty "U-scan" cashier position. Upon returning to work, she earned higher wages than pre-injury. At an AJ hearing to address the extent of the claimant's permanent disability, and whether any apportionment would apply, two vocational experts testified that if Kroger would not have accommodated the restrictions, claimant would have difficulty finding a job making the same or similar wages in the current labor market. Based on this testimony and the FCE, the AJ found the claimant had suffered a 15% industrial loss of use of her left shoulder. Further, the AJ found apportionment was inapplicable as there was no showing of previous impairment to the claimant's left shoulder. Unhappy with the AJ's order, the claimant sought review from the Commission. The Commission affirmed the decisions of the AJ. Claimant then appealed to the Mississippi Court of Appeals. Kroger asserted a cross-appeal arguing that the testimony of the treating physician and the claimant's FCE assigning only a 3% rating were disregarded. The Court affirmed the Commission, holding that substantial credible evidence supported the 15% permanent partial impairment award. Lastly, the Court affirmed the Commission's decision that apportionment was inapplicable as there was no showing of a previous permanent impairment to the claimant's left shoulder. *Eichhorn v. Kroger Co.*, No. 2020-WC-00040-COA, (Miss. Ct. App. Apr. 13, 2021).



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