

**LOUISIANA WORKERS'
COMPENSATION
LEGISLATIVE &
JURISPRUDENTIAL
UPDATE**

Presented by

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I. PENDING LEGISLATION

This legislation described below was enacted by the Louisiana Legislature in its summer 2009 Session without a veto by the Governor, such that it went into effect on August 15, 2009.

Senate Bill 303

This law provides that a "Medical Treatment Schedule" (a/k/a treatment guidelines) will be made a part of the OWC's administrative rules on or before September 30, 2010. The guidelines will be developed by the OWC's Director with the assistance of a "Medical Advisory Council." This council will be made up of representative healthcare professionals from multiple different specialties and will include, by rule, an orthopedic surgeon, a neurosurgeon, a neurologist, an interventional pain management physician, a family care physician, an occupational therapist, a physical therapist, a chiropractor, a psychiatrist and a psychologist. The Director of the OWC must consult with the various Medical Council members and refer to established inner disciplinary treatment guidelines before publishing the schedule.

Importantly, this law provides that either party may apply to the OWC's Medical Director for a decision should a dispute arise as to whether the treatment is within the guidelines or if a variance from the guidelines is appropriate. Either party may then appeal the decision of the OWC Medical Director by filing a 1008 Disputed Claim for Compensation with the OWC.

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II. RECENT JURISPRUDENCE/CASE LAW

A. Course and Scope of Employment

In ***Lemoine v. Town of Simmesport***, 08-429 (La. App. 3 Cir. 1/28/09), 998 So.2d 362, the claimant, an employee of the town of Simmesport, suffered a seizure that caused her to fall to the ground and strike her head upon the highway while volunteering at a roadblock set up to collect money for charity. This incident placed the claimant in a semi-vegetative state, thus requiring brain surgery. Following her surgeries, the claimant filed a claim for workers compensation benefits against the town. The OWC Judge, granting the defendant's motion for involuntary dismissal, held that the claimant was not acting within the course and scope of her employment with the town when the incident occurred. The claimant appealed, arguing that she was acting within the course and scope of her employment with the town because of the fact that she remained "on the clock" during the volunteer effort.

The appellate court found no manifest error on the part of the OWC Judge in his finding that the claimant was not in the course and scope of her employment with the town. The appellate court noted the testimony of the mayor in which he stated that participation in such roadblocks were strictly voluntary and that they usually only occur on weekends.

Additionally, the mayor stated that the claimant had been a volunteer with the charity program before she attained employment with the city. The appellate court also noted the fact that the claimant left her office in order to change her clothes before returning to aid in the charity roadblock. While the evidence did show that the claimant was in fact "on the clock" at the time of the incident, the appellate court reasoned that this factor alone was not determinative of whether or not the claimant was acting within the course and scope of her employment.

In ***Lockman v. Town of Maringouin***, 07-0615 (La. App. 1 Cir. 3/6/09), 4 So.3d 828, while driving back to the Town of Maringouin from a visit with his mother in the hospital, the police chief of the Town of Maringouin was killed in an accident with a drunk driver outside of the police chief's jurisdiction. The vehicle in which the police chief was traveling was an unmarked police cruiser provided by the town for both his official and personal use. In addition to the car, the town also provided the deceased with a cellular telephone which he had used that evening prior to the accident. The deceased's wife filed a claim for compensation, including funeral expenses and death benefits.

The OWC Judge found that the police chief was in fact acting within the course and scope of his employment, thus entitling the deceased's wife to the requested benefits. The OWC Judge highlighted the fact that the deceased was traveling in a vehicle provided by the town that was equipped with a two-way radio and bubble light. Additionally, the OWC Judge noted the fact that because of his position as the chief law enforcement officer in the small town, the deceased was always "on call". The Town of Maringouin argued that since the officer was outside of his jurisdiction, he was also outside of the course and scope of his employment as the chief of police.

The appellate court here reversed the decision of the OWC, thus holding that the deceased was not acting within the course and scope of his employment. The appellate court held that La. R.S. 23:1034.1, governing workers' compensation for law enforcement officers, requires that an officer be injured while performing some law enforcement function. The appellate court noted that while the fact that the deceased was outside of his jurisdiction when he was injured would not preclude recovery under the statute, the court stressed that the deceased or any other injured officer must be involved in a typical law enforcement function in order to establish a valid claim. In this case, simply driving his official vehicle on a personal errand did not constitute such a law enforcement function.

In ***Hirachi v. Kamata***, 09-34 (La. App. 5 Cir. 5/12/09), 2009 WL 1324736, the plaintiff's husband suffered a fatal heart attack while working as a chef in a Japanese restaurant. The deceased's wife requested death benefits from his employer. When said benefits were denied, she filed suit against the restaurant. The trial court denied such benefits, finding that the deceased did not suffer a compensable work injury. The claimant appealed this finding.

The appellate court affirmed the decision of the trial court, relying upon the language of La. R.S. 23:1021. The court noted that when an employee's death is due to a heart attack, the requirements of the statute are controlling rather than the general requirements for a workers' compensation claim. This statute placed upon a claimant a higher burden of proof to show a causal link between on the job physical stressors and the employee's heart attack. The wife of the deceased did not live with her husband at the time of his death, thus she was only able to testify to telephone conversation with her husband in which he stated that he was working too much and he was very stressed. The restaurant was able to offer more convincing first-hand testimony which stated that the duties of the deceased's job were the same as all other chefs employed within the restaurant and that the restaurant only required a chef

B. PENALTIES AND ATTORNEY'S FEES

In ***Wilczewski v. Brookshires Grocery Store***, 08-718 (La. App. 3 Cir. 1/28/09), 2 So.3d 1214, an employee suffered an injury to her back while lifting a 50lb.crate of hams. The employee was treated by a specialist who recommended that she receive a spinal cord simulator. Additionally, during this time, the employee's specialist, concerned with her mental health, sent the employee to a physiologist who then recommended a pain management program for the employee. The employer denied both of these treatments, and the employee filed a workers' compensation claim. The Judge ruled on the matter, holding that the employee was entitled to the spinal cord simulator treatment and the pain management program recommended by the psychologist. The OWC Judge awarded the employee penalties and attorney's fees because of her employer's refusal to approve either of these treatments. The defendant appealed the matter, arguing that the OCW Judge erred when it awarded the claimant penalties and attorney's fees.

The appellate court here upheld the OCW Judge's decision to penalize the employer for its refusal to approve both the spinal cord simulator and the pain management program. In upholding the decision of the OWC Judge, the appellate court highlighted the fact that as an employer had a statutory duty to investigate both the incident and the medical condition as well as a duty to determine how the condition should be both diagnosed and treated. The appellate court noted that the defendant received letters from the claimant's treating physician detailing the claimant's condition and his request for the spinal simulator treatment. The court reasoned that the defendant had received notice of the request for the treatment, but they failed to fulfill their statutory duty. Therefore, because of this failure to provide the claimant with reasonable medical care, the appellate court reasoned that the OWC Judge was correct in awarding penalties and attorney's fees against the defendant.

In ***Sartelle v. Footlocker***, 08-579 (La. App. 3 Cir. 11/5/08), 996 So.2d 1280, the claimant was injured in the course and scope of his employment with a retail shoe store. The claimant fell from a rolling ladder and his back struck a wall of shoes. The incident went unwitnessed, but the claimant did report the incident a week later when his supervisor returned from vacation. The defendant tried to show inconsistencies in the claimant's testimony, and they highlighted the claimant's past history of drug use and the fact that while only 25 years old, he could not recall a majority of his life. Despite these attempts, the OWC Judge found that the claimant was "extremely credible" and that his claim was compensable. Further, the OWC Judge awarded penalties and attorney's fees to the claimant.

The defendant appealed, arguing that the OWC Judge erred in awarding penalties and attorney's fees. The appellate court affirmed the imposition of penalties and attorney's fees, finding no manifest error on the part of the OWC Judge. The appellate court agreed with the OWC Judge that following the depositions of the claimants friends and doctors, the defendant had enough information and evidence to determine that the claim at issue was compensable. Additionally, the appellate court highlighted the fact that the claims adjuster never spoke with any of the Footlocker employees when first investigating the claim.

In ***Sevin v. Chevrolet***, 08-1362 (La. App. 1 Cir. 4/30/09), 2209 WL 1160077, an employee of an automobile dealership suffered an injury to her back when she fell from her desk chair in which she was leaning in order to retrieve a calculator. The claimant filed a disputed claim for worker's compensation benefits. The defendant asserted that it was not liable for such benefits because it had already provided the claimant with medical treatment and work accommodation. The OWC Judge ruled in favor of the defendant, and the employee's claim was dismissed. She subsequently initiated an appeal.

After reviewing the claimant's assignments of error, the appellate court affirmed part of the ruling of the OWC Judge in addition to reversing part of his decision as well. The appellate court ruled in favor of the claimant on her assignment of error claiming that the defendant failed to properly investigate her claim for compensation, thus reversing this portion of the OWC Judge's ruling. Concerning this determination, the appellate court looked to the testimony of the claims adjuster for the defendant's workers' compensation insurer. According to her testimony, the claimant was denied medical benefits because she had determined that Ms. Sevin had abandoned treatment.

The court found that this determination and the subsequent decision to deny the claimant medical benefits after she resumed treatment was arbitrary and capricious. The appellate court imposed penalties and attorney's fees upon the employer for their handling of Ms. Sevin's claim.

NOTES

C. Section 1208 Forfeiture/Fraud

In ***Acadian Ambulance Service, Inc. v. Darbonne***, 08-983 (La. App. 3 Cir. 2/4/09), 2009 WL 250439, the claimant suffered an injury to her shoulder while moving a patient from a stretcher. Her employer initially paid workers' compensation benefits as well as treatment costs for the claimant; however, the claimant's employer stopped making payments when they felt that the claimant was fraudulently misrepresenting the extent of her injury and the employer filed a 1208 action against the claimant. The claimant subsequently filed a reconventional demand seeking penalties and attorney's fees for the employer's denial of her benefits. The trial court rendered judgment in favor of the claimant, finding that she did not violate La. R.S. 23:1208. The employer appealed, arguing that the OWC Judge erred in failing to find that the claimant had violated Section 1208.

On appeal, Acadian Ambulance Service primarily relied upon a video tape of the claimant in which she can be seen raising her arm over her head and placing her hair in a ponytail. In affirming the ruling of the OWC Judge that the claimant had not violated Section 1208, the appellate court noted the short length video tape and the fact that the video was recorded after the claimant had begun to receive some treatment for the injury that she had suffered. Additionally, the court noted that there was an MRI of the claimant's shoulder which clearly revealed the presence of the complained of injury. Thus, the appellate court found that the employer's videotaped "evidence" could not counter the evidence of injury produced by the claimant.

In ***Slater v. Mid-South Extrusion***, 43,343 (La. App. 2 Cir. 8/13/2008), 989 So.2d 252, an employee responsible for grass cutting on the defendant's property flipped a riding lawnmower over while cutting the grass on an incline. The employee complained of back pain, and he was taken to a local medical center where he was treated for his pain and given a drug test. The employee was instructed not to use the riding mower on the incline, and he was fired for his history of safety violations. The employee subsequently filed a disputed claim with OWC requesting medical expenses concerning his alleged back injury and weekly benefits. The employer issued a general denial, and through an amended claim, the employer and their worker's compensation insurer raised La. R.S. 23:1208. The OWC Judge found that the claimant employee was injured in the mowing incident while in the course and scope of his employment, thus he was entitled to workers' compensation benefits. Additionally, the OWC Judge denied the 1208 fraud claim. The employer and its insurer appealed.

During the appeal, the employer argued that the OWC Judge erred in denying their claim of fraud due to the fact that the record showed that the employee had a history of drug-seeking behavior and malingering. The appellate court found that the OWC Judge's finding, denying the 1208 fraud claim by the employer, was manifestly erroneous. The court looked to the testimony of a treating physician who had become suspicious of the employee. The physician testified that while the claimant walked with a cane and complained of limited use of his legs during his consultation, the employee picked up his cane and walked in a normal gate when he was outside of the physicians office. Additionally, the court pointed out evidence in the record showing that the employee stopped seeing a physician because the physician would no longer prescribe the claimant pain medication. The appellate court held that the employee forfeited his right to compensation through his violation of La. R.S. 23:1208.

Thus, the court reversed the ruling of the OWC requiring the employer and its insurer to pay workers' compensation benefits to the claimant.

In ***Clark v. Godfrey Knight Farms, Inc.***, 08-1723 (La. App. 1 Cir. 2/13/09), 6 So.3d 284, the claimant was injured while in the course and scope of his employment when his boss, in an attempt to attach an implement to the back of a tractor, crushed the claimant between the tractor and the implement. The accident left the claimant with lower back and leg pain. However, after the accident, the claimant began to complain of pain in his neck and hands as well. The claim received medical treatment, and the defendant's workers' compensation insurance paid the claimant temporary total disability benefits. After the claimant's pain persisted, it was recommended by the claimant's physician that he undergo several diagnostic tests and perhaps surgery in order to correct the injury to his back. Additionally, the physician recommended surgery for the pain in the claimant's hands. The employer's workers' compensation insurer would not cover these tests, and they order their own tests for which they refused to pay as well. Thus, the claimant filed a disputed claim for benefits with the OWC.

At the close of the employer's case at trial, it moved to assert a claim of fraud under La. R.S. 23:1208. The employer claimed that both the claimant's testimony and that of his treating physician raised issues as to whether the claimant had been truthful as to his back problems. The OWC Judge allowed the amended complaint, but she ruled that the employer had not carried the burden of proving a violation under Section 1208. The employer appealed.

D. Supplemental Earnings Benefits

In ***Ledford v. New Orleans Saints***, 08-1307 (La. App. 4 Cir. 4/29/09), 2009 WL 1153463, the claimant, a professional football player, received a fracture in his pinkie finger during his pre-season employment with the New Orleans Saints. Prior to his injury, the claimant entered into a two year contract with the team for \$260,000 payable his first year with the organization and \$280,000 for his second year, if he remained on the active roster. Subsequent to his injury, the claimant was released from the team before the beginning of the regular football season, thus he was never placed on the active roster of the Saints. Following his release from the team, claimant gained employment as a coach in the All American Football League for \$5,000.00 a month. The OWC Judge determined that the claimant's average weekly wage for the purpose of supplemental earnings benefits by dividing the \$12,808.58 that he received for the 24 weeks that he was with the franchise. The claimant's average weekly wage was determined to be \$527, thus his supplemental earnings benefits rate was determined to be \$352.61 per week.

The claimant appealed, assigning as error both the finding of the OWC Judge that his weekly wage was \$527 and his being denied supplemental earnings benefits.

After affirming the wage calculation of the OWC Judge, the appellate court addressed the supplemental earnings benefits issue. The court stated that the purpose of the supplemental earnings benefits is to compensate an injured employee for his loss of wage-earning capacity resulting from an accident within the course and scope of his employment. Supplemental earnings benefits are computed by examining a claimant's average weekly wage.

Additionally, the appellate court noted that La. R.S. 23:1221(3) places a burden upon the claimant to prove a work related injury resulted in his inability to earn 90% or more of his pre-injury wages. Therefore, based upon the claimant's preseason wages, \$12,808.58, and the fact that he was currently earning a wage of \$5,000 a month, the appellate court held that the claimant could not prove that he was unable to earn at least 90% of his pre-injury wages.

In ***Morrison v. First Baptist Church of West Monroe***, 44,189 (La. App. 2 Cir. 4/8/09), 2009 WL 929525, the claimant, a kitchen manager, suffered an injury to her wrist while stacking bus pans. The claimant was

diagnosed by her physician as having a pre-existing condition that was aggravated by her injury. Prior to this injury, the claimant worked 40 hours a week, and she received \$12.50 an hour. Subsequent to her injury, the defendant offered the claimant a "light duty position" for 30 hours per week at her pre-injury rate of pay. The claimant rejected this position, which was approved by her treating physician, and she made a claim for supplemental earnings benefits. Her case was heard by an OWC Judge who held that she was not entitled to any claimed supplemental earnings benefits. The OWC Judge cited the fact that the claimant had rejected an offer of employment from the defendant at her pre-injury rate of pay.

On appeal, the court reversed the decision of the OWC Judge that denied the issuance of supplemental earnings benefits to the claimant. The appellate court noted that the claimant had the burden of proving by a preponderance of the evidence that she was not able to earn 90% or more of her pre-injury wages. In awarding the supplemental earnings benefits, the appellate court reasoned that the OWC Judge had mistakenly calculated the claimant's wages under the light duty position offered by her employer. The court noted that while the rate of pay was the same, the new, post-accident position only allowed the claimant to work 30 hours per week. Thus, the new position provided the claimant with ten fewer hours than her pre-accident position, and at the rate of pay of \$12.50 an hour, the claimant would receive only 75% of her pre-injury wages.

In ***Williams v. Averitt Express, Inc.***, 08-1343 (La. App. 3 Cir. 4/1/09), 2009 WL 838597, the claimant, while employed as a truck driver for the defendant, suffered an injury to his spine while attempting to unhook a trailer. The claimant was diagnosed as having bulging disks, and he was under a restriction not to drive commercial vehicles by his treating physician. Several months after the incident, the defendant employer stopped making weekly indemnity payments to the claimant due to the fact that there was videotaped evidence that the claimant was working in his brother's tractor shop. Upon the cessation of the indemnity payments, the claimant filed a disputed claim with the OWC.

At trial, the OWC Judge found that the claimant did not violate La. R.S. 1208 and that he was entitled to supplemental earnings benefits. The employer appealed, arguing that the OWC Judge erred in awarding supplemental earnings benefits to the claimant.

The appellate court rejected the employer's argument and upheld the OWC Judge's issuance of supplemental earnings benefits to the claimant.

