

Judgment rendered June 26, 2019.  
Application for rehearing may be filed  
within the delay allowed by Art. 2166,  
La. C.C.P.

No. 52,697-WCA

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

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JOSUE TREJO

Plaintiff-Appellee

versus

CANAAN CONSTRUCTION, LLC,  
AND BRIDGEFIELD CASUALTY  
INSURANCE COMPANY

Defendants-Appellants

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Appealed from the  
Office of Workers' Compensation, District 1-East  
Parish of Ouachita, Louisiana  
Trial Court No. 15-02895

Brenza Irving Jones  
Workers' Compensation Judge

\* \* \* \* \*

ANZELMO & CREIGHTON, LLC  
By: Donald J. Anzelmo

Counsel for Appellants

BRUSCATO LAW FIRM  
By: John F. Bruscatto

Counsel for Appellee

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Before WILLIAMS, COX, and STEPHENS, JJ.

## **STEPHENS, J.**

The defendants, Canaan Construction, LLC, and Bridgefield Casualty Insurance Company, appeal from a judgment by a workers' compensation judge ("WCJ") finding that the plaintiff, Josue Trejo, was entitled to temporary total disability benefits, medical benefits, penalties, attorney fees, and costs. For the following reasons, we affirm the WCJ's judgment.

### **FACTS**

This workers' compensation lawsuit stems from the injury of Josue Trejo sustained while working on a construction job for Canaan Construction, LLC ("Canaan"), in Ruston, Louisiana, on February 11, 2015. Trejo, a native of Honduras living in Louisiana, does not speak English. He was injured while working when he fell from an eight-foot ladder, hitting his head on concrete and sustaining multiple injuries as a result. Trejo was airlifted by helicopter to University Health in Shreveport and spent one night there. His diagnosis included a fracture of the anterior and posterior frontal sinus, right orbital floor fracture, nondisplaced nasal bone fracture, commotio retinae of the right eye, and a facial laceration. His laceration was sutured, and no surgery was required. Trejo also claimed he injured his arm, wrist, and hip in the fall. He received some followup treatment at University Health on February 20 and March 9, 2015. At the March visit, Trejo complained of periodic headaches and occasional dizziness when bending over. After that, Trejo was treated by physicians in Ruston and Monroe.

Trejo filed a disputed claim for compensation against his employer, Canaan, and its insurer, in which he claimed he could not work. In his petition, Trejo also claimed: no wage benefits had been paid; entitlement to either temporary total disability benefits or supplemental earnings benefits; a

refusal of the defendants to authorize/submit evaluation with a medical provider; and, entitlement to penalties, costs, and attorney fees. Canaan answered, admitting that Trejo was temporarily disabled for a period of time following the accident but denying he was permanently disabled or that he sustained an injury resulting in loss of earning capacity. Canaan also claimed that Trejo committed fraud under La. R.S. 23:1208, resulting in forfeiture of his right to all benefits. The specific conduct which would constitute fraud was not stated by Canaan.

On November 3, 2015, Canaan sent Trejo a letter offering to allow him continued employment with the company at his previous wage and offered to make whatever accommodations were required by Trejo's physicians; however, Trejo did not return to work at Canaan. Shortly after Canaan's offer for continued employment, in November 2015, Trejo filed a supplemental and amended petition alleging permanent partial disability and seeking costs, penalties, and attorney fees for Canaan's failure to pay benefits during the time that Trejo had been unable to work.

Ultimately, a trial of the matter commenced on May 4 and 24, and December 1, 2017—after numerous continuances while discovery was conducted and multiple depositions were taken. Following a pretrial conference, the WCJ noted that the parties stipulated to Trejo's employment with Canaan, and Trejo was involved in a work-related accident. Later during the trial, the parties also stipulated that Trejo had not been reimbursed for \$400 in out-of-pocket expenses. The issues that were considered at trial included: entitlement to indemnity benefits; entitlement to medical benefits; the nature and extent of Trejo's disability; Trejo's average weekly wage; and, entitlement to an award of penalties and attorney fees. The parties

jointly admitted into evidence the ambulance bills, records from University Health, and medical records from two of Trejo's treating physicians, Dr. Michael McCormick and Dr. Lawrence Danna. The parties jointly stipulated that the wage records submitted by Canaan in pretrial discovery were not sufficiently reliable to be considered by the WCJ.

At trial, Cruz Rodriguez testified that he worked with Trejo at Canaan and was present when the accident occurred.<sup>1</sup> Rodriguez described picking Trejo up after the accident and there was blood on the spot where Trejo hit the ground. In fact, Trejo told Rodriguez that he "thought his eye fell out." Rodriguez recounted that other employees were present at the site, and they called an ambulance. It was Rodriguez's recollection that Trejo was unconscious after the accident. Rodriguez also testified regarding his own hourly wage and the average number of hours he worked.

Dr. McCormick, a family medicine physician, treated Trejo and testified at trial. He first saw Trejo on April 2, 2015. According to Dr. McCormick, Trejo was accompanied to his appointments by a woman who translated for him. At that visit, Trejo complained of chest pain, shortness of breath, heart racing, nausea, vomiting, pain in the left hand, arm, and leg, and headaches. Trejo reported to Dr. McCormick at that time that he was knocked unconscious as a result of the fall. Dr. McCormick found that Trejo suffered skull and facial fractures and all of his symptoms were related to the accident. On that date, he recommended that Trejo not be released to return to work.

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<sup>1</sup> Rodriguez testified through an interpreter.

Dr. McCormick followed up with Trejo on April 16, 2015, seeing Trejo for similar complaints as well as neck pain, hip and arm pain, headaches, and depression. Dr. McCormick opined that Trejo sustained a concussion in the accident. Again, Trejo was not released to return to work.

At an office visit on May 7, 2015, Trejo's complaints were consistent with his past complaints. His arm pain had improved, but his hip pain and headaches had not. Dr. McCormick testified he noted in his medical records that the headaches were enough to keep Trejo from working. Again, Trejo was not released to return to work.

On June 8, 2015, Dr. McCormick saw Trejo for dizziness, hip pain, myalgia, headaches, and anxiety disorder. There was no significant improvement in those symptoms.

Finally, at an office visit on July 8, 2015, Trejo denied dizziness, but still complained of daily headaches, which Dr. McCormick characterized in his notes as a "dull ache." He administered a shot of cortisone to Trejo. Physical therapy was discussed. Dr. McCormick ordered a CT scan of Trejo's brain, which did not reveal any acute intracranial findings. Dr. McCormick testified he never released Trejo or told him he could return to any level of work.

On December 30, 2015, Trejo was seen by an ear, nose, and throat specialist, Dr. Danna, who ordered a CT scan of the maxillofacial/sinuses. This did not reveal any significant abnormalities. An MRI of Trejo's brain, also ordered by Dr. Danna, showed "no obvious residuals of closed head injury."

Trejo was referred to a neurologist, Dr. Brian L. Stucki, who saw him for an initial consultation in June 2016.<sup>2</sup> While evaluating Trejo, Dr. Stucki noted his complaints of chronic headaches, poor memory, mood changes, neck pain, insomnia, dizziness, hip pain, depression, and anxiety. Dr. Stucki stated Trejo had an MRI of the brain in November 2015, which showed a right minimally displaced fracture of the maxillary sinus and orbital floor, a medial displaced fracture of the right medial orbit wall involving the ethmoid sinus and right frontal sinus, and a nondisplaced lateral orbital wall fracture. Based on that, Dr. Stucki diagnosed Trejo with a traumatic brain injury with a skull fracture. Dr. Stucki opined that headaches are commonly associated with traumatic brain injuries. Dr. Stucki wanted a neuropsychiatric evaluation, which was denied. He did not recommend Trejo be released to return to work.

Trejo testified through an interpreter. Trejo related, on the date of the accident, he fell at the jobsite and opened his eyes when he was arriving at the hospital. Trejo had no memory of being in an ambulance and did not remember much about the next day. Trejo contended he was unconscious after the accident and others who were present told him he was “like dead” for approximately 30 minutes.

Trejo’s physical complaints were headaches and pain in the hip, back, and neck, which were not improving. He related that Dr. Stucki gave him medicine for the headaches, but the medicine made him drowsy. He denied being able to do any work, and he claimed activity made his headaches worse. Trejo also stated being affected if he went outside in bright sunlight.

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<sup>2</sup> In lieu of his trial testimony, Dr. Stucki’s deposition was introduced into evidence at trial.

Trejo testified when he was working at Canaan, he was paid \$17 per hour and worked 55 to 75 hours per week. He did not receive overtime for work in excess of 40 hours per week and was paid in cash.

On cross-examination, Trejo said he was unaware that Dr. McCormick's notes mentioned his headaches had gotten better and were a "dull ache." Trejo was also asked about the absence of any complaints of dizziness or memory loss until months after the accident. Notably, the notes of a second interpreter, utilized by the WCJ to assess the accuracy of the trial transcript, show that the interpreter present at trial did not use the proper Spanish word for "dizziness." It is not clear that Trejo ever understood the questions posed.

Trejo was asked about the offer of employment with accommodations made by Canaan in November 2015; he was unaware of the offer and said he did not feel able to work. Trejo denied he had worked anywhere since the accident.

Trejo related that he lives with two brothers and a cousin in a house with Alejandra Fuentes. According to Trejo, Fuentes is employed at Weil Cleaners and works from 7:00 a.m. until 6:00 p.m. Trejo said he occasionally sweeps the house, and his cousin and brothers help unload Fuentes' car. They pay someone to do yard work or his brother does it. Trejo said he watered the yard in the morning about once a month. He claimed bending over hurt his hip and made him nauseous. Trejo testified he does not go into the front yard much because it is too sunny. He claimed he has had trouble sleeping at night because of headaches. He noted he had not driven since the accident and walks to the store, which is located next door to his house.

Fuentes testified she and Trejo have resided together for three years. She related that since the accident, Trejo has complained of pain in his arms with numbness and tingling, but his most common complaint was headaches which seemed to be affected by the weather. She said, while working for Canaan, Trejo brought home \$1,100 to \$1,200 per week, but he never earned less than \$900 per week. Each work day, Fuentes related that Trejo left the house at 6:00 a.m. and arrived home between 6:30 p.m. and 8:00 p.m. Fuentes testified Trejo has not worked anywhere since the accident and denied he worked at Weil Cleaners with her.

In support of their fraud claim, the defendants presented testimony of two private investigators hired during the course of the litigation in an attempt to establish that (1) Trejo worked at Weil Cleaners and, (2) he did work around his residence he claimed he could not do. Nechanta Alexander was one of those private investigators utilized by defendants, and she was employed by Woodall and Broome. She described surveillance of Trejo on March 29 and 30, 2017, when she videoed his activities. On the first day, she stated Trejo left his residence at 6:52 a.m. and arrived at Weil Cleaners at 6:58 a.m. The vehicle left the employee parking lot at 10:52 a.m. Alexander claimed she called the business at 8:37 a.m. and confirmed Trejo was inside; however, she did not testify who gave her that information. The following day, Alexander claimed Trejo left the residence at 6:41 a.m., with other subjects, and went to the cleaners. He left at 1:17 p.m. with a female and two other males. He arrived home soon thereafter and was observed on the front porch of his house. Alexander claimed she called the cleaners on that day also and confirmed Trejo was inside—again, with no evidence regarding the person she spoke with. Alexander was asked on cross-

examination if she had ever been convicted of a crime involving fraud or dishonesty or issuing worthless checks. She stated she had not.

Ashley David Nichols, another private investigator also with Woodall and Broome, testified he conducted surveillance on Trejo on April 10-12, 2017, and on April 28-29, 2017. His surveillance tapes and still photographs showed Trejo outside looking up at the sun, bending over in the front yard, pulling weeds, and sweeping dirt out of the front door of the house. Nichols observed Trejo on several days watering the yard. Once Trejo was observed digging in the dirt with a stick and unloading items from a vehicle, as well as walking to the grocery store next door to his house several times. Nichols claimed on April 28, he saw Trejo get out of a vehicle at the cleaners at 12:41 p.m.

In response to the investigators' testimony, the WCJ summoned Fuentes into the courtroom and warned her of the penalties for committing perjury. The WCJ then asked Fuentes about her testimony that Trejo was not working at the cleaners. Fuentes insisted Trejo had not worked at the cleaners and reiterated he had gone there with her twice, but stayed in the vehicle because no one but employees were allowed in the work area. She said Trejo went into the break room "to see what we were doing."

The trial was recessed and continued until May 24, 2017. On that date, Alexander testified again about her video surveillance of Trejo on March 29 and 30, 2017, in which she claimed he went to the cleaners and stayed there several hours each day. She also specifically asserted she verified Trejo was inside the business on those days.

Alexander was asked if she had ever pled guilty to or been convicted of a crime or if she was ever on probation. She denied any convictions.

However, she was presented with the transcript and record of criminal proceedings against her in Georgia involving fraud and identity theft.

Eventually, the WCJ ordered this evidence stricken from the record. Nichols again testified, but this time by telephone. He stated Alexander was a reliable person and there was no dishonest reporting.

Fuentes was called back to the stand on cross-examination. She was questioned about Trejo's lawyer using her to translate in order to facilitate communication with Trejo regarding the case. There was an issue of whether this constituted a breach of the rule of sequestration since Fuentes was also a witness in this matter. Fuentes denied that Trejo's lawyer discussed the testimony of other witnesses with her.

It was also pointed out that, in her deposition and at trial, Fuentes testified Trejo had never gone to the cleaners with her. When questioned by the WCJ, she stated Trejo had gone with her to the cleaners twice. Fuentes was asked if she had discussed this matter with Donnie Weil, the owner of the cleaners. She said she had asked whether Weil had surveillance video of the business on the dates Trejo was alleged to be working there.

David Donnie Weil, the owner of Weil Cleaners and Fuentes' employer, appeared and stated Trejo did not work for him at the cleaners. Weil presented his video surveillance footage from the business on the days Alexander claimed Trejo was working there. The videos showed on March 29, 2017, Fuentes arrived at the cleaners alone at 6:55 a.m. On March 30, 2017, Fuentes was seen on video arriving at work between 6:46 and 6:53 a.m. Again, she was alone. According to Weil, the business has two locations. Later that morning, Fuentes went to one location, picked up clothes and took them to the other location. She left the cleaners at 1:16

p.m. Weil said he looked at a video from other cameras and never saw Trejo enter any of the buildings belonging to the cleaners. The video did not show Trejo was in the vehicle with Fuentes on either day.

Weil said he supplied his video footage based on the dates and times furnished by Trejo's counsel. He did not supply any video from inside the business. Weil admitted that Fuentes made him aware that it was alleged in court Trejo had been working at the cleaners, which was the impetus for reviewing his video footage to see if Trejo had been at the business. Weil stated he did review some footage from inside the business, which was not produced at trial; however, none of the footage showed that Trejo was present at the cleaners. After Weil's testimony, the case was continued until December 1, 2017.

When court reconvened in December 2017, issues regarding discrepancies in the prior translation of the questions posed to Trejo and his answers were discussed. Trejo sought to clarify that he can carry things which are not too heavy and the doctor told him if he was more active, he would feel better. He still insisted he could not work due to pain in his head and sensitivity to sunlight.

The WCJ read its judgment and reasons for judgment into the record on February 8, 2018. The WCJ found Trejo was unable to return to work and was entitled to indemnity benefits, which the WCJ based on the medical opinions of the treating physicians, Dr. McCormick and Dr. Stucki. The WCJ noted, according to Trejo's unrefuted testimony, he earned \$17 an hour and worked at least 65 hours per week; based on that, the WCJ determined Trejo should receive temporary total disability indemnity benefits in the amount of \$630 per week, beginning on February 11, 2015, and continuing

until he is released to return to work. Additionally, Trejo was found to be entitled to medical benefits and treatment as recommended by his physician and was entitled to be reimbursed for out-of-pocket expenses. Canaan was granted a credit for disfigurement benefits paid.

Although the WCJ found “several factors containing characteristics of fraud,” regarding Trejo’s statements to doctors, she noted Trejo suffered a serious head injury and confusion was observed in his medical records. The WCJ said the statements concerning sensitivity to sunlight and headaches were too vague to constitute an intentional and willful misrepresentation. In great detail, the WCJ discussed the video and pictures of Trejo outside his house pulling weeds, examining vegetation, and watering. The WCJ stated she could not find that the actions of the claimant amounted to a willful misrepresentation when he denied doing “yard work,” reasoning that the term “yard work can carry with it various meanings and interpretations” and Trejo could have easily considered his activity to have been a form of gardening, cultivating, or pruning.

The WCJ observed a portion of Canaan’s claim that Trejo was not entitled to benefits due to fraud was based upon allegedly false statements at trial concerning his abilities and activities. However, the WCJ stated Canaan’s decision to deny benefits was made prior to trial; therefore, Trejo’s statements at trial could not have served as a valid basis for the denial of benefits. So considering, the WCJ concluded Trejo had not committed fraud under La. R.S. 23:1208, and there was no reason for forfeiture of his workers’ compensation benefits. The WCJ ordered Canaan to pay a penalty of \$2,000 for failure to pay indemnity benefits and a \$2,000 penalty for

failure to pay medical benefits. Canaan was also ordered to pay attorney fees of \$10,000 and costs of the proceedings.

Subsequently, motions for new trial were filed by each party and were argued before the WCJ on June 4, 2018. Canaan contended the judgment was contrary to the law and evidence, and it urged that the WCJ erred in finding Trejo did not commit fraud under La. R.S. 23:1208, requiring a forfeiture of benefits. Canaan argued Trejo's statements to his doctors showed fraud and the questions about yard work were specific and could not be misconstrued. Defendants maintained the videos of Trejo show a man capable of doing "whatever he wants to do whenever he wants to do it." Canaan argued its position that, at the least, indemnity benefits should not be awarded after November 3, 2015, when the company made an offer for Trejo to return to work with accommodations at the same rate of pay. Regarding penalties and attorney fees, Canaan argued it acted reasonably in relying on its fraud claim to deny benefits to Trejo. Therefore, the company asserted penalties and attorney fees should not have been awarded.

Trejo sought a new trial on the issue of attorney fees and attempted to present documentation as to the amount of fees actually incurred, which the WCJ refused to consider.

On June 29, 2018, the WCJ read the judgment and reasons for judgment into the record denying both motions for new trial. The WCJ found, after reviewing the evidence, her initial judgment was not contrary to the law and evidence, and this appeal by defendants ensued.

## DISCUSSION

### Forfeiture of Benefits

In its first assignment of error, Canaan argues the WCJ erred in failing to find Trejo forfeited the right to benefits by making false statements and representations in furtherance of his workers' compensation claim in violation of La. R.S. 23:1208. Further, Canaan submits that the WCJ erred in failing to award restitution to Canaan due to Trejo's violation of that statute. This assignment of error is without merit.

### *Legal Principles*

It shall be unlawful for any person to willfully make a false statement or representation for the purpose of obtaining or defeating any workers' compensation benefit or payment. La. R.S. 23:1208(A). Any employee who violates this section shall, upon determination by the WCJ, forfeit any right to compensation benefits. La. R.S. 23:1208(E). This statute authorizes forfeiture of benefits upon proof that: (1) there is a false statement or representation; (2) it is willfully made; and, (3) it is made for the purpose of obtaining or defeating any benefit or payment. *Resweber v. Haroil Const. Co.*, 1994-2708 (La. 9/5/95), 660 So. 2d 7; *Ehrman v. Graphic Packaging Int'l, Inc.*, 51,237 (La. App. 2 Cir. 5/17/17), 221 So. 3d 945, writ denied, 2017-1131 (La. 10/27/17), 228 So. 3d 1227. There is no requirement of prejudice to the employer; when the statute is satisfied, benefits will be forfeited for the sole reason that the claimant has willfully and deliberately attempted to defraud the workers' compensation system, and no further requirements are to be imposed. *Desadier v. West Frasier, Inc.*, 48,303 (La. App. 2 Cir. 8/7/13), 122 So. 3d 584. Forfeiture is a harsh remedy and must be strictly construed. *Ehrman, supra*. All of these elements must be present

before a claimant can be penalized. The determination of misrepresentations for forfeiture of benefits is subject to the manifest error standard of review. *Green v. Allied Bldg. Stores, Inc.*, 50,117 (La. App. 2 Cir. 1/22/16), 185 So. 3d 164, *writ denied*, 2016-0508 (La. 5/27/16), 192 So. 3d 737.

When a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. When there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed even though the appellate court may feel that its own inferences and evaluations are as reasonable. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989); *Borders v. Boggs & Poole Contracting Grp., Inc.*, 49,228 (La. App. 2 Cir. 8/13/14), 147 So. 3d 308.

The relationship between the false statement and the pending claim will be probative in determining whether the statement was made willfully for the purpose of obtaining benefits. An inadvertent and inconsequential false statement will not result in the forfeiture of benefits. *Green v. Allied Bldg. Stores, Inc.*, *supra*; *Borders v. Boggs & Poole Contracting Grp., Inc.*, *supra*.

### ***Analysis***

Canaan posits it proved at trial Trejo's violation of La. R.S. 23:1208, requiring the forfeiture of any right to workers' compensation benefits and restitution of benefits paid. Accordingly, Canaan submits the WCJ was manifestly erroneous in finding fraud had not been proven. We disagree.

Throughout these proceedings, Canaan has asserted Trejo willfully made false statements to his doctors for the purpose of receiving workers' compensation benefits. The WCJ specifically determined Trejo "sustained a

very serious head injury,” and “confusion was noted” in his medical records. These conclusions are supported by the record, which shows Trejo suffered a severe head injury resulting in numerous fractures of his skull. The initial medical records from University Health note Trejo experienced confusion. The records and testimony of Trejo’s treating physicians, Dr. McCormick and Dr. Stucki, show Trejo consistently complained of dizziness and headaches. Both physicians determined, during the time they treated Trejo, he was not able to return to work as a result of his injuries. They also stated Trejo’s complaints were consistent with the serious head injury he suffered. Neither doctor indicated Trejo was untruthful or his complaints were inconsistent with the nature and severity of his injuries.

Furthermore, the willfulness of Trejo’s representations was also affected by a unique situation in this matter: the language barrier. Trejo’s inability to speak English and the necessity of his physicians to communicate with him through an interpreter most certainly created a problem—which even manifested in the legal proceedings, as the record shows many of Trejo’s statements at trial were misinterpreted. Here, the WCJ was required to make a credibility determination as to whether Trejo willfully made false statements to his doctors for the purpose of obtaining workers’ compensation benefits. Ultimately, the WCJ found Trejo to be credible; based upon this record, we do not conclude that determination was manifestly erroneous. Therefore, despite the assertions of Canaan, we conclude the record supports the WCJ’s determination that Trejo did not make willful misrepresentations.

Canaan also maintains the WCJ erred in rejecting the pictures and surveillance video showing Trejo was able to engage in physical activity,

which he claimed he could not do. The company urges the WCJ was incorrect in finding there was a misunderstanding about what was meant by the term “yard work” when Trejo denied he could do that. Canaan argues the video and photographs refute Trejo’s testimony that he could not be in the sun, could not work in the yard, could not unload a car, and could not do any physical activity without having a severe headache with nausea. Canaan urges the video shows Trejo doing all these activities with no resulting indications of nausea or pain.

The WCJ thoroughly reviewed and discussed the surveillance video and pictures showing Trejo walking in his yard, watering plants, and bending over. The correct translation of Trejo’s testimony showed he said he occasionally watered the yard. The transcript shows Trejo understood “yard work” to mean mowing the grass. He said he could not do that and there is no evidence in the record he was untruthful in that statement. The WCJ did not find that the activities Trejo was engaged in were sufficient to show he willfully made false statements about being able to work. The activities observed were limited, and we do not find the WCJ was manifestly erroneous in concluding this evidence failed to establish that Trejo committed actions requiring the forfeiture of workers’ compensation benefits under La. R.S. 23:1208.

Additionally, Canaan argues the WCJ was manifestly erroneous in rejecting evidence showing that Trejo was working at Weil Cleaners. Canaan contends that in ultimately deciding the case, the WCJ did not give proper weight to the testimony of Alexander, Canaan’s private investigator who testified Trejo was working at the cleaners. Canaan asserts the WCJ erred in finding Weil’s testimony and video records were credible evidence

Trejo did not work at the cleaners. The company contends Weil had discussed the case with Fuentes and Trejo's attorney and was aware of the testimony of other witnesses regarding whether Trejo worked at the cleaners.<sup>3</sup>

The WCJ's decision to reject Canaan's contention that Trejo was working at Weil Cleaners was based upon a credibility determination between Alexander's and Weil's testimony. Although the trial court ultimately refused to consider evidence regarding whether Alexander had a criminal record, the WCJ was able to observe both Alexander and Weil during their testimony. The video taken by Alexander and admitted at trial does not contain any images of Trejo arriving at or departing from the cleaners. The video of Fuentes' white vehicle does not show that Trejo was in the vehicle. Despite Canaan's claims, Weil's video shows Fuentes arriving alone at the cleaners on the days that Alexander claimed Trejo was working there—at the same time Alexander claimed she observed Trejo. Alexander stated she called the cleaners on both days to confirm that Trejo was working there, but she failed to give the name of the person she claimed she talked to at the cleaners. She did not furnish any other evidence to corroborate her testimony. However, Weil specifically stated Trejo did not work for Weil Cleaners, an 88-year-old business which Weil himself had managed for approximately 34 years. Nothing in this record would indicate a reason for Weil to misrepresent Trejo's status with his business; obviously, the WCJ reasonably determined Weil was more credible than Alexander, and this determination was not manifestly erroneous. Therefore, based upon

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<sup>3</sup> Canaan's argument regarding the violation of the rule of sequestration is discussed below.

this record, we find the WCJ was not manifestly erroneous or clearly wrong in finding that Canaan failed to establish Trejo violated La. R.S. 23:1208, requiring the forfeiture of workers' compensation benefits. This assignment of error is without merit.

### **Employment Offer**

In Canaan's second assignment of error, it maintains the WCJ erred in awarding wage benefits after the company offered Trejo modified employment on November 3, 2015. Specifically, Canaan argues the WCJ erroneously disregarded evidence of Trejo's ability to work. This argument is without merit.

### ***Legal Principles***

A claimant is entitled to temporary total disability benefits if he proves by clear and convincing evidence, unaided by any presumption of disability, that he is physically unable to engage in any employment or self-employment. La. R.S. 23:1221(1)(c). A claimant who can perform light duty work is not entitled to temporary total disability benefits. *Morrison v. First Baptist Church of W. Monroe*, 44,189 (La. App. 2 Cir. 4/8/09), 7 So. 3d 873. An employee is deemed capable of performing offered employment unless he can establish by clear and convincing evidence, unaided by any presumption of disability, that solely as a consequence of substantial pain, he cannot perform the offered employment. La. R.S. 23:1221(3)(c)(ii); *Morrison, supra*.

A claimant does not have to accept employment that involves an appreciable and significant risk to his wellbeing. *Daugherty v. Domino's Pizza*, 1995-1394 (La. 5/21/96), 674 So. 2d 947; *Perrilloux v. Uniforms by Kajan, Inc.*, 13-377 (La. App. 5 Cir. 12/27/13), 131 So. 3d 1026.

## *Analysis*

Citing the alleged misstatements to treating physicians and the surveillance videos discussed above, Canaan urges that the evidence shows Trejo could have returned to light duty work as of the date of its offer to light duty work in November 2015, and the WCJ erred in awarding indemnity benefits after that point. We disagree.

As discussed above, the record does not establish that Trejo willfully made false statements to his treating physicians. The offer of employment was made on November 3, 2015. Dr. Stucki noted that Trejo's MRI done in November 2015 showed several skull fractures, and he diagnosed Trejo with skull fractures and a traumatic brain injury. Dr. McCormick treated Trejo for serious headaches he found to be consistent with Trejo's injuries. Dr. McCormick and Dr. Stucki, based on their physical examinations of Trejo as well as his physical complaints, never released Trejo to return to *any* kind of employment. Further, although at trial defendants posed hypothetical questions to Trejo's doctors regarding a person's ability to work with headaches, both physicians stated explicitly Trejo was not yet able to return to work.

Tellingly, defendants did not present any medical evidence to rebut this testimony. Canaan never requested Trejo submit to an independent medical examination ("IME"), a functional capacity evaluation, or any other method that might have been employed to challenge the medical evidence and testimony presented by Trejo's treating physicians. *See* La. R.S. 23:1123; La. R.S. 23:1124.1; La. R.S. 23:1317.1.

Therefore, under these facts, Canaan simply failed to rebut the medical evidence and testimony presented by Trejo regarding his inability to

work. He was not required to accept employment that involved an appreciable and significant risk to his wellbeing. Importantly, Canaan put forth no evidence to support this claim that Trejo could have performed some kind of work. Thus, the WCJ did not err in accepting the unrebutted medical evidence and testimony and awarding WC benefits after the date of the offer of modified employment in November 2015. We conclude this assignment of error is without merit.

### **Compensation Rate**

In another assignment of error, Canaan argues that the WCJ erred in the calculation of the applicable compensation rate. The company also urges that the WCJ erred in rejecting the testimony of Trejo's coworkers concerning their earnings. This assignment of error lacks merit.

### ***Legal Principles***

An employee is entitled to workers' compensation benefits if he "receives personal injury by accident arising out of and in the course of his employment." La. R.S. 23:1031(A). Factual findings in workers' compensation cases are subject to review for manifest error. *See Buxton v. Iowa Police Dept.*, 2009-0520 (La. 10/20/09), 23 So. 3d 275; *Johnson v. Manitowoc Co.*, 52,264 (La. App. 2 Cir. 9/26/18), 256 So. 3d 463, *writ denied*, 2018-1759 (La. 1/8/19), 260 So. 3d 592; *Johnson v. Northwest La. War Veterans Home*, 51,875 (La. App. 2 Cir. 2/28/18), 246 So. 3d 681.

Under the manifest error rule, the reviewing court does not decide whether the WCJ was right or wrong, but only whether its findings are reasonable. As already stated, when there are two permissible views of the evidence, the WCJ's choice between them can never be manifestly erroneous or clearly wrong. The reviewing court is emphatically not

permitted to reweigh the evidence or reach its own factual conclusions from the record. *Elmuflihi v. Central Oil & Supply Corp.*, 51,673 (La. App. 2 Cir. 11/1/17), 245 So. 3d 155, *writ denied*, 2017-2009 (La. 2/23/18), 237 So. 3d 1189.

The manifest error standard applies even when the WCJ's decision is based on written reports, records, or depositions. *Bruno v. Harbert Int'l Inc.*, 593 So. 2d 357 (La. 1992); *Harris v. City of Bastrop*, 49,534 (La. App. 2 Cir. 1/14/15), 161 So. 3d 948.

Louisiana R.S. 23:1221 provides in pertinent part:

Compensation shall be paid under this Chapter in accordance with the following schedule of payments:

(1) Temporary total.

(a) For any injury producing temporary total disability of an employee to engage in any self-employment or occupation for wages, whether or not the same or a 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 injury was particularly fitted by reason of education, training, or experience, sixty-six and two-thirds percent of wages during the period of such disability.

.....

(d) An award of benefits based on temporary total disability shall cease when the physical condition of the employee has resolved itself to the point that a reasonably reliable determination of the extent of disability of the employee may be made and the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required.

Wages are defined in La. R.S. 23:1021, which provides in part:

(13) "Wages" means average weekly wage at the time of the accident. The average weekly wage shall be determined as follows:

(a) Hourly wages.

(i) If the employee is paid on an hourly basis and the employee is employed for forty hours or more, his hourly wage rate multiplied by the average actual hours worked in the four full

weeks preceding the date of the accident or forty hours, whichever is greater[.]

### *Analysis*

Significantly, the owner of Canaan did not appear to testify at trial and was not deposed prior to trial.<sup>4</sup> Therefore, the WCJ heard no testimony or received any evidence from anyone associated with Canaan who was responsible for paying employees. Canaan offered *no* evidence regarding the hourly rate paid to Trejo or the number of hours he worked each week. In fact, and as stated above, the parties agreed prior to trial that the pay records produced by Canaan during discovery were not reliable and should not be used.

Canaan furnished the testimony and depositions of several of Trejo's coworkers addressing the number of hours they worked and the hourly rate they were paid. However, none of these witnesses provided any information regarding the amount *Trejo* was paid or the number of hours *he* worked—the only worker whose compensation matters in this litigation. As to that fact, both Trejo and Fuentes testified that Trejo made \$17 per hour and worked between 55 and 75 hours per week.

We agree with the WCJ's observation that the testimony from Trejo's coworkers regarding their wages was not useful in the calculation of Trejo's average weekly wage. The WCJ recognized the hours and rates of pay varied among these witnesses. The record contains only the unrebutted testimony of Trejo and Fuentes regarding Trejo's earnings. Considering the evidence presented, there was no error by the WCJ in relying upon that

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<sup>4</sup> After Trejo rested his case, the defendants intended to present the testimony of Canaan's owner, Carlos Guerrero, but he did not appear at the trial because he was apparently working in New Orleans. The WCJ agreed to leave the record open to obtain his testimony, but this never occurred.

testimony in calculating Trejo's average weekly wage and setting the weekly amount to be paid for his temporary total disability benefits.

### **Sequestration**

Canaan argues the WCJ erred by allowing Weil to testify as a rebuttal witness despite a violation of the rule of sequestration. Specifically, on appeal Canaan submits there were multiple violations of the rule of sequestration in the course of the hearing, but concedes in brief those violations did not cause material prejudice to the defense. It only assigns as error its argument that the WCJ erred in allowing Weil to testify as a rebuttal witness. Canaan expressed concern to the WCJ that it would be a violation of the rule of sequestration for an attorney to discuss prior evidence or testimony with a potential witness. According to Canaan, the WCJ initially agreed, but then reversed her position and overruled Canaan's objection, which Canaan submits was error. This assignment of error is without merit.

### ***Legal Principles***

Regarding the sequestration of witnesses, La. C.E. art. 615 provides in part:

A. As a matter of right. On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case *with anyone other than counsel in the case*. In the interests of justice, the court may exempt any witness from its order of exclusion.

••••

C. Violation of exclusion order. A court may impose appropriate sanctions for violations of its exclusion order including contempt, appropriate instructions to the jury, or when such sanctions are insufficient, disqualification of the witness. [Emphasis supplied.]

Comment (f) to this statute explains disqualification is the most drastic remedy, specifically noting, “When a party has had no knowledge of the violation and has played no role in bringing it about, disqualification unjustly impairs his case.” Disqualification may be approved when the sequestration violation was committed with the consent, connivance, procurement, or knowledge of the party calling the witnesses. *Briscoe v. Briscoe*, 25,955 (La. App. 2 Cir. 8/17/94), 641 So. 2d 999; *Palmer v. UV Ins. Risk Retention Grp., Inc.*, 18-404 (La. App. 5 Cir. 12/19/18), 262 So. 3d 1006, *writ denied*, 2019-0107 (La. 4/29/19), --- So. 3d ---.

A primary purpose underlying the rule of sequestration is to prevent the fact witnesses from being influenced by prior testimony. *Cory v. Cory*, 43,447 (La. App. 2 Cir. 8/13/08), 989 So. 2d 855; *Iseah v. E.A. Conway Mem. Hosp.*, 591 So. 2d 767 (La. App. 2d Cir. 1991), *writ denied*, 595 So. 2d 657 (La. 1992). Accordingly, where an individual witness violates the rule of sequestration, such will be considered harmless error where there is no evidence that the violation of sequestration has altered or influenced that witness’s testimony. *Cory v. Cory, supra*; *Iseah v. E.A. Conway Mem. Hosp., supra*.

Not every violation of a sequestration rule must result in a sanction, such as the exclusion of testimony. *Cory v. Cory, supra*; *Silvio v. Rogers*, 580 So. 2d 434 (La. App. 2d Cir. 1991). The trial judge may, in her discretion, refuse to disqualify an errant witness or impose any other sanction for a violation if the purpose of the sequestration has not been thwarted, or if there is no evidence that the witness’s testimony has been tainted. *Cory v. Cory, supra*; *Silvio v. Rogers, supra*. The trial judge is in the best position to determine whether a violation of the sequestration rule

has occurred resulting from any irregularity or ignorance of the sequestration rule, or whether the violation was intentional. *Cory v. Cory, supra*.

The particular remedy imposed for sequestration violations rests within the sound discretion of the trial court. *Briscoe v. Briscoe, supra*; *Palmer v. UV Ins. Risk Retention Grp., Inc., supra*.

### ***Analysis***

Canaan maintains Weil's testimony demonstrated that Fuentes told him about Alexander's testimony that Trejo was working at the cleaners. Specifically, Canaan is concerned with conversations between Weil and Trejo's attorney aimed at discovering the existence of testimony and physical evidence to rebut testimony Trejo worked at the cleaners. Canaan contends Weil's testimony was tailored to respond to the testimony and video. Canaan argues Trejo's counsel knew that Weil was a future witness when he discussed with him the testimony of other witnesses and showed him the surveillance video provided by Canaan. Canaan asserts it was an abuse of discretion for the WCJ to allow Weil to testify after a blatant violation of the rule of sequestration. We disagree.

Regarding the conversation between Weil and Fuentes, Weil disclosed in his testimony Fuentes told him about Canaan's assertion that Trejo worked at the cleaners. This conversation occurred before Weil was ever called as a witness. He was not under the rule of sequestration at that time, and there is no showing any testimony he eventually gave was materially changed in any way because of the conversation.

As to the conversation between Weil and Trejo's attorney, the WCJ correctly noted Weil was not under the rule of sequestration when those conversations occurred. Louisiana C.E. art. 615 is clear that a witness may

discuss the facts with counsel in the case without violating the rule of sequestration. Here, Canaan did not inform Trejo before trial it intended to use the testimony and surveillance video from the private investigators in an attempt to establish that Trejo had misrepresented his abilities to work. Trejo did not object to this testimony and evidence; however, after being confronted with it, Trejo's attorney sought to investigate the allegations that Trejo worked at the cleaners and to determine if any evidence rebutting or refuting the contention was available. There is no showing that any violation of the rule of sequestration occurred. Further, even if a violation had been shown by the arguments presented by Canaan, the company failed to establish Weil's testimony was in any way influenced or tainted by his conversation with either Fuentes or Trejo's attorney. The WCJ did not abuse her discretion in allowing Weil to testify and present his video evidence in this case, and there is no error by the WCJ on this issue.

### **Penalties and Attorney Fees**

Canaan argues the WCJ erred in awarding penalties and attorney fees under the facts and circumstances of this case. Canaan maintains it acted in good faith and pursued a serious defense against Trejo's claims, which it characterizes as "close issues of law." This argument is without merit.

### ***Legal Principles***

Because one purpose of the workers' compensation law is to promptly provide compensation and medical benefits to an employee who has suffered a work-related injury, a failure to timely provide payment can result in the imposition of penalties and attorney fees except when the claim is reasonably controverted. *Lafayette Bone & Joint Clinic v. Louisiana United Bus. SIF*, 2015-2137 (La. 6/29/16), 194 So. 3d 1112. Louisiana R.S.

23:1201(F) governs the assessment of penalties and award of attorney fees for an employer's failure to pay benefits or authorize medical treatment.

Louisiana R.S. 23:1201(F)(2) provides that the provision is inapplicable if the claim is reasonably controverted or if such nonpayment results from conditions over which the employer had no control. *See, Lafayette Bone & Joint Clinic v. Louisiana United Bus. SIF, supra; Smith v. Graphic Packaging, Inc.*, 51,590 (La. App. 2 Cir. 9/27/17), 244 So. 3d 755, writ denied, 2017-1806 (La. 12/15/17), 231 So. 3d 640.

In order to reasonably controvert a claim, a defendant must have some valid reason or evidence upon which to base the denial of benefits.

*Lafayette Bone & Joint Clinic v. Louisiana United Bus. SIF, supra.*

Reasonably controverting a claim means that an employer has sufficient factual and medical information to reasonably counter that provided by the claimant. The crucial inquiry in determining whether to impose penalties and attorney fees is whether the payor had an articulable and objective reason to deny payment at the time it took action. *Id.*

Awards of penalties and attorney fees in workers' compensation cases are essentially penal in nature and are intended to deter indifference and undesirable conduct by employers and insurers toward injured employees.

*Iberia Medical Center v. Ward*, 2009-2705 (La. 11/30/10), 53 So. 3d 421.

Penal provisions are strictly construed. *Tingle v. Page Boiler, Inc.*, 50,373 (La. App. 2 Cir. 1/13/16), 186 So. 3d 220. The WCJ's grant or denial of penalties and attorney fees in a workers' compensation case is subject to manifest error review. *Smith v. Graphic Packaging, Inc., supra.*

## *Analysis*

Canaan claims it had a sufficient legal basis to defend against Trejo's claim for workers' compensation benefits by showing he committed fraud and was capable of employment activities. Canaan contends because it asserted this defense in good faith, penalties and attorney fees were not justified, and the WCJ was manifestly erroneous in making the award. The record does not support Canaan's argument.

Trejo was injured on February 11, 2015. He was initially treated at University Health and then saw Dr. McCormick from April 2 through July 8, 2015. Trejo filed his disputed claim for compensation in May 2015. At that time, three months after the accident, Canaan had not made *any* indemnity payments. In June 2015, Canaan filed an answer to the disputed claim for compensation alleging fraud, but specified no basis for the allegation. In fact, despite its allegation of fraud by Trejo, the defendants admitted he was injured in the course and scope of his employment. In November 2015, Canaan made an offer for Trejo to return to work without any showing that he had been released to do any kind of work, light-duty or otherwise. Canaan never had an IME performed to independently assess Trejo's medical condition, which it was legally entitled to request.

The observations by the private investigators, which Canaan claimed established fraud, occurred between March 29 and April 29, 2017, more than two years after the accident and shortly before trial. At that point, Canaan still had not paid indemnity benefits to Trejo and had not paid all medical benefits due. This record clearly shows that at the time Canaan denied payment of benefits to Trejo, the company had no articulable and objective reason for the denial. Canaan did not possess any factual or medical

information to counter Trejo's claims. There was no valid reason or evidence upon which to base a denial of any benefits for Trejo, and under these circumstances, the WCJ did not err in awarding penalties for the denial of indemnity and medical benefits and for awarding attorney fees and costs in this matter.

### **Attorney Fees on Appeal**

Trejo's attorney requested in his appeal brief additional attorney fees for the work necessitated by this appeal. However, an appellee who neither answers an appeal nor appeals from the trial court's judgment is not entitled to additional attorney fees for legal services rendered on appeal. La. C.C.P art. 2133. Although a request for additional attorney fees is made in his appeal brief, Trejo did not correctly request them by answering this appeal. Thus, we will not increase his award for attorney fees incurred in the process of the appeal.

### **CONCLUSION**

For the reasons stated above, the judgment in favor of the plaintiff, Josue Trejo, against the defendants, Canaan Construction, LLC, and Bridgefield Casualty Insurance Company, is affirmed. Costs of this appeal in this court are assessed against the defendants.

**AFFIRMED.**