



## Louisiana Workers' Compensation Decisions December 2017

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### Supreme Court

### First Circuit

### Second Circuit

### Third Circuit

*Christus Health Southwest Louisiana vs. All About You Home Healthcare*, (La. App. 3 Cir. 12/6/17) [HCP – Tom Filo; ER – Kevin Marks; WCJ – Mayo]

#### **MEDICAL BILLING**

Affirmed WCJ's award of \$1,398 for underpayment of medical bill, plus \$2,000 penalty and \$15,000 attorney fee, rejecting payor's assertion that the dispute was subject to the FairPay class action settlement/FFPM.

HCP filed a disputed claim seeking reimbursement of three bills for outpatient services totaling \$2,282.40, of which the defendant had paid \$656.13. Defendant asserted various exceptions/defenses based on the FairPay class action settlement (e.g. non-joinder of FairPay, lack of subject matter jurisdiction) all of which the WCJ denied. OWC rendered judgment awarding reimbursement of 90% of the billed charges, plus penalties and attorney fees.

The court of appeal affirmed. After reviewing the status of the FairPay settlement and the FFPM enforcement, the court found that the HCP had complied with the review and reconsideration process required to bring the dispute on OWC. The court noted defendant's arguments and attempts to "bring the matter within the parameters of the settlement" and make the matter about "the proper application of the FFPM" However, it found that under the plain language of the settlement, having exhausted the processes provided for therein, resolution of the dispute now depended on the LWCA. It concluded that the WCJ properly looked to the LWCA medical fee schedule to resolve the dispute, and correctly awarded reimbursement at 90% of billed charges.

*Harper vs. Boise Paper Holdings, LLC*, (La. App. 3 Cir. 12/6/17) [EE – T. Townsley; ER – C. Farr; WCJ – Palermo]

### **MEDICAL TREATMENT GUIDELINES**

Reversed WCJ's decision denying radio frequency ablation procedure.

Claimant suffered a compensable injury in 2012, causing occipital neuralgia. Per a prior judgment, an occipital nerve stimulator was implanted to relieve chronic headaches. However, claimant developed an infection due to the procedure and had it removed. As an alternative, his doctor recommended radio frequency ablation. The request was denied by defendant's UR. The OWC medical director found it was not covered by the MTG and required a variance, which had not been requested. The WCJ concluded that claimant failed to prove by clear and convincing evidence that the medical director was incorrect.

The appellate court reversed. It concluded that "a plain reading" of the guidelines dealing with occipital neuralgia indicated that the injury should be treated under the cervical injury guidelines. Those guidelines state "there is good evidence" supporting RFA. The court concluded "it is patently obvious" that RFA is appropriate for occipital neuralgia. Further, it found that the UR denial of the request was directly in conflict with the treatment guidelines. Accordingly, the court awarded claimant a \$2,000 penalty, and attorney fees of \$7,500.

*Carter vs. Iberia Parish School Board*, (La. App. 3 Cir. 12/13/17) [EE – David Whitmore; ER – William Bordelon; WCJ – Lanier]

### **CAUSATION, EVIDENCE**

Affirmed WCJ's judgment that claimant failed to prove her cervical injury was caused by a work accident.

Claimant, a cook for the defendant school board, suffered a compensable low back in May of 2011, lifting a piece of equipment. She treated with multiple physicians. She did deny any neck symptoms until a year after her work accident, when she reported a "sudden onset" of neck and arm pain requiring a trip to the emergency room. The employer denied that the neck injury was related to her 2011 lifting accident, despite a contrary opinion from one of claimant's doctors that her low back injury masked her cervical complaints.

At trial, defendant offered testimony from two orthopedists disputing causation. The WCJ overruled claimant's objection that the testimony was cumulative, and concluded that claimant failed to prove her cervical injury was caused by the work accident.

The appellate court affirmed. The court held that the WCJ properly allowed both of defendant's orthopedists to testify, since the language of R.S. 23:1124.1 allows parties to offer testimony from "no more than two" physicians. It rejected claimant's assertion that only one physician in any field or specialty was allowed, noting that the limitation of R.S. 23:1121 applied to examinations of the employee.

Regarding causation, the court agreed that the claimant failed to prove a causal link between her work accident and the cervical injury by a preponderance of the evidence. She did not report any neck symptoms for thirteen months, nor did she establish a pre-existing condition that may have been aggravated by the accident.

*Hataway vs. Akal Security, Inc.*, (La. App. 3 Cir. 12/28/17) [EE – M. Losavio; ER - J. Woods; WCJ – Braddock]

### **MENTAL INJURY, 1208 FRAUD, EXPANSION OF PLEADINGS**

Affirmed WCJ's decision that claimant failed to prove mental-mental or mental-physical injury under R.S. 23:1021(8), but also that defendants failed to prove 1208 fraud based on claimant's receipt of income while she was receiving indemnity benefits.

Claimant, an aviation security guard, claimed she was injured when a fight broke out among deportees she was supervising. Although she claimed various ongoing physical injuries, including neck, back, and shoulder pain, numerous doctors were unable to identify a physiological cause for her complaints. A psychologist eventually diagnosed her with "conversion disorder, posttraumatic disorder, and pain syndrome related to physical condition." At trial, defendant asserted a 1208 defense based on claimant's denial that she earned income by selling various goods on Facebook.

The WCJ concluded that claimant failed to meet the clear and convincing burden imposed by R.S. 23:1021(8) regarding mental injuries caused by either mental stress or physical injury. However, the trial court also denied the defendant's 1208 claim and accepted claimant's explanation that her Facebook postings purporting to sell various items were actually for her husband because he could not receive calls at work.

The court of appeal affirmed. The court rejected claimant's contention that the parties had stipulated to a compensable accident, noting that defense counsel's statements in that regard at trial were equivocal and insufficient to establish a stipulation. It found that the WCJ was not clearly wrong in finding that claimant failed to prove a compensable injury, noting the absence of any medical evidence showing a physiological cause for her complaints and that three doctors had diagnosed a conversion disorder. Further, the court found that claimant failed to prove that her alleged mental injury was caused by a physical injury, notwithstanding her psychologist's opinion that her "conversion disorder and the posttraumatic stress disorder were caused by the traumatic event, work accident."

Regarding the defendant's fraud defense, the court found that the WCJ was not clearly wrong in finding that claimant did not commit fraud. It noted the WCJ's "great discretion" in allowing the defense based on claimant's testimony at trial, but concluded that the trial judge was not clearly wrong in accepting claimant's explanation that she posted various items for sale on Facebook on behalf of her husband, because he could not answer his phone while he was at work. [Note partial dissent of Kyzar, J., re denial of benefits for mental/physical injury.]

#### **Fourth Circuit**

#### **Fifth Circuit**

*Eugene-Robinson vs. East Jefferson General Hospital*, (La. App. 5 Cir. 12/27/17) [EE – L. Maschek; ER – A. Stumpf; WCJ – Bruno]

#### **PRESCRIPTION**

Affirmed WCJ's grant of prescription exception as to indemnity benefits.

Claimant allegedly injured her back on 11/21/14, while carrying a stretcher at work. She filed a 1008 on 12/27/16, contending the employer had not paid any indemnity benefits. Claimant subsequently amended her dispute in March of 2017 to allege a developmental injury. The employer admitted that claimant suffered a work related injury but denied that it was developmental, and filed an exception of prescription as to indemnity benefits. In support of the exception, defendant offered medical records showing that claimant had been disabled and/or assigned work restrictions in December of 2014, and ultimately resigned her position on August 10, 2015, stating she was no longer able to perform her duties due to health reasons.

At the hearing on the exception, claimant's attorney acknowledged that she had resigned, but argued that she found another job and continued working until March of 2017, when she learned she had a torn labrum requiring surgery. Thus, her disability did not develop until 2017. The WCJ granted the exception, finding that claimant was on notice of her disability when she was restricted from work from December 5–9, 2014, and again in August 2105 when she resigned from her employment.

The court of appeal affirmed. Apparently accepting claimant's assertion that her injury was a "developing injury" subject to R.S. 23:1209(A)(3), the court nevertheless found no evidence to support the argument that she continued working after resigning from the defendant. It concluded that the WCJ was not clearly wrong in determining August of 2015 as the latest date for development of claimant's disability. Further, the court rejected claimant's position that she should have been allowed to amend her petition,

noting that she had an opportunity to offer evidence that her claim was timely filed and failed to do so.

