STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1033

WHW
JEW
TMH

ELAY SAVANNAH

VERSUS

SMITHY'S SUPPLY/BIG 4 TRUCKING

Judgment Rendered: MAY 31 2019

Appealed from the
Office of Workers' Compensation Administration
District 6
State of Louisiana
Docket Number 17-03328

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

****

Laurie W. Maschek
Slidell, LA

Counsel for Plaintiff/Appellant
Elay Savannah

Frank R. Whiteley
Megan M. Richardson
New Orleans, LA

Counsel for Defendants/Appellee
Smitty's Supply/Big 4 Trucking

****

BEFORE: WHIPPLE, C.J., McCLENDON, WELCH, HIGGINBOTHAM, AND CRAIN, JJ.

PMW
WJC
McClendon, J. dissents.
CRAIN, J. dissents.

WHIPPLE, C.J.

Elay Savannah ("claimant") appeals the decision of the Office of Workers' Compensation, District 6, granting summary judgment in favor of defendant Smitty's Supply/Big 4 Trucking,[1] and dismissing his claim with prejudice after finding that he made false statements for the purpose of obtaining workers' compensation benefits, and thereby forfeited his right to workers' compensation benefits under LSA-R.S. 23:1208. For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

Elay Savannah, a forty-five year-old man with a tenth-grade education, filed a disputed claim for compensation (Form 1008) with the Office of Workers' Compensation ("OWC") on May 31, 2017. The Form 1008 identified Smitty's Supply/Big 4 Trucking as his employer, and indicated that an accident occurred on April 5, 2017 at a NAPA store in Gretna, Louisiana. Claimant stated in the Form 1008 that he was pulling a manual pallet jack, which was loaded with 150 cases of oil, that he felt a pain across his chest, neck, and arms, and that he reported the incident to his dispatcher on April 12, 2017.

Claimant was deposed and testified that, while he did not recall the exact date of his injury, he was injured while making a delivery to an auto parts store, which he thought was a NAPA in Gretna, Louisiana. According to claimant, he was delivering a large pallet of "cat litter"[2] and attempting to insert a manual pallet jack underneath the pallet when he discovered the center of the pallet had collapsed. Claimant stated that, in attempting to maneuver the pallet jack under the collapsed pallet, he "felt the pain run down the back part of [his] neck and [his] chest" and "thought [he] was having a heart attack." Claimant stated that he stood

[1] As reflected in the defendant's answer and subsequent pleadings, plaintiff mistakenly identified Smitty's Supply/Big 4 Trucking as "Smithy's Supply/Big 4 Trucking" in his disputed claim for compensation.

[2] In the deposition, claimant explained that it was not actual cat litter; rather, "cat litter" was the term used for the product being delivered.

around for about twenty minutes after he felt the pain and that once it subsided, he resumed moving the pallet to the edge of the truck so that it could be unloaded. According to claimant, the pain was in the lower part of his chest, and he had numbness in his left arm, which claimant stated that he had never had before. He denied ever feeling as though he was having a heart attack before that day and ever receiving medical treatment for heart attack-like symptoms. Upon further questioning regarding whether he had ever been treated for heart-related problems or heart care, claimant stated that he had ripped his chest muscle while working out years ago, which caused him to feel as though he was having a heart attack.

Regarding prior injuries, claimant testified that he had suffered a back injury while lifting a heavy box and felt a sharp pain go down his back. He stated that he sought and received medical treatment for this injury, including massages, electric lobes, and therapy. He also wore a back brace, and he was out of work for about a year as a result of this incident.

Claimant further testified that he has a family doctor he visits for regular checkups, as he is on antidepressants, and the same family doctor saw him after the injury at issue in this case. Claimant also denied being treated for high blood pressure. Claimant stated that in the past ten years, he had been hospitalized twice out of state: once for pneumonia and once for a hernia repair. Claimant maintained that he had never received any medical treatment for symptoms similar to those experienced after the injury at issue.

Claimant testified that after the NAPA incident, he did not report the heart attack-like pain he felt to anyone and did not talk to anyone about the injury, as the pain had completely gone away. As time passed, however, he would feel a little pain, but the pain was not so outrageous that he could not perform his job duties. A few weeks after the injury occurred, he felt a pain in his chest, which was similar

to the pain that he previously felt after the injury, as well as tingling in his back and numbness in his little toes. At the time the pain returned, claimant was driving back to the work yard from a delivery in Jackson, Mississippi. On this occasion, the pain was in his chest and shooting down his left arm and into his ring and pinky fingers.

Upon returning to the work yard and parking the truck, claimant spoke with his dispatcher, Michael Wheat. He told Mr. Wheat that he felt like he was having a heart attack so he was going to the hospital. After leaving the work yard and picking up his mother, claimant then went to the hospital. At the hospital, blood was drawn, and claimant was kept overnight for observation and additional tests to be performed the next day. According to claimant, he communicated with Mr. Wheat via text message while at the hospital, notifying his employer through Mr. Wheat that he was being kept overnight. Claimant additionally testified that he told Mr. Wheat in a text message that "they're keeping me because they somehow think I maybe injured myself when I was moving the cat litter."

After his discharge from the hospital, claimant had follow-up appointments with a doctor at a heart and vascular clinic, who told him that it was not a heart attack, but could be nerve damage. This doctor directed claimant to his family doctor, who saw claimant a few days later. Ultimately, claimant's family doctor recommended that he receive acupuncture treatment, but he never received the treatment due to payment issues.

On October 25, 2017, a month after claimant was deposed, defendant filed its pretrial statement in advance of the trial date in which defendant set forth the allegation that claimant made willful misrepresentations for the purpose of obtaining workers' compensation benefits. Thereafter, on November 22, 2017, claimant circulated an errata sheet, in which he made corrections to his prior

deposition testimony. On the eve of the November 28, 2017 trial, an unopposed motion to continue was filed by claimant, which the OWC granted.

Subsequently, defendant moved for summary judgment, contending that there was no genuine issue of material fact remaining as the facts undisputedly showed that claimant committed fraud under LSA-R.S. 23:1208 by making willful misrepresentations for the purpose of obtaining workers' compensation benefits. Claimant opposed the motion. On February 15, 2018, the motion for summary judgment was heard by the OWC, which granted summary judgment in favor of defendant and dismissed the matter with prejudice. This ruling was reduced to a written judgment and signed on March 12, 2017.

Claimant then filed the instant appeal of the March 12, 2017 judgment, contending that the OWC erred in finding that no genuine issues of material facts remained in dispute, and in concluding that the defendant carried its burden of establishing that there were no genuine material facts in dispute as would entitle defendant to judgment as a matter of law.

DISCUSSION

The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. Hines v. Garrett, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 769 (*per curiam*). After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3). "A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate." Jackson v. City of New Orleans, 2012-2742 (La. 1/28/14), 144 So.

3d 876, 882, cert. denied, 135 S.Ct. 197, 190 L.Ed.2d 130 (2014). Moreover, the determination of whether a particular disputed fact is material must be seen in light of the substantive law applicable to the case. Newman v. Richard Price Const., 2002-0995 (La. App. 1st Cir. 8/8/03), 859 So. 2d 136, 139 (citing Zeringue v. Karl Ott Poles & Pilings, 2000-0522 (La. App. 1st Cir. 5/11/01), 808 So. 2d 628, 631).

On a motion for summary judgment, the mover bears the initial burden of proof. LSA-C.C.P. art. 966(D)(1). Once the motion for summary judgment is properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. See LSA-C.C.P. art. 967(B); Holt v. Torino, 2012-1579 (La. App. 1st Cir. 4/26/13), 117 So. 3d 182, 184, writ denied, 2013-1161 (La. 8/30/13), 120 So. 3d 267. In deciding a summary judgment motion, it must first be determined whether the supporting documents presented by the mover are sufficient to resolve all material fact issues. Dimattia v. Jackson Nat. Life Ins. Co., 2004-1936 (La. App. 1st Cir. 9/23/05), 923 So. 2d 126, 129.

In reviewing the grant of a motion for summary judgment by the OWC, an appellate court conducts a *de novo* review, using the same criteria the OWC considered in evaluating whether summary judgment was appropriate. Morris v. Textron Marine & Land Sys., Inc., 2014-0293 (La. App. 1st Cir. 9/24/14), 155 So. 3d 21, 23, writ denied, 2014-2223 (La. 1/9/15), 157 So. 3d 1108.

WILLFUL MISREPRESENTATION

Pursuant to LSA-R.S.-23:1208(A), it is unlawful to willfully make any false statement or misrepresentation for the purpose of obtaining or defeating workers' compensation benefits. If an employee is found to have made such prohibited false statements or misrepresentations, he shall forfeit any right to workers' compensation benefits. LSA-R.S. 23:1208(E). This statute is broadly worded, as

evidenced by its lack of any limiting language, and includes any false statement or misrepresentation made to anyone if made willfully and deliberately in an effort to obtain workers' compensation benefits. Hull v. Fluker Farms, 2000-0757 (La. App. 1st Cir. 5/11/01), 787 So. 2d 535, 539, writ denied, 2001-2291 (La. 11/16/01), 802 So. 2d 612 (citing Resweber v. Haroil Const. Co., 94-2708 (La. 9/5/95), 660 So. 2d 7, 9, 12).

Notably, "willful" has been defined as "proceeding from a conscious motion of the will; voluntary; knowingly; deliberate; intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary." Newman, 859 So. 2d at 141, (citing Grant v. Natchitoches Manor Nursing Home, 96-1546 (La. App. 3rd Cir. 5/14/97), 696 So. 2d 73, 76, writ denied, 97-1582 (La. 10/17/97), 701 So. 2d 1330). In determining whether a false statement has been made for the purpose of obtaining workers' compensation benefits, courts look to the relationship between the false statement and the claim. Id. (citing Resweber, 660 So. 2d at 16). If a false statement is inconsequential to the claim at issue, then it may indicate that the statement was not willfully made for the purpose of obtaining workers' compensation benefits. Id. Thus, an inadvertent and inconsequential false statement should not result in the forfeiture of workers' compensation benefits. Id.

The employer has the burden of proving that an employee willfully made a false statement or misrepresentation for the purpose of obtaining workers' compensation benefits. Shelton v. Smitty's Supply, Inc., 2017-1419 (La. App. 1st Cir. 6/12/18), 253 So. 3d 157, 164, writs denied, 2018-1195 (La. 11/14/18), 256 So. 3d 258, 2018-1199 (La. 11/14/18), 256 So. 3d 291. Specifically, in order for LSA-R.S. 23:1208 and its effects to apply, the employer must establish that: (1) there was a false statement or representation; (2) the statement or representation

was willfully made; and (3) the statement or representation was made for the purpose of obtaining workers' compensation benefits. Id. (citing Resweber, 660 So. 2d at 14). If the employer fails to establish any one of these elements, workers' compensation benefits are not forfeited and the employer does not escape liability. Id. Moreover, due to the fact that LSA-R.S. 23:1208 is quasi-penal, it must be strictly construed. Revere v. Dolgencorp, Inc., 2004-1758 (La. App. 1st Cir. 9/23/05), 923 So. 2d 101, 107.

As claimant's employer, defendant bore the burden herein of establishing all of the above-noted elements for LSA-R.S. 23:1208 to apply. Additionally, as the mover seeking summary judgment, defendant bore the burden of establishing that there were no material facts in dispute and that it was entitled to judgment in its favor as a matter of law. LSA-C.C.P. art. 966(D)(1). In support of its motion for summary judgment, defendant submitted the following exhibits: (1) excerpts of claimant's deposition; (2) North Oaks Medical Center medical records; (3) Ochsner Medical Center medical records; (4) North Oaks Medical Center rehabilitation records; (5) medical records from Dr. Illias Caralopoulos; (6) text messages between claimant and Michael Wheat; (7) the Form 1008 filed by claimant; (8) claimant's answers to interrogatories; (9) defendant's pretrial statement; and (9) claimant's errata sheet to the September 21, 2017 deposition.

Citing instances that it claimed were indicative of claimant's willful misrepresentations for the purpose of obtaining workers' compensation benefits in his September 21, 2017 deposition, defendant contended that the evidence undisputedly established claimant had committed fraud for the purpose of obtaining workers' compensation benefits. Specifically, defendant argued that claimant made false statements regarding: his prior experiencing of symptoms similar to those he had after the injury at issue; his reporting of the injury and

accident to his employer; his informing of medical providers about the accident at issue; and, in making substantial changes to his deposition testimony in an errata sheet.

Reporting of Injury

Defendant contended that there were no issues of material fact that claimant made willful false representations about informing his employer and his medical providers regarding the incident at NAPA and the injury at issue. Defendant contends that because the medical records do not contain any specific reference to the incident at NAPA, claimant's statements in his deposition that he reported the incident to his medical providers were willful and false. However, we note that while defendant cited various instances in the medical records wherein there was no mention of the NAPA incident, the same records state that "[s]ymptoms are worsened with lifting, pulling [...] and relieved with rest" and that "[p]atient states he does strenuous work and that the chest pain may be more related to his strenuous activity." Thus, we reject defendant's argument that the failure of the medical providers to explicitly detail the NAPA incident in their records undisputedly establishes that claimant did not report or relay the incident to his providers, particularly in light of the references in the records specifically noting his mentioning his strenuous work, heavy lifting, and pulling. Thus, defendant has not undisputedly established, on this basis, that claimant made a false statement as to whether he reported the injury to his medical providers, as reasonable persons could disagree, and more than one conclusion could be reached from the records. Jackson, 144 So. 3d at 882.

Defendant also argues that claimant falsely indicated in the disputed claim for compensation, that he reported the incident to his dispatcher on April 12, 2017, and cites to a portion of claimant's deposition, wherein claimant stated that he

informed his employer about the incident at NAPA through text messages to Mr. Wheat while at the hospital. In support of its contention that claimant committed fraud, defendant attached an unsworn summary of text messages and individual e-mails containing individual messages to and from claimant and Mr. Wheat as an exhibit to its motion for summary judgment. Noting that claimant was admitted to the hospital at 6:27 p.m. and then texted Mr. Wheat at 7:14 p.m. that he had "been having chest pains for a few weeks..got bad when I was leaving the bank so i just came the the e.r.they might be keeping me," defendant argues that because claimant did not mention the NAPA incident in the text messages, the text messages prove that claimant did not report the NAPA incident or any work-related incident to Mr. Wheat, and undisputedly establish that claimant's testimony concerning his informing his employer of the incident was false.

However, a review of the full transcript of claimant's testimony reveals that claimant also stated that he spoke to Mr. Wheat in person when he returned to the work yard before he went to the hospital. While claimant stated in his deposition that he told Mr. Wheat in a text message about the injury and incident involving the cat litter, claimant's affidavit submitted in opposition to the summary judgment points out that the text messages did not represent the entire conversation. Upon review of the unsworn summary of text messages from Mr. Wheat cited in support of defendant's motion for summary judgment, as well as claimant's testimony and affidavit stating that he also spoke with Mr. Wheat and that the text messages did not reflect the entire conversation, we are unable to say defendant established that no genuine issue of fact remains as to whether claimant willfully made a false statement for the purpose of obtaining benefits when he testified that he reported the NAPA incident to Mr. Wheat. Id.

Prior Symptoms and Treatment

Defendant next argues that claimant made numerous false statements or misrepresentations related to his previous experience and treatment for symptoms similar to those suffered after the incident at issue. Claimant testified that after the NAPA incident, his symptoms included a pain running down the back of his neck, chest pain, numbness in his left arm, and feeling as though he was having a heart attack. According to claimant's discovery responses, his injuries from the NAPA incident included headaches, dizziness, neck pain and stiffness, shoulder pain, arm or hand pain, upper, lower and mid-back pain, chest pain, muscle spasms, hip/pelvic pain, left leg pain, stiffness, leg swelling, toe numbness, and left hand pain. Claimant testified that he had never experienced symptoms like these before and specifically denied having any pain in his left arm and leg, chest pain, and ever feeling like he was having a heart attack.

Defendant argues that claimant committed fraud in his statements as the medical records indicate that he presented to hospitals and doctors with purportedly similar complaints and symptoms in the two years prior to the NAPA incident. Specifically, in 2015, claimant twice presented to North Oaks Medical Center with corresponding follow-up visits with his family doctor. First, on July 30, 2015, claimant went to the emergency room with complaints of intermittent shortness of breath, chest pain, and soreness and discomfort in his left shoulder with radiation to his left arm and was diagnosed with shortness of breath, as well as chest wall and shoulder pain, which was attributed to anxiety or near panic attacks. Claimant then saw his family doctor for follow-up care concerning his shortness of breath, and was ultimately diagnosed with chest pain, shortness of breath, anxiety and depression. Notably, a cardiac treadmill stress test was

prescribed, and claimant was instructed to report to the emergency room if symptoms returned.

On September 21, 2015, claimant again presented to the emergency room, but this time, he complained of pain in his left hip, back pain, and headaches. He was diagnosed with sciatica and a muscle tension headache. At the follow-up appointment with his family doctor, claimant requested a referral to see a neurosurgeon. His medical records reflect that after this visit, claimant was diagnosed, primarily, with left-sided sciatica as well as unspecified spinal osteoarthritis. The records also show that a CT of his lumbar spine without contrast was ordered, and claimant was referred to a neurosurgeon. Claimant was later seen by the neurosurgeon and prescribed medication and physical therapy for his lower back and knee pain. The physical therapy evaluation records show that claimant indicated that he had a chronic history of back pain over the last twenty years and a previous injury to his lower back while lifting products in 2001. He also complained of pain on his left side that increased at night and weakness in his left leg. A year later, claimant returned to the emergency room at North Oaks Medical Center on November 26, 2016, with complaints of a sharp pain in his left leg and knee, and received a final diagnosis of knee pain.

While claimant testified that when he lived in Dallas he was "working out [...] ripped [his] chest muscle [...] causing the fluid to leak into my blood [and] what made me feel like I was having a heart attack working out," he also testified that he never received treatment in a hospital for a heart attack or heart attack related symptoms. As indicated in the records from claimant's July 30, 2015 visit to the emergency room, chest x-rays and an electrocardiogram were ordered and performed as a result of his complaints of chest pain. After this hospital visit,

claimant was prescribed a cardio treadmill stress test by his family doctor. These tests were ordered for chest pains associated with anxiety or panic attacks.

Contending that claimant made false statements regarding his prior treatment for heart-attack symptoms, defendant relies on a discharge summary for Claimant's April 12, 2017 North Oaks Medical Center emergency room visit and hospital admittance for chest pain. The discharge summary indicated that claimant had a history of chest pain and was seen in the emergency room six months prior, with an unremarkable electrocardiogram and no acute findings on chest x-rays. However, the history taken upon claimant's arrival to the emergency room on April 12, 2017 indicated that he was having chest pains, shortness of breath with exertion, and had never had a cardio workup.

When testifying at his deposition, claimant was generally asked whether he had symptoms similar to those he experienced after the NAPA incident and whether he sought treatment for such symptoms, and he responded that he had not. When specifically asked whether the onset of the symptoms in his chest, arm, and leg began when he pulled on the pallet jack at NAPA, claimant responded affirmatively. Claimant was then asked whether he had experienced these symptoms in his chest, arm, and leg before, and he testified that he had not. As the medical records show, claimant previously sought treatment for symptoms in some respects similar to those he complained of after the NAPA incident, *i.e.*, chest pains.

We note that the statements, which were made during claimant's deposition, are not inconsequential, and arguably could be viewed as statements made willfully for the purpose of obtaining workers' compensation benefits in violation of LSA-R.S. 23:1208. See Newman, 859 So. 2d at 141. However, in opposition to the motion for summary judgment, claimant submitted his affidavit with

attachments, his deposition and errata sheet, and a medical report from North Oaks Medical Center. Claimant contends that the deposition testimony regarding prior symptoms cited by defendant as being false was corrected through the errata sheet submitted after the deposition transcript was prepared, noting that he reserved his right to read and sign the transcript of his testimony. Specifically, claimant provided the following explanation and correction for the instance in the deposition transcript where he was asked about experiencing symptoms similar to those experienced after the NAPA incident, as follows:

> I forgot I had chest pains before[;] they were not like this. Prior to this I had chest pains because of anxiety attacks. I had prior L [(left)] leg pain due to RA. I never had prior accidents or injuries involving these body parts.

Louisiana Code of Civil Procedure article 1445[3] provides that a witness is entitled to make "[a]ny changes in form or substance" he so desires to his deposition, but the witness must also provide a statement with the reasons the changes are being made. Defendant contends that claimant impermissibly used the errata sheet to "fix" his deposition testimony and that his changes exceed the scope

---

[3] Louisiana Code of Civil Procedure article 1445 provides as follows:

> When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. **Any changes in form or substance which the witness desires to make shall be entered upon the deposition** by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or is absent from the parish where the deposition was taken or cannot be found or refuses to sign. If the deposition is not signed by the witness within thirty days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Article 1456 the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. A video deposition does not have to comply with the requirements of reading and signing by the deponents.

(Emphasis added.)

of an errata sheet.[4] Moreover, defendant maintains that as a matter of law, the late-submitted errata sheet renders claimant's changes ineffective and that it is entitled to use the deposition fully as though signed pursuant to LSA-C.C.P. art. 1445. We disagree.

In Fireman's Fund Ins. Co. v. Browning-Ferris Indus., 30,595 (La. App. 2nd Cir. 5/13/98), 714 So. 2d 168, writs denied, 98-1569 (La. 9/18/98), 724 So. 2d 765 and 98-1555 (La. 9/18/98), 724 So. 2d 769, the Louisiana Second Circuit Court of Appeal recognized that a witness may make any changes to his deposition, and both the changed and original versions are admissible at trial, which permits an adverse party to impeach the witness regarding the substantively changed testimony. Id. at 174-75 (citing Lugtig v. Thomas, 89 F.R.D. 639, 641-42 (N.D. Ill. 1981)); but cf. EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 268 (3d Cir. 2010) (holding that on review of a motion for summary judgment, a district court did not abuse its discretion in refusing to consider proposed substantive changes to a witness's deposition testimony that lacked sufficient justification; however, the court reiterated that a district court has discretion to choose to allow such contradictory changes as the circumstances warrant).

Here, claimant undisputedly did not sign the errata sheet with his corrections within thirty days of the submission of the transcript to him. However, the requirements for using the deposition as if signed set forth in LSA-C.C.P. art. 1445 were not met in this case, as the court reporter did not sign and state on the record

[4] Relying on Greenway v. Int'l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992), defendant argues that a "deposition is not a take home examination" and that LSA-C.C.P. art. 1445, like Federal Rule of Civil Procedure 30(e), cannot be construed "to allow one to alter what was said under oath." Id.

the fact of the waiver of signing or, if any given, the reasons for the failure of the witness to sign.[5] See Crawford v. Brookshire Grocery Co., 50,151 (La. App. 2nd Cir. 9/30/15), 180 So. 3d 478, 485 (the court held that the party moving for summary judgment was not in a position to use the deposition fully as though signed absent the requirements of LSA-C.C.P. art. 1445 being met); also see McCoy v. Winn-Dixie of Louisiana, Inc., 95-1214 (La. App. 1st Cir. 4/4/96), 672 So. 2d 312, 315-316. Thus, notwithstanding the timing of the errata changes, both the changes and the original version of the deposition transcript may be considered despite the defendant's arguments otherwise. See Fireman's Fund Ins. Co., 714 So. 2d at 174-75.

Thus, the fact that errata changes were made does not alone prove that the statements and changes made were fraudulent. The errata changes indicate that claimant simply forgot that he had chest pains previously, which he explained were in relation to panic attacks he had experienced, and which he felt were unlike the chest pain he experienced after the NAPA accident.[6] Moreover, claimant's affidavit indicates that his treatment for anxiety attacks was different from the treatment for the symptoms of the NAPA incident.

In view of the evidence submitted by claimant and in light of the strict construction we must apply under LSA-R.S. 23:1208, we are unable to say, without weighing conflicting evidence, that the issue of whether claimant willfully made a false representation regarding his prior symptoms and treatment for the purpose of obtaining workers' compensation benefits is undisputed in this case, as

---

[5] While the deposition contains a certificate signed by the court reporter, the certificate simply attests that the court reporter had complied with all rules governing the taking of testimony and that she had no conflict of interest in the matter and it does not comply with LSA-C.C.P. art. 1445.

[6] Claimant testified that he takes antidepressants daily; however, there were no questions asked regarding the symptoms or the reason why claimant was prescribed antidepressants. A review of the medical records indicates that he was prescribed antidepressants in connection with his anxiety and a panic attack he experienced two years earlier, on July 30, 2015.

reasonable persons could disagree and more than one conclusion could be reached. Revere, 923 So. 2d at 107; Jackson, 144 So. 3d at 882. Instead, the issues in this case are vigorously disputed by both parties and can only be resolved by a trier of fact evaluating and weighing the original testimony, the errata changes, the claimant's affidavit,[7] and the other evidence presented both in support of and opposition to the motion for summary judgment, and making credibility determinations reserved for the trier of fact. Janney v. Pearce, 2009-2103 (La. App. 1st Cir. 5/7/10), 40 So. 3d 285, 293, writ denied, 2010-1356 (La. 9/24/10), 45 So. 3d 1078. After carefully considering the record herein, we find that claimant made the requisite showing that material factual issues remained in dispute, precluding the granting of summary judgment in this matter. LSA-C.C.P. art. 966(D)(1).

CONCLUSION

For the above and foregoing reasons, the March 12, 2018 judgment of the OWC, granting the motion for summary judgment of Smitty's Supply/Big 4 Trucking and dismissing claimant's action, is hereby reversed. This matter is remanded to the OWC for further proceedings. Cost of the appeal are assessed to the appellee, Smitty's Supply/Big 4 Trucking.

REVERSED AND REMANDED.

[7] We note that this court has held that a supplemental affidavit that contradicts earlier deposition testimony is not itself sufficient to create an issue of fact precluding summary judgment; however, when a subsequent affidavit merely supplements rather than contradicts prior deposition testimony, a court may consider the affidavit in evaluating whether genuine issues of material fact remain thereby precluding summary judgment. Terrebonne v. Floyd, 1999-1036 (La. App. 1st Cir. 5/23/00), 767 So. 2d 754, 757.