NOT DESIGNATED FOR PUBLICATION

VICTOR GANT	*	**NO. 2000-CA-1263**
VERSUS	*	**COURT OF APPEAL**
THE CITY OF NEW ORLEANS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 97-08615, DISTRICT "EIGHT"
Honorable Gwendolyn R. Thompson, Workers' Compensation Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge Max N. Tobias Jr.)

Tobias, J., Dissenting

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REVERSED

The defendant, the City of New Orleans, appeals the trial court's determination that it arbitrarily and capriciously terminated the plaintiff, Victor Gant's, workers' compensation benefits. For the reasons stated below, we reverse the judgment of the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. Victor Gant ("Mr. Gant") was employed by the City of New

Orleans as a police officer. On February 8, 1996, while on duty and in the course and scope of his employment, Mr. Gant slipped and fell on a wet floor. When Mr. Gant slipped, he fell and struck his knee. He filed a workers compensation claim with the New Orleans Police Department and received supplemental earnings benefits ("SEBs") and medical treatment benefits dating from February 8, 1996 to December 20, 1996. In sum, he received SEBs in the amount of $14,124.00 and medical benefits in the amount of $9,603.08. Thereafter, Mr. Gant's benefits were terminated.

Mr. Gant then filed a claim against the City of New Orleans, alleging that his benefits had been arbitrarily and capriciously terminated. On January 20, 2000, this matter went to trial before the Office of Workers' Compensation. Upon conclusion of the trial, the judge found that the City of New Orleans had acted in an arbitrary and capricious manner in terminating Mr. Gant's benefits. He was awarded SEBs dating from December 20, 1996 (when his benefits were terminated) and continuing in the amount of $330 per week plus legal interest from the date of each installment due. Plus, he was awarded payment of all medical bills and expenses related to treatment for his low back injury and left knee. Furthermore, the trial judge assessed attorneys' fees in the amount of $2,500 and a penalty in the amount of 12% of the unpaid compensation or a total of not more than fifty dollars per

calendar day (not to exceed $2,000 in the aggregate) against the City of New Orleans for violating La. R.S. 23:1201(F). Lastly, for arbitrarily and capriciously terminating Mr. Gant's benefits, the City of New Orleans was assessed attorneys' fees in the amount of $10,000.00 pursuant to La.R.S. 23:1201.2.

DISCUSSION

Factual findings in workers' compensation cases are subject to the manifest error or clearly wrong standard of appellate review. *Banks v. Industrial Roofing & Sheet Metal Works*, 96-2840, (La. 7/1/97), 696 So.2d 551, 556. Those findings are not to be reversed on appeal unless they are unreasonable in light of the record. *Stobart v. State, through DOTD*, 617 So.2d 880 (La. 1993).

The City of New Orleans first argues that the trial court erred in finding that that Mr. Gant proved his injury. Louisiana Revised Statutes 23:1221(3)(a) governs an employee's entitlement to employment benefits for injuries suffered during the course and scope of employment. La.R.S. 1221(3)(a) provides in pertinent part as follows:

> (a) For injury resulting in the employee's inability to earn wages equal to ninety per cent or more of wages at time of injury, supplemental earnings benefits equal to sixty-six and two-thirds percent of the difference between the average monthly wages at the time of injury and average monthly wages earned or average monthly wages the employee is able to earn in any month thereafter in any employment or self-employment, whether or not the same or

> similar occupation as that in which the employee was customarily engaged when injured and whether or not an occupation for which the employee at the time of the injury was particularly fitted by reason of education, training, and experience, such comparison to be made on a monthly basis.
> . . . .
>
> (c) (i) Notwithstanding the provisions of Subparagraph (b) of this Paragraph, for purposes of Subparagraph (a) of this Paragraph, if the employee is not engaged in any employment or self-employment, as described in Subparagraph (b) of this Paragraph, or is earning wages less than the employee is able to earn, the amount determined to be the wages the employee is able to earn in any month shall in no case be less than the sum the employee would have earned in any employment or self-employment, as described in Subparagraph (b) of this Paragraph, which he was physically able to perform, and (1) which he was offered or tendered by the employer or any other employer; or (2) which is proven available to the employee in the employee's or employer's community or reasonable geographic region.

The court in *Joffrion v. Bryant*, 98-1439, p. 4 (La. App. 3 Cir. 4/14/99), 732 So.2d 776,770, accurately described the burden that both the employee and employer bear in establishing whether compensation benefits are due. The court stated:

> The statute involves shifting burdens of proof. Initially, the employee must prove by a preponderance of the evidence that due to a workplace injury, he or she is unable to earn at least ninety percent of the wages earned prior to the injury. *Seal v. Gaylord Container Corp.*, 97-0688 (La. 12/2/97), 704 So.2d 1161. Once the employee satisfies that initial burden, in order to defeat the employee's claim for SEBs, the employer must demonstrate, 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 region." 97-0688 at p. 8; 704 So.2d at 1166. However, it is only after the employee carries his initial burden of

establishing entitlement to SEBs that the burden shifts to the employer. *See Smith v. Hamp Enterprises, Inc.*, 95-2343 (La.App. 4 Cir. 4/17/96). 673 So.2d 267.

Failure to Pay Supplemental Earnings Benefits

First, we will address whether Mr. Gant actually met his burden of proof – whether by a preponderance of the evidence, he proved that the injury he suffered resulted in an inability for him to earn at least ninety percent of his former wages. *See Rapp v. City of New Orleans*, 95-1638 (La. App. 4 Cir. 9/18/96), 681 So.2d 433, at 438; *Smith v. Louisiana Dept. of Corrections*, 93-1305, (La. 2/28/94), 633 So.2d 129, 132. Only one doctor, Dr. Gregory W. Stewart ("Dr. Stewart"), an orthopedic surgeon, testified as to the extent of Mr. Gant's injuries. Initially, when Mr. Gant first began seeing Dr. Stewart in February of 1996, he complained that he had twisted his knee and that he could not stand or walk for prolonged periods of time. To alleviate Mr. Gant's pain, Dr. Stewart prescribed anti-inflammatory medication and physical therapy. Thereafter, in March of 1996, Mr. Gant began to complain that he was suffering from low back pain that radiated down his leg, and he also stated that his knee began giving out on him. In April of 1996, Dr. Stewart diagnosed Mr. Gant as having a tear in the medial meniscus and recommended that he have surgery. After the diagnosis, Dr. Stewart deduced that Mr. Gant's back pain was caused by the mechanics of his walk

as a result of knee injury. In order to confirm that Mr. Gant suffered no independent back problem other than that related to the knee injury, Dr. Stewart referred him to another orthopedic surgeon named Dr. James E. Ricciardi. Dr. Ricciardi concluded that he did not find anything serious or of a surgical nature in regards to Mr. Gant's back and prognosticated that his low back pain could be treated with physical therapy and activity, but spinal surgery was unnecessary.

On May 10, 1996, Mr. Gant successfully underwent knee surgery. Thereafter, he continued to see Dr. Stewart, who put him on outpatient physical therapy twice per week and continued to prescribe the pain medication, Vicodin ES. Prior to the surgery and through December of 1996, Dr. Stewart recommended that Mr. Gant refrain from work due to his back pain. Mr. Gant was still receiving treatment for his back pain when his benefits were terminated. From the evidence presented, the record does support that Mr. Gant sustained an injury as a result of the accident that occurred on February 8, 1996.

The next question is whether Mr. Gant proved by a preponderance of the evidence that he was so injured that he was unable to earn at least ninety percent of his income as a police officer. The record does not present evidence which substantiates the proposition that Mr. Gant was

unemployable to the extent that he could not earn at least ninety percent of his pre-injury wages. Dr. Stewart stated that he recommended that Mr. Gant stay home prior to and subsequent to his knee surgery due to his complaints of back pain. Since Dr. Stewart recommended that Mr. Gant refrain from his work as a police officer due to his back pain, this does imply that he was disabled as a policeman. However, Mr. Gant failed to present evidence which would corroborate that he had any educational, mental or other impediments to some other type of employment other than police work that would prevent him from earning ninety percent of his pre-injury wages. *See Rapp v. City of New Orleans*, 681 So.2d 433, at 445.

In *Joffrion v. Bryant*, *supra*, the plaintiff-employee was a truck driver who was injured when he fell off of a trailer. At trial, he submitted evidence that he had suffered an injury, had surgery, and had been out of work for approximately seven months. The treating physician had released him to work; however, the claimant still complained of pain. Upon release, the treating physician wrote a note stating that the injured employee "was not likely able" to return to his job as a truck driver and also listed some additional functions that the employee should refrain from doing. He further stated that if the employee did return to his job, he would most likely aggravate his present condition. The worker's compensation judge ruled in

favor of the employee and awarded him SEBs. Upon review, the appellate court found that the trial court's ruling was manifestly erroneous because even if the physician's note was interpreted to mean that the employee could not return to his former job, the employee failed to meet his burden by showing that he was unable to earn ninety percent of his pre-injury wages at any job that he was able to perform.

Similarly, this case presents the same problem. Mr. Gant did not show by a preponderance of the evidence that he was unable to earn ninety percent of his policeman's salary and therefore, he did not show that he was entitled to receive SEBs. *See Rapp*, 681 So.2d 433, at 445; *Schmitt v. City of New Orleans*, 632 So.2d 367, 374 (La. App. 4 Cir. 1993). The testimony at trial reveals that Mr. Gant was assigned to desk duty to accommodate his injury but could not perform the duties associated with that position because of his back pain. However, the fact that Mr. Gant could not do this job or return to his prior position because of the injury is not conclusive in determining whether he is due compensation benefits; he must further show that he is unable to earn ninety percent of his pre-injury wages at *any* job which he is able to perform. *See Joffrion v. Bryant*, 732 So.2d 767, at p. 770. As the court in *Duhon v. Holi Temporary Services, Inc.*, 97-0604 (La. App. 4 Cir. 10/01/97), 700 So.2d 1152, at 1155 stated, (quoting *Rapp v.*

City of New Orleans, 681 So.2d. 433 at 438), "It is not enough just to prove the inability to continue in the pre-injury job. . . . To do otherwise would provide a claimant with a strong incentive to remain unnecessarily unemployed."

Additionally, at trial Ms. Michelle Bonin of Rosenbush Claim Service testified that in November of 1996, Rosenbush attempted to schedule vocational rehabilitation with Mr. Gant; however, Mr. Gant's former attorney did not schedule an evaluation. A vocational rehabilitation expert would have been able to assess how or whether Mr. Gant's injury affected his prospect of employment and what jobs, if any, would be available to him in light of his condition. However, since Mr. Gant never met with the vocational rehabilitation expert, the record is further devoid of any evidence that he was unable to earn ninety percent of his former income.

It is also important to note that between Mr. Gant's injury and the time that his case went to trial before the workers' compensation judge, he did perform some part time work. In August of 1996, Mr. Gant was terminated from the police department and was subsequently reinstated in November of 1999. During the time period when he was terminated from the police department, he testified that he "worked part-time" out of the Carpenter's Union Hall. This implies that at some point, Mr. Gant was

physically able to do some type of labor; however, the record does not reflect exactly what type of work Mr. Gant did, how often he worked or how much compensation he received.

We find that Mr. Gant did not show by a preponderance of the evidence that he was unable to earn ninety percent of his pre-injury wages and subsequently, whether he was entitled to receive SEBs. Mr. Gant failed to meet the burden articulated in *Joffrion*, and consequently, the burden never shifted to the City of New Orleans. *See Smith v. Hamp Enterprises, Inc.*, 95-2343 (La. App. 4 Cir. 4/17/96), 673 So.2d 267; *Joffrion v. Bryant*, 732 So.2d 767, at 771.

Failure to Authorize Treatment or Pay Medical Benefits

Under La.R.S. 23:1201 (F), the workers' compensation judge awarded attorneys's fees in the amount of $2,500 and penalties pursuant to the guidelines set forth in La.R.S. 23:1201 (F).

In part, the aforementioned statute reads as follows:

> E. Medical benefits payable under this Chapter shall be paid within sixty days after the employer or insurer receives written notice thereof.
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> F. Failure to provide payment in accordance with this Section shall result in the assessment of a penalty in an amount equal to twelve percent of any unpaid compensation or medical benefits or fifty dollars per calendar day, whichever is greater, for each day in which any and all compensation or medical benefits remain unpaid, 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. . . .

* * *

(2) This Subsection shall not apply if the claim is reasonably controverted or if such nonpayment results from conditions over which the employer or insurer had no control.

Mr. Gant generally contends that the City of New Orleans was in violation of La.R.S. 23:1201(E) and (F), but does not substantiate this claim. The City of New Orleans alleges that it never declined to authorize medical treatment or pay any medical bills presented on behalf of Mr. Gant. The City of New Orleans argues that the workers' compensation judge erred in this finding.

At trial, Ms. Bonin testified that no medical bills or requests for authorization were presented to Rosenbush to pay on behalf of the City of New Orleans. She further testified that Rosenbush keeps a phone log, which documents all phone calls placed in reference to a particular employee, and that no phone calls had been placed seeking authorization for treatment of Mr. Gant. In fact, Mr. Gant actually saw Dr. Stewart twice after he received the termination of benefits letter in January and April of 1997, so Mr. Gant's argument that he was denied treatment is without merit. What is more, Dr. Stewart testified that after he saw Mr. Gant in April, his office still had appointments scheduled to treat Mr. Gant, however, Mr. Gant – *not* the City

of New Orleans - canceled these appointments on three occasions. Furthermore, as already indicated, the Rosenbush file confirms that no requests to treat Mr. Gant were denied and that no medical bills were unpaid.

Accordingly, we find that in this case, the evidence in the record shows that the City of New Orleans never failed to authorize medical treatment or pay any medical benefits and as a result, there is no basis in this case for penalties under La. R.S. 23:1201 (F).

Arbitrary and Capricious

An employee is entitled to penalties and attorneys' fees if workers' compensation benefits are terminated arbitrarily, capriciously, or without cause by the employer. La.R.S. 23:1201.2. Whether the termination of workers' compensation benefits is arbitrary, capricious, or without probable cause, for purposes of determining entitlement to penalties and attorneys' fees, depends primarily on facts known to the employer or insurer at the time of its action. *City of Eunice v. Credeur*, 99-302 (La. App. 3 Cir. 10/13/99), 746 So.2d 146, 151, *writ granted in part, judgment vacated in part by* 99-3249 (La. 1/28/00), 753 So.2d 226. An arbitrary and capricious action is a willful and unreasonable action taken without consideration and regard for the facts and circumstances presented. *J.E. Merit Constructors, Inc. v. Hickman*, 2000-0493, p. 3 (La. 1/18/01) 776 So.2d 435.

In this case, the trial court judge found that the City of New Orleans was arbitrary and capricious in terminating Mr. Gant's benefits and pursuant to La. R.S. 1201.2 assessed the city $10,000 in attorneys' fees. This statute reads as follows:

> 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. The provisions of R.S. 23:1141 limiting the amount of attorney fees shall not apply to cases where the employer or insurer is found liable for attorney fees under this Section. The provisions of R.S. 22:658 (C) shall be applicable to claims arising under this Chapter.

We have already determined that the Mr. Gant did not meet his burden of showing that he was unable to earn ninety percent of his pre-employment salary. Furthermore, as already stated, Ms. Bonin testified that in November of 1996, Rosenbush attempted to schedule vocational rehabilitation with Mr. Gant; however, Mr. Gant's former attorney was unable to schedule an evaluation. Approximately one month later, Rosenbush terminated Mr. Gant's benefits. As a result of the foregoing, we cannot find that based upon the evidence contained in the record, that the City of New Orleans was arbitrary and capricious in terminating his benefits.

CONCLUSION

For the foregoing reasons, the judgment of the Office of Worker's

Compensation is reversed.

REVERSED