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LOUISIANA AND MISSISSIPPI WORKERS' COMP NEWSLETTER

RECENT CASES AND NEWS



EMPLOYER IMPROPERLY REDUCED TTD TO SEB AFTER VOC REHAB LABOR MARKET SURVEY EFFORTS

Claimant injured his back, neck, shoulder and knee in a work accident that precluded him from returning to his job as a police officer. After reaching MMI, the employer started vocational rehabilitation and labor market survey efforts to find suitable employment. The voc counselor worked with claimant for seven months before finding six potential sedentary and light duty jobs to present to the treating doctor for approval.



Initially, the doctor approved three of the jobs, noting on the approval that the employer would need to make an accommodation for claimant's pain medication and absences. The medication the doctor was prescribing made claimant "drowsy and tired." Then, at a final rehab conference with the voc counselor, the doctor approved the other three jobs, but did not write the medication condition on the approval as he did with the first three jobs. However, the doctor noted in his own records after the final conference that the claimant "will need continued medical management but hopefully he will be able to return to some type of gainful employment with the restrictions that we have placed." Because there was no condition specifically listed on the approval of the last three jobs, the employer converted claimant to SEB and reduced benefits. The vocational counselor then ended her work with claimant despite continued reports from the doctor that claimant continued to have the same pain issues. Claimant sued for reinstatement of TTD because no job had been identified that would accommodate the medication restriction placed by his doctor. At trial, the employer's argument was that the final three jobs were suitable because the doctor's approval contained no conditions. Given these facts, the court had little difficulty concluding that benefits were wrongly converted and reduced, and further that the employer was liable for penalties and attorney's fees. Lentz v City of New Orleans Police Department, 2022-CA-0500 (La. 4 Cir. 12/15/22).



CLAIMANT DID NOT COMMIT FRAUD AND LATE ADDED HEAD INJURY WAS COMPENSABLE

Claimant slipped and fell while working at a chicken processing plant landing on her left knee. Eleven months after the accident, while undergoing a routine eye exam, it was discovered that she had a right optic nerve hemorrhage and swelling of the optic nerves in both eyes. To relieve pressure, the employee underwent a lumbar puncture and later sought treatment from an ophthalmologist, a neurologist, and a physical medicine rehabilitation specialist. Claimant was eventually diagnosed with post-concussion syndrome that her physician related to the work accident. Employer disputed the compensability of any injury other than the left knee injury, and further asserted fraud based on claimant's statements not documented until well after the accident that she hit her head in the fall. Claimant testified at trial that she did not immediately realize that she had hit her head as she was focusing more on her leg injury, but that she did complain of a headache the day of the accident to the company nurse. She also allegedly reported having a headache to the ER doctor (along with knee pain) and that she had taken 800mg of ibuprofen before she arrived at the hospital. Neither the company nurse's report nor the ER record documented the alleged headache complaints. The workers' comp judge rule in claimant's favor on all issues, concluding that claimant injured her neck, back, shoulder, elbow, thigh, left knee, and head in the work accident. The court of appeal affirmed the ruling noting that any failure of the employer records to document all the reported injuries would have been the fault of the nurse. In that regard, the court pointed out that the nurse had a serious hearing problem based on the nurse's admission during trial that he could not hear many of the questions asked to him and that he stated "he was never really sure of what anybody tells him." With regard to the alleged fraud for claimant's failure to mention a head injury in a recorded statement, the court explained that the inaccurate investigative report written by the nurse was used to prepare the questions for the claimant's recorded statement, which is why no head injuries were addressed in the statement. Calhoun v. Sanderson Farms, Inc. 2022-0478 (La. App. 1 Cir. 12/16/22).



DEPT. OF LABOR ADJUSTS PENALTIES FOR INFLATION

On January 13, 2023, the Department of Labor published a final rule, effective January 15, 2023, adjusting penalties under the Inflation Adjustment Act for 2023. The final rule is on the Federal Register website. The rule makes the following adjustments to penalties assessed by the Office of Workers' Compensation Programs (OWCP) under the Longshore and Harbor Workers' Compensation Act:

Section 14(g) of the LHWCA, 20 C.F.R. § 702.236: Failure to Report Termination of Payments

The penalty amount has increased from \$320 to **\$345**.

Section 30(e) of the LHWCA, 20 C.F.R. § 702.204: Penalty for Late Report of Injury or Death

The maximum penalty amount has increased from \$26,269 to **\$28,304**.

Section 49 of the LHWCA, 20 C.F.R. § 702.271(a)(2): Discrimination Against Employees Who Bring Proceedings

The penalty amount has increased from a \$2,627 minimum and a \$13,132 maximum to a **\$2,830 minimum and \$14,149 maximum**.

Industry Notice No. 195, which is available on the OWCP, Division of Federal Employees', Longshore and Harbor Workers' Compensation (DFELHWC) website at

<https://www.dol.gov/agencies/owcp/dlhwc/lindustryntices/lindustryntices>, outlines the adjustments in detail. The new amounts will apply to penalties assessed after January 15, 2023.



COURT OF APPEAL REVERSES THE COMP JUDGE, RULES THAT EMPLOYER MAY COMPEL AN FCE

In a very brief opinion, the Louisiana Third Circuit Court of Appeal issued the following ruling upholding the employer's right to compel an FCE:

We find that the workers' compensation court erred when it denied Relator's motion to compel a functional capacity examination (FCE). Pursuant to La.R.S. 23:1121(A), Plaintiff "shall submit [her]self to an examination by a duly qualified medical practitioner provided and paid for by the employer... as often as may be reasonably necessary." Such duly qualified medical practitioner may include a physical therapist, and an FCE may be compelled in order to resolve disputes over an injured employee's ability to return to work. *Gautreaux v. K.A.S. Const., LLC*, 05-1192 (La. App. 3 Cir. 2/22/06), 923 So.2d 850, and *Clavier v. Coburn Supply Co., Inc.*, 16-625 (La. 6/29/17), 224 So.3d 954. An FCE is reasonably necessary in the instant case to resolve the dispute over Plaintiff's ability to return to work. Accordingly, we reverse the ruling of the workers' compensation court and grant Relator's Motion to Compel. *Lafayette City-Parish Consolidated Govt v Senegal*, WCW 22-0530 (La. 3 Cir. 12/08/22).



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