

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2002 CA 1712

BARBER BROTHERS CONTRACTING COMPANY, L.L.C.

VERSUS

JOHN E. MORGAN

JUDGMENT RENDERED ON MAY 9, 2003



Appealed from District 6
Office of Workers' Compensation Administration
in and for the State of Louisiana

Docket No. 00-06699

Honorable Robert W. Varnado, Jr., Workers' Compensation Judge

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Michael L. Hebert
Baton Rouge, LA

Attorney for Appellant
Defendant
John E. Morgan

David T. Butler, Jr.
Baton Rouge, LA

Attorney for Appellant
Plaintiff
Barber Brothers Contracting
Company

Panel composed of Judges FRANK FOIL,
PAGE McCLENDON and WILLIAM F. KLINE, JR.

Judge William F. Kline, Jr., Retired, serving Pro Tempore by special
appointment of the Louisiana Supreme Court.

FOIL, JUDGE.

In this workers' compensation case, the employer and employee both appeal. The employer, Barber Brothers Contracting Company, LLC, challenges the workers' compensation judge's determinations that: (1) John Morgan, the employee, sustained a work-related accident; (2) Mr. Morgan was temporarily, totally disabled; and (3) Barber Brothers continues to be liable for medical treatment and rehabilitation associated with Mr. Morgan's injury. In his appeal, Mr. Morgan contends the workers' compensation judge erred in reducing his weekly indemnity benefits and in failing to order Barber Brothers to pay all court costs. He also seeks an award of attorney fees for legal services provided on appeal.

DISCUSSION

Whether an employee has established a work-related accident, whether he is entitled to temporary total disability benefits, as well as the duration of his disability, are factual determinations subject to the manifest error or clearly wrong standard of appellate review. **Franklin v. Georgia-Pacific Port Hudson Division**, 01-1854 (La. App. 1 Cir. 9/27/02), 835 So.2d 592, 594; **Collins v. Family Dollar Stores, Inc.**, 99-0622 (La. App. 1 Cir. 5/12/00), 760 So.2d 1210, 1214, writs denied, 00-2356, 00-2363 (La. 11/13/00), 773 So.2d 727; **Williams v. Wal-Mart Stores, Inc.**, 00-0863 (La. App. 4 Cir. 5/16/01), 787 So.2d 1134, 1137. A workers' compensation judge's finding that an employee has refused to accept necessary rehabilitation, warranting a reduction in benefits under La. R.S. 23:1226(E), is also a factual determination. **Ricaud v. Holloway Sportswear, Inc.**, 98-1422 (La. App. 3 Cir. 5/26/99), 741 So.2d 124, 129, writs denied, 99-1822, 99-1882 (La. 10/1/99), 748 So.2d 454, 455. Thus, based on this applicable standard of review, and after a thorough review of the record, we find no manifest error in the workers' compensation judge's determination regarding these issues. We adopt his reasons for judgment as our own and attach a copy to this opinion.

Regarding the allocation of court costs, La. R.S. 23:1317(B) provides the allocation of such lies within the workers' compensation judge's discretion and can be reversed only upon a showing of an abuse of that discretion. **Boleware v. City of Bogalusa**, 01-1014 (La. App. 1 Cir. 12/20/02), 837 So.2d 71, 75; **Washington v. Lyons Specialty Company**, 96-0263 (La. App. 1 Cir. 11/8/96), 683 So.2d 367, 381, writ denied, 96-2944 (La. 1/31/97), 687 So.2d 408. In this case, the workers' compensation judge ordered that each party be responsible for his respective costs. Given that neither party prevailed fully on the merits, we find no abuse of the workers' compensation judge's discretion in the assessment of costs.

Finally, Mr. Morgan requests that we award him attorney fees for defending this appeal. Although we may award damages for frivolous appeal under La. C.C.P. art. 2164, we find Barber Brother's appeal was not frivolous. Accordingly, we decline to award attorney fees to Mr. Morgan. See King v. Gulf Coast Construction, Inc., 94-1019 (La. App. 4 Cir. 12/28/94), 648 So.2d 498, 500.

CONCLUSION

For the foregoing reasons, the workers' compensation judgment is **AFFIRMED**. Costs of this appeal are to be borne equally by Mr. Morgan and Barber Brothers.

AFFIRMED.

1 OFFICE OF WORKERS' COMPENSATION

2 STATE OF LOUISIANA

3
4 JOHN E. MORGAN

5 VERSUS

NO. 00-06699

6 BARBER BROTHERS CONTRACTING

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9 REASONS FOR JUDGMENT taken before the

10 Honorable Robert W. Varnado, Jr., Judge Presiding,

11 District 6, Office of Workers' Compensation, State of

12 Louisiana, in Covington, Louisiana.

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21 REPORTED BY:

22 Marsha M. Donnelly, CCR

1 REASONS FOR JUDGMENT

2 BY THE COURT:

3 Having weighed the evidence and observed the
4 witnesses upon examination, the Court finds Morgan has
5 proven by a preponderance of evidence that he suffered
6 an injury by accident arising out of and in the course
7 of his employment with Barber Brothers Contracting.
8 Revised Statute 23:1021(1).

9 The Plaintiff continues to be temporarily
10 totally disabled, and the Defendant continues to be
11 responsible for Morgan's reasonable and necessary
12 medical care and rehabilitation.

13 The totality of evidence illustrates Morgan
14 has failed to give an acceptable level of effort toward
15 his own rehabilitation and re-entry into the work
16 force. The testimony of Susan Davidson weighed heavy
17 in this regard and as well as the testimony of the
18 owner of the computer school Ms. Ruth Cook.

19 The record reflects numerous attempts by that
20 of the Defendant to provide rehabilitation in an effort
21 to maximize the possibility of returning Morgan to the
22 work force. With the assistance of Susan Davidson,
23 Barber Brothers initiated vocational testing. They
24 also set up Morgan to take the DOTD test for
25 specialized certification. Morgan did not pass his
26 initial attempt, but thereafter refused individual
27 tutoring and to retake the portions previously failed.
28 Noteworthy, at trial Morgan testified he took the test
29- three times.

30 Additionally, Morgan failed to complete a
31 vocational resume. Due to Morgan's interest in
32 computers, Barber Brothers enrolled Morgan at Cook's

1 computer school in Hammond. Every attempt to
2 accommodate him was made. An occupational therapist
3 was retained to work with Morgan and to make
4 suggestions for implementation and modification of his
5 work station. This included a private area with
6 specialized equipment. Nevertheless, Morgan's
7 participation dropped off.

8 Other efforts by the employer included offers
9 of sedentary and modified light-duty positions.
10 Morgan's motivation and desire to return to the work
11 force is low. Consequently, given the totality of
12 evidence, the Court finds Morgan's weekly indemnity
13 benefits are reduced as of the date of signing judgment
14 pursuant to Louisiana Revised Statute 23:1226(E) for
15 failure to cooperate with vocational rehabilitation
16 efforts but also to provide needed incentive.

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Certified to be a true copy of the
original
Office of Worker's Compensation
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