

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

07-76

KENNETH D. LOPEZ

VERSUS

TOWN OF ZWOLLE

APPEAL FROM THE
OFFICE OF WORKERS' COMPENSATION District # 2
PARISH OF RAPIDES, NO. 02-09213
JAMES L. BRADDOCK, WORKERS' COMPENSATION JUDGE

**ELIZABETH A. PICKETT
JUDGE**

Court composed of Ulysses Gene Thibodeaux, Chief Judge, Jimmie C. Peters, and Elizabeth A. Pickett, Judges.

AFFIRMED AS AMENDED.

**George A. Flournoy
Flournoy & Doggett
P. O. Box 1270
Alexandria, LA 71309-1270
Counsel for Claimant/Appellee:
Kenneth D. Lopez**

**Joseph B. Stamey
Stamey & Miller, LLC
P. O. Box 1288
Natchitoches, LA 71458-1288
Counsel for Defendant/Appellant:
Town of Zwolle**

1 **Pickett, Judge.**

2 The defendant, the Town of Zwolle, appeals a judgment of an Office of
3 Workers' Compensation Judge (WCJ) finding the claimant, Kenneth Lopez,
4 temporarily totally disabled and awarding the claimant workers' compensation
5 benefits, penalties and attorney's fees. The claimant answered the appeal seeking an
6 increase in attorney's fees for work necessitated by this appeal. We affirm the
7 judgment of the WCJ and award the claimant an additional \$2500.00 in attorney's
8 fees.

9 **FACTS**

10 The claimant was employed by the Town of Zwolle Streets Department on
11 October 2, 2002, when he allegedly injured his back, right arm and elbow while
12 lifting an old, chest-type deep freezer into a dump truck. The Town of Zwolle
13 disputed Mr. Lopez's claim and refused to pay any workers' compensation benefits.
14 A Disputed Claim For Compensation Form was filed on December 12, 2002. Trial
15 of the matter was held June 21, 2006, and, following a delay to allow the defense to
16 depose a witness, reasons for judgment were read into the record on October 17,
17 2006. The WCJ found that the claimant had carried his burden of proving a work
18 related accident, his subsequent disability, and that the defendant's denial of the claim
19 without adequate investigation was arbitrary and capricious. The WCJ awarded the
20 claimant all back due weekly benefits, all medical expenses incurred in connection
21 with the claimant's injuries, and ordered the defendant to pay for an MRI
22 recommended by Drs. Garland Miller and Carl Goodman. Additionally, the claimant
23 was awarded \$8,000.00 (combined award) in penalties for the defendant's failure to
24 pay indemnity and medical benefits. The claimant was also awarded \$5,500.00 in

1 attorney's fees plus interest and costs. The defendant appeals arguing that the WCJ
2 erred in finding that the claimant sustained his burden of proof in establishing an
3 accident in the course and scope of his employment. The claimant answered the
4 appeal seeking additional attorney's fees necessitated by this appeal.

5 LAW AND DISCUSSION

6 The issues raised in this case have been discussed many times before. In
7 *Phillips v. Coca-Cola Bottling Co. United*, 06-323 (La.App. 3 Cir 9/27/06), 939 So.2d
8 673, this court observed the following:

9 This court, in *Monceaux v. R & R Construction, Inc.*, 05-533
10 (La.App. 3 Cir. 12/30/05), 919 So.2d 795, *writs denied*, 06-0585
11 (La.5/5/06), 927 So.2d 325, 06-0636 (La.5/5/06), 927 So.2d 317, had
12 occasion to address both the standard of review and a claimant's burden
13 of proof in workers' compensation cases involving unwitnessed
14 accidents. In that case, we said:

15
16 In *Dean v. Southmark Construction*, 03-1051, p. 7
17 (La.7/6/04), 879 So.2d 112, 117, the supreme court
18 discussed the standard of review in workers' compensation
19 cases:

20
21 In worker's compensation cases, the
22 appropriate standard of review to be applied
23 by the appellate court to the OWC's findings
24 of fact is the "manifest error-clearly wrong"
25 standard. *Brown v. Coastal Construction &*
26 *Engineering, Inc.*, 96-2705 (La.App. 1 Cir.
27 11/7/97), 704 So.2d 8, 10, (citing *Alexander*
28 *v. Pellerin Marble & Granite*, 93-1698, pp.
29 5-6 (La.1/14/94), 630 So.2d 706, 710).
30 Accordingly, the findings of the OWC will
31 not be set aside by a reviewing court unless
32 they are found to be clearly wrong in light of
33 the record viewed in its entirety. *Alexander*,
34 630 So.2d at 710. Where there is conflict in
35 the testimony, reasonable evaluations of
36 credibility and reasonable inferences of fact
37 should not be disturbed upon review, even
38 though the appellate court may feel that its
39 own evaluations and inferences are as
40 reasonable. *Robinson v. North American Salt*

1 Co., 02-1869 (La.App. 1 Cir.2003), 865 So.2d
2 98, 105. The court of appeal may not reverse
3 the findings of the lower court even when
4 convinced that had it been sitting as the trier
5 of fact, it would have weighed the evidence
6 differently. *Robinson*, 865 So.2d at 105. The
7 determination of whether injury occurred in
8 the course and scope of employment is a
9 mixed question of law and fact. *Winkler v.*
10 *Wadleigh Offshore, Inc.*, 01-1833 (La.App. 4
11 Cir. 4/24/02), 817 So.2d 313, 316 (citing
12 *Wright v. Skate Country, Inc.*, 98-0217
13 (La.App. 4 Cir. 5/12/99), 734 So.2d 874).

14
15 Recently, this court addressed a claimant's burden in proving the
16 [sic] he/she suffered a work-related accident:

17
18 In order to recover workers' compensation benefits,
19 an injured employee must prove by a preponderance of the
20 evidence that he suffered a "personal injury by accident
21 arising out of and in the course of his employment."
22 La.R.S. 23:1031(A). An "accident" is defined as an
23 "unexpected or unforeseen actual, identifiable, precipitous
24 event happening suddenly or violently, with or without
25 human fault, and directly producing at the time objective
26 findings of an injury which is more than simply a gradual
27 deterioration or progressive degeneration." La.R.S.
28 23:1021(1).

29
30 The Louisiana Supreme Court, in *Bruno v. Harbert International*
31 *Inc.*, 593 So.2d 357, 361 (La.1992), expounded on what proof will
32 satisfy an employee's burden in proving a work-related injury:

33
34 A worker's testimony alone may be sufficient to discharge
35 this burden of proof, provided two elements are satisfied:
36 (1) no other evidence discredits or casts serious doubt upon
37 the worker's version of the incident; and (2) the worker's
38 testimony is corroborated by the circumstances following
39 the alleged incident. *West v. Bayou Vista Manor, Inc.*, 371
40 So.2d 1146 (La.1979); Malone and Johnson, *13 Louisiana*
41 *Civil Law Treatise, Workers' Compensation*, § 253 (2d
42 Ed.1980). Corroboration of the worker's testimony may be
43 provided by the testimony of fellow workers, spouses or
44 friends. Malone & Johnson, *supra*; *Nelson v. [Roadway*
45 *Express, Inc.*, 588 So.2d 350 (La.1991)]. Corroboration
46 may also be provided by medical evidence. *West*, *supra*.

1 In determining whether the worker has discharged his or her
2 burden of proof, the trial court should accept as true a witness's
3 uncontradicted testimony, although the witness is a party, absent
4 "circumstances casting suspicion on the reliability of this testimony."
5 *West*, 371 So.2d at 1147; *Holiday v. Borden Chemical*, 508 So.2d 1381,
6 1383 (La.1987). **The trial court's determinations as to whether the
7 worker's testimony is credible and whether the worker has
8 discharged his or her burden of proof are factual determinations not
9 to be disturbed on review unless clearly wrong or absent a showing
10 of manifest error.** *Gonzales v. Babco Farm, Inc.*, 535 So.2d 822, 824
11 (La.App. 2d Cir.), *writ denied*, 536 So.2d 1200 (La.1988) (collecting
12 cases).

13
14 As stated in *Rosell v. ESCO*, 549 So.2d 840, 844-45 (La.1989)
15 (citations omitted):

16
17 When findings are based on determinations
18 regarding the credibility of witnesses, the manifest
19 error-clearly wrong standard demands great deference to
20 the trier of fact's findings; for only the factfinder can be
21 aware of the variations in demeanor and tone of voice that
22 bear so heavily on the listener's understanding and belief
23 in what is said. Where documents or objective evidence so
24 contradict the witness's story, or the story itself is so
25 internally inconsistent or implausible on its face, that a
26 reasonable fact finder would not credit the witness's story,
27 the court of appeal may well find manifest error or clear
28 wrongness even in a finding purportedly based upon a
29 credibility determination. But where such factors are not
30 present, and a factfinder's finding is based on its decision
31 to credit the testimony of one of two or more witnesses,
32 that finding can virtually never be manifestly erroneous or
33 clearly wrong.

34
35 *Bigge v. The Lemoine Co.*, 04-1191, pp. 2-4 (La.App. 3 Cir. 3/2/05), 896
36 So.2d 269, 271-72.

37
38 *Monceaux*, 919 So.2d at 798-800 (emphasis added).

39
40 *Phillips*, 939 So.2d at 675-77, [bolded emphasis in original].

41
42 Although the accident in *Monceau* was unwitnessed, the principles of law
43 enunciated therein are applicable to the case sub judice. In this case, even though the
44 accident was witnessed by a fellow employee, Ricky Williams, Mr. Williams was not
45 called as a witness at the hearing. The defendant did submit a hand-written statement

1 by Mr. Williams (D-4). That statement was objected to by the claimant. The WCJ
2 noted the exception, but allowed the hand-written statement to be introduced. [We
3 note that an abbreviated form of that statement was introduced in exhibit P-5, the
4 Supervisor’s Accident Investigation packet.] At the close of the hearing on June 21,
5 2006, the WCJ left the record open for 60 days to allow for the taking of Mr.
6 Williams’ deposition. The deposition contains no information that would differ
7 significantly from that in exhibits D-4 and P-5. In the deposition Mr. Williams states,
8 “I asked him [Mr. Lopez] would he lift up one end for me and after he did that I got
9 it. . . . We both got on down against the end of it and we lifted up. . . .”

10 We find the claimant’s case fits squarely under the burden of proof expounded
11 by the supreme court in *Bruno*. The defense offered no evidence which discredited
12 or cast serious doubt upon the claimant’s version of the incident. The claimant’s
13 testimony is corroborated by the medical records and depositions of the physicians
14 he saw following the alleged incident. His testimony is corroborated by the testimony
15 of his spouse.

16 The WCJ chose to accept the claimant’s testimony and evidence, and we find
17 nothing in the record to convince us that the findings of the WCJ are clearly wrong
18 or manifestly erroneous.

19 The claimant answered the defendant’s appeal seeking additional attorney’s
20 fees for the work necessitated by the defendant’s appeal. We find merit in this request
21 and award the claimant \$2,500.00 in additional attorney’s fees. All costs of this
22 appeal are assessed against the defendant, the Town of Zwolle.

23 **AFFIRMED AS AMENDED.**