

NUMBER 03-1032

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

FLOYD BOONE, JR.

VERSUS

MID-STATE MARKETING

AMY, J., concurring in part, dissenting in part.

I join in the majority's affirmation of the award of temporary total disability benefits. I also agree that the employer's failure to raise the defense of La.R.S. 23:1208 below precludes the assertion of that defense on appeal. With regard to the employer's remaining assignments, however, I conclude that a reversal is warranted.

First, I find that the workers' compensation judge erred in awarding penalties and attorney's fees as these items were not specifically alleged. Although penalties and attorney's fees are punitive in nature, I conclude that they are "items of special damages" within the meaning of La.Code Civ.P. art. 861. *See Box v. City of Baton Rouge*, 02-0198 (La.App. 1 Cir. 1/15/03), 846 So.2d 13; *Coscino v. Louisiana State Boxing and Wrestling Com'n*, 97-2733 (La.App. 4 Cir. 9/9/98), 718 So.2d 1016; *Dennis v. Allstate Ins. Co.*, 94-305 (La.App. 5 Cir. 10/25/94), 645 So.2d 763; *Smith v. Howell Industries, Inc.*, 579 So.2d 1236 (La.App. 3 Cir. 1991); *Mix v. Mougeot*, 446 So.2d 1352 (La.App. 1 Cir. 1981). Furthermore, I note that the employer objected to the expansion of the pleadings in this regard at the beginning of the hearing. Thus, I conclude that the determination that the pleadings were expanded as to the request for penalties and attorney's fees was inappropriate under La.Code Civ.P. art. 1154. As I find a reversal of the award of penalties and attorney's fees appropriate, I do not reach the merits of each individual penalty awarded.

I would also reverse the award for mental injuries as I find the evidence offered was insufficient to meet the claimant's burden of establishing that it arose out of the employment related physical injury by clear and convincing evidence. *See* La.R.S. 23:1021(7)(c). According to La.R.S. 23:1021(7)(d), a mental injury/illness is not compensable absent diagnosis "by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association." My review of the record indicates that the claimant's evidence is insufficiently particularized to satisfy the requirements of the statute.

For these reasons, I concur in part, dissent in part.