Judgment rendered July 10, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 52,733-WCA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

JAY MARSHALL — Plaintiff-Appellee

versus

TOWN OF WINNSBORO — Defendant-Appellant

* * * * *

Appealed from the
Office of Workers' Compensation, District 1-E
Parish of Ouachita, Louisiana
Trial Court No. 16-07136

Brenza Irving Jones
Workers' Compensation Judge

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HUDSON, POTTS & BERNSTEIN, LLP — Counsel for Appellant
By: Lance C. Auttonberry
Robert M. Baldwin

STREET & STREET — Counsel for Appellee
By: C. Daniel Street

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Before WILLIAMS, McCALLUM, and THOMPSON, JJ.

THOMPSON, J., concurs in part and dissents in part with written reasons.

WILLIAMS, C.J.

The defendant, Town of Winnsboro, appeals a judgment in favor of the claimant, Jay Marshall. The workers' compensation judge (WCJ) awarded claimant $4,000 in penalties and $5,000 in attorney fees for defendant's failure to timely reimburse claimant for medical visits and mileage expenses. The WCJ also dismissed defendant's reconventional demand seeking termination of supplemental earnings benefits. For the following reasons, we affirm.

FACTS

In November 2012, Jay Marshall injured his back while working as a water department supervisor for the Town of Winnsboro. The town refused to pay for medical treatment related to his injury and the claimant, Marshall, filed a disputed claim for compensation. After a trial, the WCJ awarded claimant medical and indemnity benefits, penalties and attorney fees. On appeal, this court affirmed the award of benefits and penalties. *See Marshall v. Town of Winnsboro*, 50,255 (La. App. 2 Cir. 11/25/15), 184 So.3d 796. The town has paid claimant supplemental earnings benefits ("SEB") of $2,388.55 per month for the period of November 1, 2013 through the current date.

After the accident, claimant was treated by Dr. Bernie McHugh, a neurosurgeon. Claimant has also continued to be treated by his family physician, Dr. Roland Ponarski, who prescribed the medication for claimant's work-related injury. The town paid mileage for claimant to see Dr. Ponarski until May 2017. On the dates of May 31, June 26 and July 17, 2017, claimant's attorney sent written requests seeking reimbursement for mileage and later also sought reimbursement for claimant's payments of $75

for each of his ten visits to the doctor. The town's insurer, Risk Management, Inc., sought medical reports from Dr. Ponarski to confirm the visits before paying the reimbursement and did not make payment within 60 days of the demand. Claimant filed a disputed claim for compensation seeking reimbursement for mileage and for $750 that he paid for doctor visits. Claimant also sought penalties and attorney fees alleging that the town failed to timely reimburse him for mileage and for the office visits. The town filed a reconventional demand alleging that the award of SEB should be terminated because claimant had retired from the workforce. The mileage reimbursement was eventually paid on October 30, 2017, after the adjuster received the medical records from Dr. Ponarski's office in response to a written request.

After a trial, the WCJ found that the mileage and doctor visits were related to claimant's work injury and that the town had failed to reasonably controvert his entitlement to these benefits. The WCJ further found that the evidence shows that claimant had not returned to work because of his disability. The WCJ rendered judgment awarding claimant $4,000 in penalties and $5,000 in attorney fees and dismissing the town's reconventional demand. The town appeals the judgment.

DISCUSSION

The town contends the WCJ erred in finding that claimant has not voluntarily withdrawn from the workforce. The town argues that claimant is not entitled to additional SEB because he has retired as shown by his failure to attempt to return to work.

The right to receive SEB is subject to a maximum of 520 weeks, but shall terminate when the employee retires. La. R.S. 23:1221(3)(d)(iii). A

worker retires when he withdraws from the workforce or begins receiving social security benefits. *Allen v. City of Shreveport*, 637 So.2d 123 (La. 1994). The retirement which restricts SEB payments is that based on age or years of service, resulting in some type of pension, and does not refer to unemployment resulting from a work-related injury. *Roberts v. State Office of Family Support*, 2011-1614 (La. App. 4 Cir. 7/5/12), 97 So.3d 570.

An employee's decision to accept early retirement does not necessarily equate to retirement as contemplated by the workers' compensation statute governing entitlement to SEB. The retirement referred to by R.S. 23:1221(3)(d)(iii) is not the failure to work because of disability. Instead, the statute refers to the worker who has no intention of returning to work regardless of disability. *McDonald v. City of Bastrop*, 52,366 (La. App. 2 Cir. 9/26/18), 254 So.3d 1285; *Marshall v. Town of Winnsboro, supra*. Where a worker has retired from a heavy work duty job but is willing to take on light duty employment within the scope of the limitations imposed by his disability, then that worker is said to have not withdrawn from the workforce and is not considered to have retired under the statute. *McDonald v. City of Bastrop, supra*.

Factual findings in a workers' compensation case are subject to the manifest error standard of review. The issue for the reviewing court is whether the fact finder's conclusion is reasonable in light of the record considered as a whole. *McDonald v. City of Bastrop, supra*.

In the present case, the claimant, Marshall, testified that in April 2014, he had back surgery for his work-related injury. Claimant stated that the surgery relieved the radiating pain to his legs but he still felt back pain. Claimant testified that he continued to see Dr. McHugh for treatment for his

back and that he visits Dr. Ponarski each month to have his prescription pain medication refilled. Claimant stated that after starting physical therapy in 2016, the pain down his leg resumed and he stopped going. He testified that in 2017, he paid $750 to Dr. Ponarski for 10 visits at $75 per visit. Claimant stated that the town had previously paid for his mileage to see Dr. Ponarski, but stopped paying in May 2017 and that defendant did not reimburse him for the office visits. Claimant testified that since June 2014, he has not attempted to look for a job, he has not requested vocational-rehabilitation services and that he was previously given a restriction of not lifting more than 25 pounds. He stated that he used to enjoy hunting with his dogs and riding a motorcycle, but he cannot do those activities anymore because of his back injury and he has sold his motorcycle. Claimant testified that he has not attempted to return to work because he is still having back problems and that no doctor has told him that he could return to work. He stated he has not asked any doctor if he could return to work because of his back injury and he did not see how he would be able to do any part-time job at this time. Claimant testified that he would love to return to work and had planned to get another job after retiring from his position with the town, but he is unable to work because of his back injury.

Dr. Bernie McHugh, a neurosurgeon, testified in his deposition that after claimant's surgery in 2014, he continued to complain of low back pain. Dr. McHugh stated that in August 2016, claimant complained of continuing back pain and a recurrence of radiating pain to his legs. Dr. McHugh testified that he recommended discography at the L2-3 space to determine the source of claimant's low back pain, for which he received an epidural steroid injection and a pain control patch. Dr. McHugh stated that he had

not released claimant to do any type of work and opined that claimant was unable to work at the present time.

The WCJ considered the testimony and reasonably determined that claimant was credible in testifying that he has not sought employment because of his work-related injury. The medical evidence shows that claimant has continued to seek treatment for his back pain. In addition, Dr. McHugh's opinion that claimant is unable to work because of his back condition corroborates claimant's testimony that he cannot work because of pain. Based upon this record, we cannot say the WCJ was clearly wrong in finding that claimant has not retired because his failure to work is based on his disability and not due to a desire to withdraw from the workforce. Thus, the assignment of error lacks merit.

The town contends the WCJ erred in assessing penalties and attorney fees for the failure to timely reimburse claimant for the cost of doctor visits and the failure to timely pay claimant's mileage expense.

Medical benefits payable under the workers' compensation law shall be paid within 60 days after the employer receives written notice thereof. La. R.S. 23:1201(E)(1). Failure to provide payment of benefits will result in a penalty and attorney fees unless the claim is reasonably controverted or if such nonpayment results from conditions over which the employer has no control. La. R.S. 23:1201(F)(2). The employer must pay for the actual expenses reasonably incurred by the employee for mileage necessarily traveled to obtain medical services or medicine. La. R.S. 23:1203(D).

In this case, Della Hildebrand, an adjuster of the town's insurer, testified that she received claimant's request for mileage expenses in May, June and July 2017. She stated that before paying, she telephoned Dr.

Ponarski's office twice to get medical records to confirm that the travel was related to the work injury, but she did not receive the records. Hildebrand testified that on October 24, 2017, she faxed a request for the 2017 medical reports with a HIPPA form to Dr. Ponarski's office and she received the medical records on October 25, 2017. Hildebrand acknowledged that the insurer had been paying the mileage for claimant's visits to Dr. Ponarski without medical records until May 2017, that she was aware that Dr. Ponarski was prescribing the medication for claimant's work injury and the insurer had paid for that medication. Hildebrand testified that at the time of trial in December 2017, she had not paid the $750 to reimburse claimant for his doctor visits despite having received the medical records in October 2017. Hildebrand stated that she did not pay at least the $68 for each office visit provided in the statutory fee schedule because Dr. Ponarski "does not accept" workers' compensation and she wasn't sure what amount to pay.

The town argues in its brief that the insurer's adjuster did not pay the claimant's requests for expenses because she did not receive medical records from Dr. Ponarski and his failure to send the records was out of the town's control. However, the testimony shows that when the adjuster did not get a response to her phone inquiries, she did not send a written request for the records until more than 60 days after receiving claimant's initial requests for payment of his mileage expenses. In addition, even after receiving the medical records, the adjuster did not reimburse the cost of claimant's doctor visits until more than 60 days after receiving notice thereof, contrary to the statute.

The evidence presented supports the WCJ's finding that claimant's requests for mileage expenses and for reimbursement for doctor visits were

not reasonably controverted by the town. Based upon this record, we cannot say the WCJ erred in assessing penalties and attorney fees for the town's failure to timely reimburse claimant's expenses. Thus, the assignments of error lack merit.

Answer

Claimant filed an answer to the appeal requesting an award of additional attorney fees for work required on this appeal. A workers' compensation claimant is entitled to an increase in attorney fees to reflect additional time incurred in defending the employer's unsuccessful appeal. *Frith v. Riverwood, Inc.*, 2004-1086 (La. 1/19/05), 892 So.2d 7.

Based on our decision to affirm the judgment, we award an additional $1,500 in attorney fees to claimant to reflect work performed on this appeal.

CONCLUSION

For the foregoing reasons, the judgment of the Office of Workers' Compensation is affirmed. An additional $1,500 in attorney fees is awarded to claimant, Jay Marshall. Costs of this appeal in the amount of $442.50 are assessed to the appellant, Town of Winnsboro, in accordance with La. R.S. 13:5112(A).

AFFIRMED.

THOMPSON, J., concurring in part and dissenting in part

I concur in the determination that an assessment of penalties and attorney fees against the Town of Winnsboro for failure to timely reimburse claimant's medical and travel expenses was warranted. This award was not manifestly erroneous as it was based upon the Worker's Compensation Judge's finding that the Town of Winnsboro failed to reasonably controvert claimant's requests for mileage expenses and reimbursement for doctor visits as established by the evidence, and those awards should be affirmed. I likewise concur with the award of an additional $1,500 in attorney fees for claimant's attorney on appeal. I respectfully dissent from that part of the majority's opinion concluding that the claimant had not voluntarily withdrawn from the workforce.

Subsequent to Mr. Marshall's initial injury, he was authorized to return to work with certain limitations. Two (2) physicians maintained that Mr. Marshall was cleared to return to work on light duty or sedentary work restriction. When Mr. Marshall was authorized to return to work, that event triggered the commencement of a new time period during which he would have had proactive responsibilities to seek employment. There was a significant period of time during which Mr. Marshall was able to and could have put forth efforts to seek employment, but he failed to do so. Those efforts, or more particularly, the lack thereof, constitute (in this writer's opinion) the voluntary withdrawal from the workforce for purposes of payment of supplemental earnings benefits in this matter. *See*, *Oestringer v. City of New Orleans*, 03-2213 (La. App. 4 Cir. 6/2/04), 876 So. 2d 240.