

JAMES NOONAN

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NO. 2006-CA-1121

VERSUS

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COURT OF APPEAL

CITY OF NEW ORLEANS

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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TOBIAS, J., CONCURS IN THE RESULT AND ASSIGNS REASONS

I reluctantly concur in the result reached by the majority because I find that La. R. S. 23:1225 does not permit even one initial offset under the facts presented in this case.

Section 1225(C)(1), which authorizes a reduction of the workers' compensation obligation when the employee receives other enumerated benefits, is a restriction on an injured employee's right to workers' compensation benefits and must be strictly construed. *Jones v. General Motors Co.*, 03-1766, p. 12 (La. 4/30/04), 871 So. 2d 1109, 1117 (citing *Cousins v. City of New Orleans*, 608 So.2d 978, 981 (La.1992)). An employer seeking credit for benefits covered by the statute has the burden of proving both entitlement to and the amount of the credit. *Id.*

The settled rule of statutory construction that the mention of one thing in a statute implies the exclusion of another thing, *i.e.*, the doctrine of *Expressio Unius est Exclusio Alterius*, dictates that when the legislature specifically enumerates a series of things, the legislature's omission of other items, which could have easily been included in the statute, is deemed intentional. *State Through Dept. of Public Safety and Corrections, Office of State Police, Riverboat Gaming Div. v. Louisiana Riverboat Gaming Com'n and Horseshoe Entertainment*, 94-1872 (La.5/22/95),

655 So.2d 292, 302 (citing *State ex rel. Fitzpatrick v. Grace*, 187 La. 1028, 175 So. 656 (1936); *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325 (1943); *Newblock v. Bowles*, 170 Okla. 487, 40 P.2d 1097, 1100 (1935); Sutherland *Statutory Construction*, § 47.23 (5th Ed.1992); Earl T. Crawford, *The Construction of Statutes*, § 195, at 334 (1940)).

As another rule of statutory construction instructs us, when a statute is clear and unambiguous and its application does not lead to absurd consequences, the statute is applied as written, and no further interpretation may be made in search of legislative intent. *See* La. C. C. art. 9; La. R. S. 1:4. I do not find any ambiguity in the statute at issue.

The statute is silent on whether cost-of-living increases in one's disability retirement pension may be offset when calculating the benefits due pursuant to §1225(C), while it specifically provides for other types of offsets. In my opinion, had the legislature intended the offset urged by the City, it could have done so by adding an additional sentence to subsection C. Thus, a clear reading of §1225(C) reveals a prohibition against the offset without analogy to any other part of the statute.

I would further find that the parties are prohibited from stipulating that the City may take even an initial offset pursuant to §1225(C), if that resulted in the plaintiff receiving less sixty-six and two-thirds percent of his weekly wages. *See Jones, supra*, at p. 15-16, 871 So. 2d at 1120. Because this issue is not before us, I, therefore, concur in the result reached by the majority.