

SUPREME COURT OF THE
STATE OF LOUISIANA
DOCKET NUMBER: 2004-C-2254

COPY

04 C 2254

GREGORY M. TAYLOR
PLAINTIFF/APPLICANT

VERSUS

TOMMIE'S NOVELTY GAMING AND BRIDGEFIELD INSURANCE
COMPANY AND U. S. SPECIALTY INSURANCE COMPANY
DEFENDANTS/RESPONDENTS

ON APPEAL FROM THE
COURT OF APPEAL, SECOND CIRCUIT
DOCKET NUMBER: 38, 568WCA

AND

OFFICE OF WORKERS' COMPENSATION, DISTRICT 1W
DOCKET NUMBER: 02-00501
CADDO PARISH, LOUISIANA

ORIGINAL BRIEF ON BEHALF OF TOMMIE'S
NOVELTY GAMING, L.L.C. AND BRIDGEFIELD
CASUALTY INSURANCE COMPANY
DEFENDANT/RESPONDENT

SUPREME COURT
LOUISIANA

2005 JAN 31 P 3:51

CLERK
OF COURT

Respectfully submitted,

ESKRIDGE E. SMITH, JR.
A Law Corporation

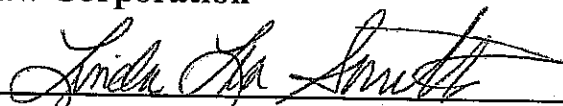
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LAW AND ARGUMENT

I. It was not manifest error for the Court of Appeal and the Trial Court to find that Taylor violated LSA R.S. 23:1208

The workers' compensation fraud statute, LSA R.S. 23:1208, mandates the forfeiture of an employee's workers' compensation benefits upon a determination by the workers' compensation judge that the employee violated the statute. The statute is designed to prevent and discourage fraud by any parties to workers' compensation actions and imposes penalties for willfully making false statements to obtain benefits.

As stated by this Court in Frith v. Riverwood, Inc., 2004-C-1086 (La. 1/19/05) 2005 WL 106491, at page 6:

“In enacting and amending La. R. S. 23:1208, the legislature made a policy decision that willful and deliberate false statements made specifically for the purpose of obtaining workers' compensation benefits are an attempt to defraud the workers' compensation system and should be dealt with harshly. The legislature has shown a continued effort over the years to make La. R.S. 23:1208 easier to enforce and to make its penalties stronger. It is clear from the history of the statute that the legislature intended that any false statements or representations willfully made for the purpose of obtaining benefits would result in forfeiture of those benefits and this legislative intent cannot be ignored. Taylor v. Tommie's Gaming, 38,568, p. 6 (La.App 2 Cir. 6/25/04), 878 So.2d 853, 858, citing Resweber. This court's decision in Resweber is correctly designed to serve the legislative purpose of penalizing employees to which they are not entitled. By protecting employers from fraudulent claims, the anti-fraud statutes actually promote the well-established purpose of the workers' compensation statutes to benefit injured employees.”

The statute is a unique part of our workers' compensation provisions and enables employers and their insurers to recover their losses on fraudulent claims. As well, the statute precludes employees from continuing to assert a claim or seek additional benefits when fraud is committed.

A claim that the employee committed fraud may be asserted by Motion for Summary Judgment or even at the trial itself. Brown v. International Paper Co., 38,892 (La. App. 2 Cir. 9/22/04), 882 So.2d 1228; Western Sizzlin Steakhouse v. McDuffie, 2002-0935 (La. App. 1 Cir. 2003), 844 So.2d 355. The employer and its insurer, however, have to be cautious in asserting this claim and terminating the employee's benefits, as they may be cast for attorney fees and penalties, in addition to the unpaid benefits, if they do not prevail on their fraud claim. Accordingly, the defendants herein were cautious as to when and how they sought to meet their burden to show by a preponderance of the evidence that Taylor committed fraud. Rather than assert the issue by pretrial motion or Motion for Summary Judgment, defendants filed a reconventional demand to be tried at

the trial on the merits. Instead of relying solely on affidavits and/or depositions, particularly to establish the intent of Taylor, defendants met their burden through live testimony in the court room by the claimant, who knew at that time the 1208 claim was being asserted, including direct and cross-exam, as well as documentary evidence and prior inconsistent statements of Taylor.

Contrary to Taylor's argument, the provisions of LSA C.C.P. art. 1672, regarding an involuntary dismissal, do not determine the outcome of this case. LSA C.C.P. art. 1672 addresses the plaintiff's case, i.e. did the plaintiff meet his burden of proof. In the instant case, the defendants established that Taylor committed fraud and established the element of their reconventional demand. Taylor then had no claim and forfeited his rights to recover benefits once fraud had been proven. Taylor's testimony at trial provided the basis for the fraud claim. Whether the fraud was proven by Motion for Summary Judgment, the plaintiff's testimony, or other additional testimony or evidence, the outcome remains the same. Once the record contained competent evidence establishing fraud, there was nothing else to be decided and no additional benefits could be awarded. LSA C.C.P. art. 1672, becomes irrelevant, as the Court was no longer considering whether Taylor was entitled to benefits, but rather, sufficiency of the proof of the fraud claim and thereafter what benefits would be forfeited and the amount of restitution the defendants were entitled to recover.

All that is required for forfeiture of benefits pursuant to our fraud statute is a factual finding by the workers' compensation judge that there was (1) a false statement or representation; (2) it was willfully made; and (3) it was for the purpose of obtaining benefits. This finding of fraud is an issue of fact and not to be reversed on appeal absent manifest error. Davis v. AMS Tube Corp., 2002-2427 (La. App. 1 Cir. 12/31/03), 2003 WL 23095407; Morton v. Wal-Mart Stores, 36,398 (La. App. 2 Cir. 10/25/02), 830 So.2d 533; Resweber v. Haroil Construction Co., 94-2708 (La. 9/5/75), 660 So.2d 7.

It is within the inherent authority of the Trial Court to conduct trials and control the presentation of the evidence in a manner consistent with the fair administration of justice. Davis, *supra* and LeBlanc vs. Continental Grain Co., 95-813 (La. App. 5 Cir. 3/13/96), 672 So.2d 951, *rehearing denied* 1996-1520 (La. 10/4/96), 679 So.2d 1383. As in the instant case, it is not necessary to hear all of the evidence desired to be presented by the parties once the Court can make a determination that fraud was committed.

The determination that Taylor committed fraud and violated the provisions of LSA R.S. 23:1208 was made by the Trial Judge after hearing the testimony of Taylor. No additional finding was necessary, as Taylor no longer had a claim for benefits. The factual finding of the Workers' Compensation Judge is substantiated by the record, and as recognized by the Second Circuit Court of Appeal, it was not reversible or manifest error to determine that Taylor violated LSA R.S. 23:1208. The Trial Judge heard the evidence, considered the testimony and reasonably concluded that Taylor committed fraud in violation of the workers' compensation statute. Whether the factual finding was made after two hours of testimony, two days of trial, at the close of the employee's case or even at the close of the evidence and the end of trial is not significant. It is not a question of whether plaintiff met his burden as to entitlement to the workers' compensation benefits he sought. Rather, the primary issue is whether the trier of fact's conclusion that the employee made willful false statements to obtain benefits was reasonably based on facts and evidence in the record. Once this determination of fraud is made, there is a mandatory forfeiture of any claim for benefits by the employee and additional evidence becomes moot and irrelevant.

The Trial Court's finding is not to be reversed if there is a reasonable factual basis for the finding and it is not manifestly erroneous. Further, in the instance of a bench trial, it is not necessary that the evidence be reviewed in a light most favorable to the employee, but rather the evidence is considered and evaluated with no special inference.

Following Taylor's testimony, there was sufficient evidence of record to satisfy the defendants' burden of establishing a violation of LSA R.S. 23:1208 as pled in the Reconventional Demand. Neither the testimony of Jason Gates or Mrs. Taylor could change Greg Taylor's testimony. Mr. Taylor's lack of veracity when testifying before the Trial Judge was weighed, and it was concluded that he made willful false statements in violation of the fraud statute. As stated by the Trial Judge "I don't feel that there is any way legally that she [Mrs. Taylor] could cure any of the things that he testified to or that's in evidence." (Tr. 557)

Even if Jason Gates testified that Taylor did not work after February, 2002, and he verified Taylor's version of the facts surrounding his employment, it would not alter the findings of the Trial Judge as to the three instances of fraud committed by Taylor. The e-mails from Taylor clearly contradict this and would not be changed by any additional testimony.

As recognized by the Second Circuit Court of Appeal, the Workers' Compensation Judge's finding was a favorable ruling on the Reconventional Demand. No additional evidence would change the Trial Judge's conclusion. The record, including the testimony and the Exhibits, substantiates the finding and there was no manifest error. Even if in the alternative, it is determined that the ruling constitutes an involuntary dismissal, it should be affirmed since dismissal of Taylor's claim was proper. Gould v. Gould, 23,996 (La. App. 2 Cir. 6/24/97), 687 So.2d 685. It was not manifest error to make a finding of fraud without additional evidence and testimony. The remaining evidence the employee desired to submit would not change the false statements.

Upon a finding of fraud, the employee is no longer entitled to benefits and pursuant to the provisions of LSA R.S. 23:1208 the trial of this matter was properly ended without further time and money being wasted. Taylor's lack of credibility and false statements to obtain benefits was substantiated throughout his testimony, including numerous inconsistencies between his direct examination, cross examination, e-mail, responses to discovery, prior deposition testimony, and histories concerning prior injuries and accidents. Taylor knew that the fraud claim was the focus of the defendants' case.

The Trial Judge identified three instances of testimony that constituted intentional or willful false statements in violation of LSA R.S. 23:1208, namely: 1) employment and work activities with Rossbottom Entities, 2) injuries from the January 25, 2002 motor vehicle accident, and 3) prior neck injuries and the Jones Act claim. Allowing additional evidence and/or testimony would not change these findings of fraud by the Trial Judge. Accordingly, the rulings of the Trial Court and Court of Appeal are correct and should be affirmed.

II. The Court of Appeal properly ordered the record to be made complete and include all filings with the Trial Court

Pursuant to LSA C.C.P. art. 2132, a record on appeal can be corrected by order of the Court of Appeal when a part of the trial record is omitted. Bridgefield Casualty Insurance Company filed with the Office of Workers' Compensation Administration a Memorandum in Support of Claim for Restitution and Damages on April 25, 2003. Exhibits were attached to the Memorandum and filed at the same time. Exhibit A was an Affidavit by Phil Moory and was filed-stamped "OWCA Received: 2003 April 25 PM 4:02, District 1 W-Shreveport." Exhibit B included five tabbed sections including: 1) Account Summary, 2) Court Costs and Expenses, 3) Other Costs and Expenses, 4)

Attorney Fees, and 5) Summit Payment History Report (4/23/03). The Exhibit was filed-stamped "OWCA Received: 2003 April 25 PM 4:03, District 1 W-Shreveport."

This was not "new" evidence as argued by Taylor but was evidence filed and presented in the Trial Court that was inadvertently omitted from the record by the clerk with the OWCA. At the hearing to determine the amount of restitution to be awarded, it was clear that the Workers' Compensation Judge and the attorney for Taylor had received and reviewed the Memorandum along with the Exhibits. The Judge specifically comments that she has received the briefs submitted and counsel for Taylor comments that Bridgefield submitted billing statements broken down by date, which is clearly a reference to information submitted in Exhibit B. (Tr. 583-585) By argument of counsel and the specific nature of the award of restitution, which includes dollars and cents clearly taken from the Exhibits filed in the trial record, the Court of Appeal properly supplemented the record to include the Exhibits attached to the Memorandum. The record herein was not supplemented with "new" evidence not introduced previously. Rather, Exhibits A and B were attached to the Memorandum at the time it was filed at the OWCA as clearly shown by the date/time file stamp, thus they were correctly added to the appellate record. These Exhibits properly served as evidence at trial level to provide the basis for the award of restitution in favor of Bridgefield and Tommie's, and were properly considered by the Court of Appeal. Allain v. Martco Partnership, 2001-0614 (La. App. 1 Cir. 4/17/02) 828 So.2d 587 and W. J. Bullock v. Commercial Union Insurance Company. 397 So.2d 13.

Taylor's argument that the Second Circuit Court of Appeal wrongfully admitted new evidence is erroneous and the correction of the record to admit Exhibits attached to a Memorandum identified at the trial court should be affirmed.

III. The award of restitution in favor of Bridgefield Casualty Insurance Company and Tommie's Novelty Gaming appropriately includes the costs of investigation, costs of litigation, and attorneys fees

In Yarnell Ice Cream Company v. Allen, 33,020 (La. App. 2 Cir. 5/10/00), 759 So.2d 1066, *writ granted* 2000-1520 (La. 9/15/00), 767 So.2d 699, *writ recalled* 2000-1520 (La. 1/17/01), 777 So.2d 472, this Court by recalling the *writ grant* allowed the Second Circuit Court of Appeal's ruling to stand, which allowed recovery of reasonable investigation and litigation costs, including attorneys fees. As defined in LSA R.S. 23:1208(C)(4) "benefits claimed or payments obtained" includes amounts spent on health care, medical case management, vocational rehabilitation, transportation

expense, and the reasonable cost of investigation and litigation. Recovery pursuant to this fraud statute is not limited to court costs traditionally recovered by litigants. As defined in the statute and as interpreted by the Courts, restitution includes not only what the employee was paid but also amounts the defendants had to expend investigating and defending a fraudulent claim.

As a result of Taylor's fraud, the defendants incurred significant costs for investigation and defense of the claim. Payments have been made to obtain records used in evidence, for investigation of the claim, and for defense of this lengthy litigation. These expenses would not have been incurred had Taylor not filed and continued to pursue this fraudulent claim for benefits. As recognized by our Courts of Appeal, LSA R.S. 23:1208 (C) defines "benefits claimed and payments obtained," and that definition is equally applicable to subsection (D) that added civil restitution in addition to criminal penalties. Dukes v. Sherwood Acres Apartment, 2001-2325 (La. App. 1 Cir. 11/8/02), 835 So.2d 742, *appeal after remand*, 2004 WL 3017072 (La. App. 1 Cir. 12/30/04); Yarnell, *supra*. There is no reason to define this term differently for purposes of civil, as opposed to criminal, penalties. Furthermore, to the extent the amounts are considered for criminal penalties, fines, and/or restitution, they should similarly be considered within the discretion of the OWC Judge's restitution award. Reading the statute as a whole, and presuming the legislature desired a consistent body of law, to give effect to legislative intent, LSA R.S. 23:1208 allows for restitution as awarded herein, which includes costs, expenses, and attorney fees. Comm-Care Corp. v. Bishop, 96-1711 (La. 7/1/97), 969 So.2d 969; In Re Succession of Boyter, 99-0761 (La. 1/7/00), 756 So.2d 1122.

While judges are cautious to accept a fraud defense, as recognized by our Courts, when there is an attempt to defraud the workers' compensation system, it should be dealt with harshly. Our legislature's continued efforts to make fraud easier to enforce and its penalties stronger is evident from the amendments to LSA R.S. 23:1208, and supports defendants' position herein that the restitution award properly included reasonable costs, including attorneys fees. Frith, *supra*; Morton, *supra*. Bridgefield Casualty's award of restitution which includes costs, expenses, and attorney fees is appropriate.

Furthermore, the award should not be reduced but increased to include all costs and expenses incurred through the date of trial. In order to defend this claim and proceed to the trial on the merits, Tommie's and Bridgefield incurred court costs, litigation expenses, investigator fees, attorney fees, and medical expenses in the amount of \$39,821.06. As recognized in Yarnell, *supra*, defendants are

entitled to reimbursement for “benefits claimed or payments obtained” as defined in LSA R.S. 23:1208(C)(4). As so defined, this includes amounts spent on health care, medical case management, vocational rehabilitation, transportation expense, and the reasonable costs of investigation and litigation. Thus, defendants are not limited to recovering the costs allowed pursuant to LSA-R.S. 13:4533, but may also recover attorney fees and costs spent on litigation and investigation.

Similar to Yarnell, *supra*, Taylor provided testimony at his trial, and that testimony was proved to be false and a basis for finding a violation of LSA R.S. 23:1208. In Yarnell, the defense attorney stated that \$13,684.66 had been spent on the defense of the claim, and this Court affirmed that award. Defendants submit that the amount spent on defense of the claim should also be made herein and restitution in the amount of \$39,821.06, plus additional attorney fees for work on appeal, should be awarded.

The statute limits restitution “up to the time the employer became aware of the fraudulent conduct”. However, in this instance, that statutory provision should not limit defendants’ recovery to amounts spent on or before September 17, 2002, the date of Taylor’s second deposition.

Establishing that Taylor did not provide truthful answers in discovery responses, in the two depositions, or at trial, required investigation, subpoenas and costs to obtain medical records, copies of law suits, information on prior claims with insurance companies, records of Taylor’s operation of businesses he, his wife, and/or Wade Wyatt owned, and obtaining records concerning his employment with Rosbottom, including the deposition of Jason Gates. As reflected in Exhibit B, Section 2, Court Costs and Expenses attached to Tommie’s and Bridgefield’s post-trial memorandum in support of its claim for restitution and damages, this follow-up work and investigation from September 17, 2002, through April 23, 2003, cost \$7,514.57, in addition to the costs expended up to the date of the September deposition in the amount of \$1,618.27. The trial judge’s ruling erroneously failed to consider these additional costs and expenses by only awarding amounts actually paid, as opposed to incurred, up until the date of the deposition.

In addition to Taylor’s direct examination, the trial court relied on Taylor’s deposition to establish a violation of LSA R.S. 23:1208, particularly as to the denial of injury in the January 25, 2002 car accident. Yet, the award of restitution fails to include the cost of the transcript of Taylor’s deposition in the amount of \$639.96, which was not billed and paid until November 25, 2002.

Similarly, costs in the amount of \$92.00 to obtain the LSU-MC records which substantiated his injury in the car accident (which had been previously denied) were not included in the award. Nor did the court allow recovery of the costs of obtaining other depositions and records admitted into evidence and recoverable as restitution and/or court costs.

Fraud claims should not be taken lightly by either the employer or employee. These claims undergo strict scrutiny given the seriousness of the penalties that attach for violations. Judges are cautious in accepting this defense. Malone and Johnson, Louisiana Civil Law Treatise, Workers' Compensation Law and Practice, Volume 14, Section 343, p. 123. Yet, as stated by this Court, when there is an attempt to defraud the system, it should be "dealt with harshly", recognizing the legislature's continued efforts to make fraud easier to enforce and its penalties stronger. Morton, *supra*, fn 2 at p. 4.

Tommie's and Bridgefield's recovery should not be reduced or limited to \$12,833.62. The full costs and attorneys fees incurred to defend this claim should be awarded. Furthermore, additional attorney fees for the work done on this appeal should be granted. Vinson v. Henley, 38,006 (La. App. 2 Cir. 1/28/04), 864 So.2d 894; Longoria v. Brookshire Grocery Co., 37,975 (La. App. 2 Cir. 12/19/03), 862 So.2d 1172.

CONCLUSION

The factual determination that Taylor committed fraud and violated the provisions of LSA R.S. 23:1208 was reasonable and substantiated by the record. Absent manifest error, the Trial Court and Court of Appeal rulings should not be reversed. Taylor's testimony and the evidence presented by defendants established that willful false statements were made by Taylor for the purpose of obtaining benefits. Forfeiture of his benefits and an award of restitution was an appropriate remedy.

No new evidence was submitted at the Court of Appeal. Defendants were properly allowed to supplement the appellate case record with Exhibits previously filed with the Trial Court and inadvertently omitted from the record. As reflected from the date file stamp, the Exhibits were filed of record and properly considered by the Workers' Compensation Judge and Court of Appeal.

AFFIDAVIT OF SERVICE AND VERIFICATION

STATE OF LOUISIANA
PARISH OF BOSSIER

BEFORE ME, Notary Public, personally came and appeared Linda Lea Smith, who after being duly sworn, did state the following:

1.

That she is the attorney of record for Defendants-Appellees, Tommie's Novelty Gaming, L.L.C. and Bridgefield Casualty Insurance Company.

2.

The allegations contained in the Original Brief on behalf of Tommie's Novelty Gaming, L.L.C. and Bridgefield Casualty Insurance Company are true and correct to the best of her information and belief.

3.

A copy of the Original Brief on behalf of Tommie's Novelty Gaming, L.L.C. and Bridgefield Casualty Insurance Company has been mailed to the office of the Second Circuit Court of Appeal, the Honorable Elizabeth Warren, Mark Manno, and Steve Wanko, at the following addresses:

Second Circuit Court of Appeals
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The Honorable Elizabeth Warren
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LINDA LEA SMITH

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this 28th day of January, 2005.


NOTARY PUBLIC
JANIS D. TUGGLE
CADDO PARISH, LOUISIANA
MY COMMISSION IS FOR LIFE
ID # 79672