

LETRESS WASHINGTON

NO. 14-CA-467 C/W
14-CA-468

VERSUS

FIFTH CIRCUIT

LOUISIANA-I GAMING, A LOUISIANA
PARTNERSHIP IN COMMENDAM
D/B/A BOOMTOWN CASINO

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE OFFICE OF WORKERS' COMPENSATION,
DISTRICT 7
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 13-4863,
HONORABLE SYLVIA T. DUNN, JUDGE PRESIDING

DECEMBER 23, 2014

COURT OF APPEAL
FIFTH CIRCUIT

FILED DEC 23 2014

HANS J. LILJEBERG
JUDGE


CLERK
Cheryl Quirk Landrieu

Panel composed of Judges Fredericka Homberg Wicker, Jude G. Gravois,
Marc E. Johnson, Robert A. Chaisson, and Hans J. Liljeberg

JOHNSON, J., DISSENTS IN PART WITH REASONS

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AFFIRMED IN PART;
REVERSED IN PART

W
FAC
JSS
RAC

Defendant-Employer, Louisiana -I Gaming, A Louisiana Partnership in Commendam d/b/a Boomtown Casino (“Boomtown”), appeals the decision of the Office of Workers’ Compensation granting medical benefits, supplemental earning benefits, penalties, and attorney’s fees to claimant, Letress Washington. For the following reasons, we affirm in part and reverse in part.

Procedural History

On July 13 and 15, 2013, claimant filed two disputed claims for workers’ compensation relative to two slip-and-fall accidents, asserting that no benefits were being authorized by defendant-employer, Boomtown. On September 9, 2013, the matters were consolidated. On October 23, 2013, the parties entered into a consent judgment, which ordered Boomtown to authorize and pay for an initial evaluation and report of Dr. F. Allen Johnston and Dr. William Alden. A trial on the merits was heard on November 25, 2013, before the Office of Workers’ Compensation.

On January 24, 2014, the workers' compensation judge rendered judgment in favor of claimant. Boomtown now appeals.

Facts

The basic facts of this case are undisputed. Claimant previously was employed by the Marriott Hotel for 37 years in a supervisory, janitorial role. At the age of 62, claimant retired and collected Social Security retirement benefits. Claimant thereafter became restless with retirement and sought employment with Boomtown, located on the West Bank of Jefferson Parish. Boomtown hired claimant on March 23, 2013, to work in the capacity of a cook. Claimant's essential functions as a cook required that she "lift, carry, and push/pull up to 50 pounds so as to be able to move and stock all necessary supplies."

At trial, the parties stipulated that claimant sustained injuries in two slip-and-fall accidents while employed with Boomtown. The first incident occurred on May 5, 2013, when she slipped on a wet, kitchen floor. Claimant testified that her lower back, neck, and right shoulder were bruised and sore. Claimant reported the incident to Boomtown and was sent to West Jefferson Industrial Medical Center for treatment, where she was diagnosed as having a contusion of the hand and a lumbar strain. Claimant testified that the doctor took X-rays and prescribed Ibuprofen for the pain and released her back to full duty work. Claimant was unsatisfied with the doctor's treatment and went to see her primary care physician, Dr. Allen Brown, on May 7, 2013. Dr. Brown explained to claimant that he did not handle workers' compensation claims, but ultimately wrote her a slip that she could not lift over 15 pounds until May 13, 2013. Claimant testified that she did not give the slip to Boomtown and returned to her regular duties. She testified that she was able to complete most of her duties with a little help with the lifting from

fellow employees; however, she still complained of soreness in her lower back, neck, and right hand.

The second incident occurred on July 6, 2013. Claimant explained that she slipped on the wet, dish room in a similar fashion to the previous accident. Claimant testified that she could not immediately stand and required assistance, but did not go to the hospital. Claimant did not immediately seek a doctor until after consulting with her attorney. Claimant thereafter saw Dr. Alden upon her attorney's referral on July 10, 2013. Dr. Alden ordered physical therapy, prescribed pain medication, and returned claimant to light duty work only.

Claimant further testified that prior to the second incident, she decided that she wished to retire and gave her two-weeks-notice to Boomtown. She explained that she did not like Boomtown's kitchen and did not like working the graveyard shift. After the second incident, claimant did not contact Boomtown regarding the accident, nor did she return to work.

The parties further stipulated that claimant's average weekly wage was \$420.00 at \$10.50 per hour with a 40-hour work week.

Assignment of Error No. 1 – Supplemental Earnings Benefits

In its first assignment of error, Boomtown asserts that the workers' compensation judge erred as a matter of law in finding that claimant is entitled to supplemental earnings benefits ("SEBs") after the July 6, 2013 accident, and "for any time period when she earned less than 90% of her pre-injury wages."

Boomtown maintains that as a matter of law, to be entitled to supplemental earnings benefits, claimant must prove an inability to earn 90% of her pre-injury wages as a result of the accident, and that claimant did not bear that burden. We agree.

“The purpose of [SEBs] is to compensate the injured employee for the wage earning capacity he has lost as a result of his accident.” *Poissenot v. St. Bernard Parish Sheriff's Office*, 09-2793 (La. 1/9/11), 56 So.3d 170, 174, citing *Banks v. Industrial Roofing & Sheet Metal Works, Inc.*, 96-2840 (La. 7/1/97), 696 So.2d 551, 556. An employee is entitled to receive SEBs if he sustains a work-related injury that results in his inability to earn 90% or more of his average pre-injury wage. La. R.S. 23:1221(3)(a). Initially, the employee bears the burden of proving, by a preponderance of the evidence, that the injury resulted in his inability to earn that amount under the facts and circumstances of the individual case. *Poissenot, supra*. It is only when the employee overcomes this initial step that the burden shifts to the employer to prove, by a preponderance of the evidence, that the employee is physically able to perform a certain job and that the job was offered to the employee or that the job was available to the employee in his or the employer's community or reasonable geographic location. La. R.S. 23:1221(3)(c)(i); *Banks, supra* at 556.

Factual findings in workers' compensation cases are subject to the manifest error or clearly wrong standard of appellate review. *Smith v. Louisiana Dept. of Corrections*, 93-1305 (La. 2/28/94), 633 So.2d 129, 132; *Freeman v. Poulan/Weed Eater*, 93-1530 (La. 1/14/94), 630 So.2d 733, 737-38. “In determining whether a [workers' compensation judge's] finding that an employee has met his initial burden of proving entitlement to SEBs is manifestly erroneous, a reviewing court must examine all evidence that bears upon the employee's inability to earn 90% or more of his pre-injury wages.” *Poissenot, supra*, citing *Seal v. Gaylord Container Corp.*, 97-0688 (La. 12/2/97), 704 So.2d 1161, 1166.

The workers' compensation judge clearly erred as a matter of law in finding that claimant is entitled to SEBs “for any time period when she earned less than

90% of her pre-injury wages” without proof by a preponderance of the evidence that her work-related injury resulted in her inability to earn 90% or more of her average pre-injury wages. Further, upon review of the record, claimant presented no evidence that she was unable to earn 90% or more of her pre-injury wages. Although the record reflects that claimant could not return to work as a cook, Dr. Alden released claimant to light duty work. Moreover, Ms. Jeannine Richert, Boomtown’s Risk & Safety Manager, testified that Boomtown had a bank of light duty positions throughout the casino; however, claimant did not contact Boomtown relative to any other work because she chose instead to retire. A claimant is not entitled to SEBs when her inability to earn wages equal to 90% of her pre-injury wages is due to circumstances other than her work-related injury. *Coleman v. Walter Indus., Inc./Jim Walter Homes*, 10-1145 (La.App. 1 Cir. 2/11/11), 56 So.3d 1258, 1262.

Accordingly, we find that the workers’ compensation judge erred in finding that claimant is entitled to SEBs based on the lack of evidence presented at trial.

Assignment of Error No. 2 – Medical Benefits

In its second assignment of error, Boomtown asserts that the workers’ compensation judge erred in finding that it failed to reasonably controvert claimant’s medical benefits after the second accident. Therefore, Boomtown argues that the workers’ compensation judge erroneously awarded penalties and attorney’s fees to claimant.¹

At trial, claimant introduced exhibits, without objection, of medical reports, bills, and mileage reimbursement relative to her treatment for injuries sustained in the second accident. Claimant testified that Boomtown refused to authorize MRIs

¹ By stipulating that claimant had a work related accident that has necessitated medical treatment, Boomtown has rendered moot any argument that the workers’ compensation judge erred in awarding “payment of all medical expenses, medication expenses, and transportation expenses, for the injuries from the two accidents.”

requested by both Dr. Alden and Dr. Johnston and that she did not receive reimbursement for her medical mileage. Further, Ms. Richert testified that no indemnity benefits were paid relative to the July 6, 2013 accident.

In its judgment, the workers' compensation judge found that Boomtown failed to reasonably controvert claimant's medical benefits and diagnostic testing after the second accident; that Boomtown failed to timely pay medical benefits in a timely manner after they entered the consent judgment on October 22, 2013; and that Boomtown refused to pay medicals and indemnity benefits even when they did not contest the occurrence of the accident. Based upon these findings, the workers' compensation judge assessed penalties in the total amount of \$8,000.00 for failure to timely pay and authorize medical expenses, medication expenses, diagnostic testing, medical evaluation and treatment, and supplemental earnings benefits pursuant to La. R.S. 23:1201.²

Based upon the testimony and evidence submitted at trial, we find that the factual findings of the workers' compensation judge are manifestly erroneous. No evidence, other than claimant's self-serving testimony at trial, exists in the record that Boomtown refused to pay medicals and indemnity benefits. Further, the only evidence in the record that reflects the earliest point in which Boomtown received claimant's medical bills or requests for authorizations is a letter with attachments, dated October 14, 2013, from claimant's attorney to Boomtown's attorney requesting payment for medical bills, authorization for MRIs, and reimbursement

² La. R.S. 23:1201(F) provides in part, "[e]xcept as otherwise provided in this Chapter, failure to provide payment in accordance with this Section or failure to consent to the employee's request to select a treating physician or change physicians when such consent is required by R.S. 23:1121 shall result in the assessment 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."

for claimant's mileage. Trial on the merits of claimant's workers' compensation claim was held on November 25, 2013, less than 60 days later.

Pursuant to La. R.S. 23:1201(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." No evidence in the record exists that claimant's medical providers utilize such electronic billing. Therefore, at the time of trial, 60 days had not expired since Boomtown received notice of claimant's medical claims. Therefore, we cannot find that Boomtown did not reasonably controvert claimant's medicals.

Accordingly, the workers' compensation judge erroneously awarded penalties and attorney's fees based on erroneous findings of fact.

Decree

Considering the foregoing, the decision of the Office of Workers' Compensation awarding supplemental earnings benefits, penalties, and attorney's fees is reversed. The judgment is affirmed in all other respects.

AFFIRMED IN PART;
REVERSED IN PART

LETRESS WASHINGTON

NO. 14-CA-467 C/W 14-CA-468

VERSUS

FIFTH CIRCUIT

LOUISIANA-I GAMING, A LOUISIANA
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JOHNSON, J., DISSENTS IN PART WITH REASONS

I, respectfully, dissent from the majority opinion on the issue of Letress Washington's entitlement to supplement earnings benefits ("SEBs"). After considering the record for this case in its entirety, I conclude the majority opinion failed to apply the appellate review standard properly for that assignment of error.

In this matter, Ms. Washington had retired at the age of 62 in 2010. After being bored with retirement, Ms. Washington applied for a position with Louisiana A-I Gaming (hereinafter referred to as "Boomtown") and was hired as a cook on March 23, 2013. On May 5, 2013, Ms. Washington slipped on the job and was sent by Boomtown to West Jefferson Medical Center. She was diagnosed with having a contusion of the hand and a lumbar strain. She was released to full duty and returned to work. Ms. Washington sought a second opinion from Dr. D. Allen Brown. Dr. Brown gave her a doctor's excuse stating, "Due to recent low back injury[,] Ms. Washington should not lift more than 15 lbs until 5/13/13." Although Ms. Washington had a doctor's excuse, she did not notify Boomtown of her work restriction subsequent to the May 5th accident.

Toward the end of June 2013, Ms. Washington gave her two week notice that she was resigning. On July 6, 2013, Ms. Washington fell a second time during the course and scope of her employment. Boomtown

completed an incident report for the accident, and Ms. Washington opted to go home instead of the hospital.

On July 10, 2013, four days after the accident, Ms. Washington filed a 1008 claim with the Office of Workers' Compensation ("OWC").

Boomtown received notice of Ms. Washington's workers compensation claim on July 12, 2013. Following receipt of the notice of Ms.

Washington's claim, Boomtown did not pay any benefits or medical bills, and it did not offer her any vocational rehabilitation.

After a trial on the merits, OWC awarded Ms. Washington SEBs for 104 weeks, medical benefits, penalties and attorney's fees. No reasons for judgment were requested. The instant appeal followed.

Factual determinations in a worker's compensation case, including whether the employee has discharged her burden of proof, are subject to the manifest error or clearly wrong standard of appellate review. *Wilson v. Metro. Dev. Ctr.*, 12-487 (La. App. 5 Cir. 3/13/13); 113 So.3d 261, 266. Under this standard, an appellate court may only reverse a worker's compensation judge's factual findings if it finds from the record that a reasonable factual basis for the finding does not exist, or that examination of the entire record reveals that the finding is clearly erroneous. *Id.* The court of appeal may not reverse the findings of the trial court even when convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Whetstone v. Jefferson Parish Sch. Bd.*, 12-639 (La. App. 5 Cir. 5/30/13); 117 So.3d 566, 569.

The purpose of supplemental earnings benefits is to compensate the injured employee for the wage earning capacity he/she has lost as a result of an accident. *Poissenot v. St. Bernard Parish Sheriff's Office*, 09-2793 (La. 1/9/11); 56 So.3d 170, 174. In order to recover supplemental earnings

benefits, the employee must first prove by a preponderance of the evidence that she is unable to earn wages equal to ninety percent (90%) or more of the wages earned before the accident. *Wilson, supra*. In determining if an injured employee has met her initial burden of proving entitlement to supplemental earnings benefits, the reviewing court must examine all evidence that bears upon the employee's inability to earn 90% or more of her pre-injury wages. *Id.* Factors that have been considered in determining whether an employee can earn 90% of her pre-injury wage include the employee's age, education, job skills and work history. *Tynes v. Gaylord Container Corp.* 11-12 (La. App. 1 Cir. 2/14/03); 844 So.2d 80, 86. An injured worker's testimony that she is no longer able to return to her pre-injury employment, without more, is insufficient to prove entitlement to supplemental earnings benefits. *Wilson, supra*.

At the trial on the merits, it was established that Ms. Washington was 65 years old and had worked as a cook for over 30 years. On direct examination, Ms. Washington testified that after falling the second time at Boomtown, she wanted to retire without working anymore. She stated that Dr. Alden could not complete his evaluation because Boomtown refused to authorize the payment for an MRI. In support of her disability claim, Ms. Washington offered doctors' reports into evidence explaining her work restrictions and the requests for MRIs. In particular, Dr. F. Allen Johnston, an orthopedic surgeon, reported in November 2013 that Ms. Washington was unable to work as a cook, and that he ordered MRIs to determine whether to suggest interventional injections.

After review of the evidence presented to the OWC, pursuant to the manifest error standard, I cannot find the trial court was manifestly erroneous in its finding that Ms. Washington met her burden of proving she

was unable to earn wages equal to 90% or more of the wages she earned before the July 6, 2013 accident. Because Boomtown did not approve the MRI requests, Ms. Washington was limited in the medical evidence that she could present. However, Ms. Washington set forth evidence that she was 65 years old, worked for over 30 years as a cook, and had a doctor's report stating that she could not work as a cook. According to *Tynes*, those are factors that can be considered in determining whether Ms. Washington met her burden of proof.

From the factors mentioned above, I believe Ms. Washington proved by a preponderance of the evidence that she could not earn 90% or more of her pre-injury wages. Thus, the burden shifted to Boomtown to prove that Ms. Washington was physically able to perform a certain job, and that a job was offered to her or was available in her community or reasonable geographic location. *See*, La. R.S. 23:1221(3)(c)(i). Boomtown did not present any of the required information to the OWC; consequently, it failed to meet its burden.

The majority opinion completely ignores the manifest error standard of review and is reweighing the evidence differently on appeal, despite its jurisprudential prohibition to do so. *See, Whetstone, supra*. The majority opinion fails to acknowledge the validity of Ms. Washington's properly admitted evidence. The majority opinion also improperly shifts the burden to Ms. Washington to prove that she was physically able to work another job, which is not the procedure set forth in La. R.S. 23:1221(3)(c)(i). It is irrelevant in this matter that Jeanine Richert, the Risk and Safety Manager at Boomtown, testified that Boomtown had a bank of light duty positions throughout the casino. Ms. Richert also testified that she did not contact Ms. Washington in any manner following the second accident. So, due to Ms.

Richert's and Boomtown's failure to contact Ms. Washington after the July 6th accident, none of the available light duty positions were ever offered to Ms. Washington.

From my review of the entirety of the record, I am of the opinion that there was a reasonable basis factual basis for the OWC's award of SEBs to Ms. Washington. Therefore, for the above stated reasons, I dissent from the majority opinion and would affirm the OWC on this issue. In all other respects, I agree with the majority opinion.

SUSAN M. CHEHARDY
CHIEF JUDGE

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**NOTICE OF JUDGMENT AND
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **DECEMBER 23, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



CHERYL Q. LANDRIEU
CLERK OF COURT

14-CA-467
C/W 14-CA-468

E-NOTIFIED

NO ATTORNEYS WERE ENOTIFIED

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