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Louisiana Workers Compensation

Chapter 12

Employer Penalties and Attorney's Fees

Time Limits to Pay Indemnity

The general theory is that indemnity benefits (wage replacement) are paid in the same method that wages were paid prior to the accident. I recommend to my clients that all indemnity benefits be paid weekly as this will minimize math errors which can result in penalties and attorney's fees.

La. R.S. 23:1201:

A. (1) Payments of compensation under this Chapter shall be paid as near as may be possible, at the same time and place as wages were payable to the employee before the accident; however, when the employee is not living at the place where the wages were paid, or is absent therefrom, such payments shall be made by mail, upon the employee giving to the employer a sufficient mailing address. However, a longer interval, not to exceed one month, may be substituted by agreement without approval of the director. An interval of more than one month must be approved by the director.

Payments of temporary total disability (TTD), permanent total disability (PTD), or death benefits shall become due on the fourteenth (14th) day after the employer has notice of injury/disability or death.

B. The first installment of compensation payable for temporary total disability, permanent total disability, or death shall become due on the fourteenth day after the employer or insurer has knowledge of the injury or death, on which date all such compensation then due shall be paid.

Installment payments for supplemental earnings benefits are due on the fourteenth (14th) day after the employer has knowledge of a compensable wage loss. This knowledge can be received in many ways, including a form 1020, which allows an employee to report his or her wage loss. Unless the employer has some evidence of earnings capacity the payment should be made within fourteen (14) days of the "wage loss", and an employer who refuses to pay without receipt of a 1020, when there is no evidence that the employee is working or capable of working, will be found to be arbitrary and capricious.[1]

C. Installment benefits payable pursuant to R.S. 23:1221(3) shall become due on the fourteenth day after the employer or insurer has knowledge of the compensable supplemental earnings benefits on which date all such compensation then due shall be paid.

When indemnity benefits are owed due to anatomical loss, or what is commonly known as schedule loss, or permanent partial disability, the payments are due within thirty (30) days of the employer receiving a medical report giving notice of permanent partial disability. If the employee's choice of doctor gives a medical report stating that he has a forty (40%) percent anatomic loss of his arm; and the employer disputes this, the employer should set up or make arrangements with a second medical opinion within thirty (30) days of receipt of the initial medical report. Failing to do so, and refusing to pay PTD, will result in an award of penalties and attorney's fees for arbitrary and capricious denial of the claim.

D. Installment benefits payable pursuant to R.S. 23:1221(4) shall become due on the thirtieth day after the employer or insurer receives a medical report giving notice of the permanent partial disability on which date all such compensation then due shall be paid.

Time Limits to Pay Medical

Medical benefits are not due until a medical report is received and proper billing information is forwarded to the employer or worker's compensation insurer. From that date the employer or workers' compensation insurer has sixty (60) days to make payment.

[1] But see safe harbor provisions discussed below.

If there is a dispute on causation the employer or workers' compensation insurer has sixty (60) days to take some action to refute the claim of causation. Most often this takes the form of a second medical opinion. Employers or workers' compensation insurers that do nothing run a high risk of penalties and attorney's fees for arbitrary and capricious refusal to pay benefits.

> E. (1) Medical benefits payable under this Chapter shall be paid within sixty days after the employer or insurer receives written notice thereof, if the provider of medical services is not utilizing the electronic billing rules and regulations provided for in R.S. 23:1203.2.
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> (2) For those providers of medical services who utilize the electronic billing rules and regulations provided for in R.S. 23:1203.2, medical benefits payable under this Chapter shall be paid within thirty days after the employer or insurer receives a complete electronic medical bill, as defined by rules promulgated by the Louisiana Workforce Commission.

Defendants have tried unsuccessfully to blame the failure to pay medical benefits within sixty (60) days on their fee review company. Medical benefits under the Workers' Compensation Act are subject to a fee schedule. Most workers' compensation carriers use a separate company to review and determine the proper amount of payment on a medical bill. The employer cannot blame its "agent" for the delay in performing its services (fee schedule review) as a defense to penalties and attorney's fees.

Time Limits to Pay Travel

Travel reimbursement is treated the same as medical benefits and the employer has sixty (60) days from the receipt of a request to make payment for travel expenses. Travel expenses include travel to and from healthcare providers, the pharmacy, and vocational rehabilitation counseling. Travel is paid at the IRS rate for travel reimbursement, and is currently 51¢ per mile.

Penalty for Failure to Pay Judgment or Settlement

Unlike normal civil judgments, workers' compensation judgments that are not timely paid are subject to penalties for failure to do so. The penalties are very significant and include attorney's fees. The penalty for failure to pay a judgment or settlement in workers' compensation is $100.00 per day capped at $3,000.00 or twenty-four (24%) percent of the value of the entire judgment (uncapped) whichever is greater. In addition to the penalty, the plaintiff's attorney is entitled to attorney's fees for his efforts in collecting the judgment. It is important to note that settlements are treated as final judgments under the statute as well. Therefore, if you have a workers' compensation settlement of $200,000.00 and payment is not received by the plaintiff for thirty-one (31) days, the

penalty for the one (1) day late payment is $48,000.00 plus a reasonable attorney fee. These penalties are very significant and operate to ensure that workers' compensation judgments and settlements are paid in a timely manner. The penalty provision is provided in §1201(g) and states as follows:

> F. If any award payable under the terms of a final, nonappealable judgment is not paid within thirty days after it becomes due, there shall be added to such award an amount equal to twenty-four percent thereof or one hundred dollars per day together with reasonable attorney fees, for each calendar day after thirty days it remains unpaid, whichever is greater, which shall be paid at the same time as, and in addition to, such award, unless such nonpayment results from conditions over which the employer had no control. No amount paid as a penalty under this Subsection shall be included in any formula utilized to establish premium rates for workers' compensation insurance. The total one hundred dollar per calendar day penalty provided for in this Subsection shall not exceed three thousand dollars in the aggregate.

Conduct Resulting in Penalties and Attorney's Fees

Penalties and attorney's fees are awarded in a variety of circumstances. Some examples are:

1. Failure to investigate;
2. Improper calculation of compensation rate;
3. Improper payment of medical expenses;
4. Failure to pay or late payment of medical bills;
5. Failure to authorize medical treatment; and
6. Failure to consent to choice of physician.

Employers have a duty to investigate. A workers' compensation claim is very much like a tennis game. Every time the employer or workers' compensation insurer receives information suggesting a compensable workers' compensation claim, they have a duty to react to that information. They can react by paying the claim, or they can react by investigating the claim. But when an employer fails to evaluate factual or medical information about the claimant's physical condition before denying the claim they run the risk of being subjected to penalties and attorney's fees.

Even if, ultimately, the workers' compensation claim is found to be "non-compensable", the employer can still be arbitrary and capricious in their handling of the claim. Courts routinely award penalties and attorney's fees to punish the activity or inactivity of a workers' compensation insurer. The determination of whether a penalty and attorney's fees are owed is based on the facts known by the employer at the time of the actions. Even if the employer eventually puts together facts to prove the case is not compensable, it cannot arbitrarily and capriciously deny medical treatment when the "known" facts do not support such a denial.

One of the most common areas for penalties and attorney's fees is improper calculation of the rate of indemnity benefits. It is imperative that the employer or workers' compensation insurer accurately calculate the average weekly wage and the resulting indemnity rate. It is very common for a minor error of 5¢ or 10¢ to result in a very major claim for penalties and attorney's fees. Courts sometimes give leniency to the employer/workers' compensation insurer if they correct their error when put on notice by the employee. This certainly is not a guarantee and the only way to truly avoid penalties and attorney's fees is to correctly calculate the average weekly wage and the workers' compensation rate.[2]

Commonly employers and workers' compensation insurers claim that their error was justified due to a computer error. The courts have routinely found this not to be a justifiable excuse. Statements like "the claim just fell off the system" or "the error was made due to a software glitch" are not acceptable excuses. The employer or insurer must react to the latest information.

The employer or workers' compensation carrier may be justified if there is a close factual or legal dispute about the compensability of the claim. Again, however, the employer cannot rest on initial good reports or facts to deny the claim when later reports or facts suggest a compensable claim.

Medical Issues

An employer must make reasonable efforts to determine the employee's medical condition before terminating or refusing to pay benefits.

Often times, employers or workers' compensation insurers rely on a conflict in medical reports to attempt to defeat penalties and attorney's fees. This is a risky proposition. When the treating physician states that treatment is necessary or that an employee is disabled, and the only information the employer has to counter this information is a second medical opinion, by a doctor of their choosing, this often results in an award of penalties and attorney's fees, as the opinion of the treating physician is given great deference over an opinion based on a single visit/evaluation. The proper procedure, once a medical dispute occurs, is for the employer to seek an independent medical exam appointed by either the Office of Workers' Compensation or the Workers' Compensation Judge. The employer cannot rely blindly upon earlier favorable medical reports when more recent reports suggest disability.

Burden of Proof for Penalties and Attorney's Fees

Technically, penalties are awarded for failure to pay benefits timely unless the employer or insurer "reasonably controverted" the claim or the non-payment results from

[2] Under the newly enacted safe harbor provisions, which are discussed below, the employer or insurer may avoid these penalties if it files the appropriate form when it initiates benefits.

conditions over which the employer or insurer had no control. 23:1201(F) (2). Penalties are awarded when an employer or insurer discontinues benefits when the discontinuance is found to be arbitrary, capricious or without probably cause. 23:1201(I)

In my view, this is a distinction without a difference. I do not think reviewing courts differentiate between the two standards. A court is not going to deny an employee penalties and attorney's fees simply because the court finds that an insurer's denial of needed medical care was only unreasonable, not arbitrary and capricious.

Despite my opinion, many courts have spent a great deal of time discussing the difference between the two standards. The Louisiana Supreme Court stated:

> "The phrase "reasonably controverted," on the other hand, mandates a different standard. In general, one can surmise from the plain meaning of the words making up the phrase "reasonably controvert" that in order to reasonably controvert a claim, the defendant must have some valid reason or evidence upon which to base his denial of benefits. Thus, to determine whether the claimant's right has been reasonably controverted, thereby precluding the imposition of penalties and attorney fees under La. R.S. 23:1201, a court must ascertain whether the employer or his insurer engaged in a non-frivolous legal dispute or possessed factual and/or medical information to reasonably counter the factual and medical information presented by the claimant throughout the time he refused to pay all or part of the benefits allegedly owed. This definition is in accord with that presently used by the lower courts to determine whether penalties and attorney fees are owed. *See* *Antrainer v. Great Atlantic & Pacific Tea Co.*, 97-1554, p. 6 (La.App. 1 Cir. 4/8/98), 712 So. 2d 590, 594 ("Given the facts, medical and otherwise, known to the employer or his insurer, did the employer or insurer have a reasonable basis to believe that medical expenses and compensation benefits were not due the employee."); *Woods v. Ryan Chevrolet, Inc.*, 30,206, p. 9 (La.App. 2 Cir. 2/25/98), 709 So. 2d 251, 257 ("The employee's right to such benefits will be deemed 'reasonably controverted' if the employer or insurer had a reasonable basis for believing that medical expenses and indemnity benefits were not due the employee. . . . Reasonably controverting a claim means that the payor has factual or medical information of such a nature that it reasonably counters that provided by the claimant."); *Cook v. Kaldi's Coffee House*, 97-0979, p. 10 (La.App. 4 Cir. 1/28/98), 706 So. 2d 1052, 1058 ("The test to determine whether the claimant's right has been reasonably controverted turns on whether the employer or his insurer had sufficient factual and medical information to reasonably counter the factual and medical information presented by the claimant."); *Lemoine v. Hessmer Nursing Home*, 94-836, p. 20 (La.App. 3 Cir. 3/1/95), 651 So. 2d 444, 456 ("A workers' compensation claim is 'reasonably controverted,' precluding imposition of penalties and attorney fees, if the employer had sufficient factual and medical information upon which to base a decision to reduce or terminate benefits."). If an employer or insurer reasonably controverts a

claim and then becomes aware of information that makes his controversion of that claim unreasonable, he must then pay the benefits owed or be subject to penalties and attorney fees from that point forward."

"We are cognizant of the fact that defendants did not act in an egregious manner in this case. However, the purpose of an imposition of penalties is to "nudge the employer into making timely payments when there is no reasonable basis for refusing or delaying its obligation." *Weber v. State*, 93-0062, p. 8 (La. 4/11/94), 635 So. 2d 188, 193. An imposition of penalties in this case furthers such a policy by ensuring that employers and insurers are in compliance with the statutory scheme that requires timely payments unless the employer or insurer has a valid reason or evidence upon which to base a denial of benefits."

Brown v. Texas-La Cartage, Inc., 721 So. 2d 885 (La. Dec. 1, 1998)

The Louisiana Supreme Court, a decade after *Brown,* basically defined arbitrary and capricious as unreasonable, stating:

"Awards of penalties and attorneys' fees in workers' compensation cases are essentially penal in nature, being imposed to discourage indifference and undesirable conduct by employers and insurers. *Williams v. Rush Masonry, Inc.*, 1998-2271 (La. 6/29/99), 737 So. 2d 41, 46. Although the Worker's Compensation Act is to be liberally construed in regard to benefits, penal statutes are to be strictly construed. *Id.* "Arbitrary and capricious behavior consists of willful and unreasoning action, without consideration and regard for facts and circumstances presented, or of seemingly unfounded motivation." *Brown v. Texas-LA Cartage, Inc.*, 1998-1063, p. 8-9 (La. 12/1/98), 721 So.2d 885, 890."

Iberia Med. Ctr. v. Ward, 53 So. 3d 421, 433-434 (La. 2010)

Seemingly, the more courts discuss arbitrary and capricious and unreasonable controversion, the more the distinction is blurred.

"Penalties and attorney fees are provided for in La.R.S. 23:1201 and La.R.S. 23:1201.2, which are penal in nature. These provisions were enacted to "deter employers and insurers from irresponsibly handling an employee's workers' compensation claim. The legislature provided for statutory penalties in instances when the employee's right to benefits has not been reasonably controverted by the employer, and attorney's fees where an insurer has acted arbitrarily, capriciously. . . ." Jeansonne v. American Native Const., 97-1228, p. 13 (La.App. 3 Cir. 3/6/98); 710 So. 2d 306, 313 (citations omitted). In LaHaye v. Westmoreland Casualty Co., 509 So. 2d 748 (La.App. 3 Cir. 1987), penalties and attorney fees for untimely payments of compensation benefits and medical benefits were addressed. We find the

facts and reasoning therein [is] analogous to this case. In LaHaye, the court observed:

> It is uncontradicted that these payments were late. Unless defendants can show that the late payments resulted from conditions over which the employer or insurer had no control or that the employee's right to such benefits had been reasonably controverted, LSA-R.S. 23:1201 mandates a 12% penalty payment.
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> . . . .
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> No satisfactory explanation was offered as to why these benefits were not timely paid. Rather, the errors seem to have been made by Westmoreland's agents not diligently reviewing and adjusting plaintiff's claim. This laxity will not be tolerated as it constitutes arbitrary and capricious action under LSA-R.S. 23:1201.2.

LaHaye v. Westmoreland Casualty Co., 509 So. 2d 748 (La.App. 3 Cir. 1987). *Id*. at 750 (citations omitted).

> No weekly benefits were paid for six weeks from the time Ms. Lejeune was taken off duty by Dr. Budden; that was five and one-half weeks after Ms. Dozier admitted receiving notice of the change to non-work status. Thereafter, even though Ms. Dozier promised Ms. Lejeune's counsel that she would bring the benefits current in exchange for cancellation of a mediation conference, which she did, she failed to see that Ms. Lejeune's benefits continued to be paid on time thereafter. We find three lapses of no less than four weeks each to be inexcusable. Accordingly, we find Ms. Lejeune is entitled to penalties and attorney fees.

LeJeune v. Integrated Health Serv., 729 So. 2d 616, 618-619 (La.App. 3 Cir. Dec. 9, 1998)

Penalty Paid to Claimant, Maximum Amount

Workers' compensation penalties are paid directly to the claimant. The claimant can be an injured worker, the survivor of an injured worker, or a healthcare provider, etc. The penalty is not payable to the plaintiff's attorney.

§1201(f) deals with late payments. Section (f) states in pertinent part:

> of a penalty in an amount up to the greater of twelve percent of any unpaid compensation or medical benefits, or fifty dollars per calendar day for each day in which any and all compensation or medical benefits remain unpaid or such consent is withheld, together with reasonable attorney fees for each

> disputed claim; however, the fifty dollars per calendar day penalty shall not exceed a maximum of two thousand dollars in the aggregate for any claim. The maximum amount of penalties which may be imposed at a hearing on the merits regardless of the number of penalties which might be imposed under this Section is eight thousand dollars. An award of penalties and attorney fees at any hearing on the merits shall be res judicata as to any and all claims for which penalties may be imposed under this Section which precedes the date of the hearing. Penalties shall be assessed in the following manner:

This section deals primarily with the late payment of benefits. The penalty is $50.00 per day. If there is one (1) late payment, and the payment is more than forty (40) days late, the employee or healthcare provider would be entitled to a maximum penalty of $2,000.00 (40 days * $50). If there are four (4) or more late payments of benefits in a single claim the maximum amount of penalty that can be awarded is $8,000.00. It is not uncommon for a workers compensation claim to last for many years. Hypothetically, if the workers' compensation carrier was routinely late in making payments, and for example, it was proven that the workers' compensation carrier was late on fifty (50) or sixty (60) payments over the years, the maximum penalty that could be awarded would be $8,000.00. A finding of entitlement to penalties is res judicata as to all late payments occurring prior to the adjudication. It would be impermissible, therefore, for a claimant to file multiple suits for each of the four (4) late payments in order to ultimately collect more than $8,000.00 in penalties. Once there is a adjudication, however, if new late payments occur there could be a new claim for penalties for the post judgment late payments.

§1201(i) states in pertinent part:

> Any employer or insurer who at any time discontinues payment of claims due and arising under this Chapter, when such discontinuance is found to be arbitrary, capricious, or without probable cause, shall be subject to the payment of a penalty not to exceed eight thousand dollars and a reasonable attorney fee for the prosecution and collection of such claims.

This section applies when an employer or insurer discontinues benefits. A single discontinuance can result in a penalty of up to $8,000.00.

It is arguable that these two (2) provisions could encourage employers and insurers to make a single decision to not start benefits and thus only be subject to a $2,000.00 claim. It is very common for workers' compensation judgment to award penalties in the $2,000.00 to $8,000.00 range. The distinction between discontinuance, termination and refusal to pay become very blurred, and the penalty provisions are very inconsistently applied.

Award of Attorney's Fees

The amount of attorney's fees are not limited by the Workers' Compensation Act. They are, however, not to be used to punish the defendant/workers' compensation carrier for bad faith or culpability. *Langley v. Petro Star Corp.*, 792 So. 2d 721 (La. June 29, 2001).

They are only to pay for the reasonable value of services rendered by the workers' compensation attorney. Attorney's fees should be based on the degree of skill and ability exercised by the attorney, the amount of the claim, the amount of the recovery by the claimant and the amount of time the attorney devoted to the case. Routinely, attorney's fees are awarded in the $5,000.00 to $20,000.00 range for fairly simply workers' compensation cases.

> The factors usually taken into account when fixing the amount of attorney fees to be awarded in workers' compensation cases are the degree of skill and ability exercised by the attorney, the amount of the claim, the amount recovered for the claimant, and the amount of time the attorney devoted to the case. McCarroll at p. 9, 773 So. 2d at 700; Melancon v. Fruit of the Loom, Inc., 97-2670, p. 2 (La. 2/6/98), 706 So. 2d 1390, 1391; Naquin v. Uniroyal, Inc., 405 So. 2d 525, 528 (La. 1981). See also H. ALSTON JOHNSON, III, 14 LOUISIANA CIVIL LAW TREATISE: WORKERS' COMPENSATION LAW AND PRACTICE § 389 (3d ed. 1994).
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> *Langley v. Petro Star Corp.*, 792 So. 2d 721, 727-728 (La. June 29, 2001)

Failure to provide vocational Rehabilitation can result in an award of Attorney's Fees

An injured worker is entitled to vocational rehabilitation if he can prove a wage loss. If the employer/workers' compensation carrier is arbitrary and capricious in refusing to provide vocational rehabilitation services they can be assessed with penalties and attorney's fees. The court in *Haynes* reasoned as follows:

> "Under the provisions of LA. REV. STAT. ANN. § 23:1226(B)(3), "should the employer refuse to provide these [rehabilitation] services, the employee may file a claim with the office to review the need for such services in the same manner and *subject to the same procedures as established for dispute resolution of claims for workers' compensation benefits*." (emphasis added). LA. REV. STAT. ANN. § 23:1201.2, a provision implemented in the resolution of disputed claims for workers' compensation benefits, provides in pertinent part:
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> > Any employer or insurer who at any time discontinues payment of ***claims due*** and arising under this Chapter, when such discontinuance is found to be arbitrary, capricious, or without probable cause, shall be subject to the payment of all reasonable attorney fees for the prosecution and collection of such claims. (emphasis added).
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> We find that vocational rehabilitation is a "claim due" under LA. REV. STAT. ANN. § 23:1201.2 because LA. REV. STAT. ANN. § 23:1226(A) provides that the employee shall be entitled to prompt rehabilitation services when he has

suffered an injury which precludes him from earning wages equal to wages earned prior to the injury."

Haynes v. Williams Fence & Aluminum, 851 So. 2d 917, 918 (La. Apr. 21, 2003)

Safe Harbor from Penalties and Attorney's Fees

Effective August 1, 2013, new procedures became effective that attempt to protect Louisiana employers and insurers from claims for penalties and attorney's fees. The technical requirements of these "safe harbor" provisions are beyond that scope of these materials, but, under La. R.S. 23:1201.1, an employer or insurer should not be liable for penalties and attorney's fees if, when it contests or discontinues benefits, it files a Notice of Payment, Modification, Suspension, Termination or Controversion of Compensation or Medical Benefits (LWC-WC-1002). The statute sets forth procedures for an employee to disagree with the employer or insurer's action and for courts to resolve any disagreement. If the employer or insurer complies with the procedures set forth in the statute, however, it should not liable for penalties and attorney's fees, even if the court ultimately determines that the denial or discontinuance of benefits was improper.

The Safe Harbor provisions apply to all issues except medical necessity[3], but certain provisions specifically address and change prior law. Previously, an employer or insurer could not withhold SEB based on an employee's failure to submit a 1020 form (Monthly Report of Earnings). Now, the employer or insurer may suspend benefits by filing a Notice of Suspension if the employee does not submit the form. Similarly, the employer or insurer now, by filing a Notice of Suspension, may suspend medical benefits when an employee refuses to submit a choice of physician form and may suspend all benefits if an employee refuses to submit to a medical examination. An employer or insurer now may reduce benefits by filing a Notice of Modification when an employee refuses to participate in vocational rehabilitation.

Failure of Employer to Provide Worker's Compensation Insurance

1. La. Rev. Stat. 23:1170--Civil penalties $250 per employee, second offense is $500 per employee, not to exceed $10,000.

2. La. Rev. Stat. 23:1172--Criminal penalties include fines up to $10,000 plus hard labor for maximum of one year.

3. La. Rev. Stat. 23:1171.1--Permits director of OWC to seek a court injunction to close business if it has several violations of this law.

4. La. Rev. Stat. 23:1171.2--An employer who has not secured workers' compensation insurance will be required to pay 50% more in weekly

[3] Issues regarding medical necessity are governed by La. R.S. 23:1203.1

benefits.

5. La. Rev. Stat. 23:1171.1--Criminal penalties are established for an employer who misrepresents that he has insurance. Monetary penalties of up to $10,000 and hard labor for up to two years.