

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

**07-313**

**EVERGREEN PRESBYTERIAN MINISTRIES**

**VERSUS**

**BRENDA WALLACE**

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APPEAL FROM THE  
OFFICE OF WORKERS' COMPENSATION - DISTRICT 3  
PARISH OF CALCASIEU, NO. 03-07473  
CHARLOTTE A. L. BUSHNELL, WORKERS' COMPENSATION JUDGE

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**ELIZABETH A. PICKETT  
JUDGE**

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Court composed of John D. Saunders, Elizabeth A. Pickett, and James T. Genovese,  
Judges.

**AFFIRMED.**

**Saunders, J., dissents in part and assigns written reasons.**

**Charles V. Musso Jr.  
Plauche, Smith & Nieset  
P. O. Box 1705  
Lake Charles, LA 70602  
(337) 436-0522  
Counsel for Plaintiff-Appellee  
Evergreen Presbyterian Ministries**

**Thomas E. Townsley  
Attorney at Law  
711 Pujo Street  
Lake Charles, LA 70601  
(337) 430-0994  
Counsel for Defendant-Appellant  
Brenda Wallace**

**PICKETT, Judge.**

The claimant, Brenda Wallace, appeals a judgment of the Office of Workers' Compensation (OWC) finding she was entitled to supplemental earnings benefits (SEB) rather than permanent and total disability (PTD) benefits or temporary and total disability (TTD) benefits, finding Mrs. Wallace lacked standing to contest the under-payments to her physician, and awarding certain penalties and attorney fees.

**STATEMENT OF THE CASE**

This case is before this court for a second time. Originally, the workers' compensation judge (WCJ) found that Mrs. Wallace was entitled to SEB at a rate of \$61.34 per week, which was a reduction from the previous TTD payments of \$217.33 per week that she had been receiving since the injury. The WCJ severed the issues of penalties and attorney fees raised in the case and had not ruled on them when both parties appealed. We dismissed the first appeals filed by Evergreen Presbyterian Ministries (Evergreen) and Mrs. Wallace, finding that the WCJ had ruled on the disability issue but had failed to rule on the issues of penalties and attorney fees in the case. We found that such a piecemeal appeal was not proper and remanded the case for the WCJ to issue rulings on the remaining issues. *Evergreen Presbyterian Ministries v. Wallace*, 05-1343 (La.App. 3 Cir. 4/5/06), 926 So.2d 759.

This matter was heard on remand by the WCJ on November 2, 2006. The issues presented to the WCJ were: (1) whether the failure of Evergreen to pay for sympathetic therapy, or STS therapy, entitled Mrs. Wallace to penalties and attorney fees, (2) whether Evergreen was arbitrary and capricious in terminating Mrs. Wallace's TTD benefits and reducing the benefits to SEB, entitling her to penalties and attorney fees, (3) whether Evergreen failed to pay Dr. Frank Lopez correctly

according to the fee schedule, (4) whether Mrs. Wallace is entitled to penalties and attorney fees for the failure to pay Dr. Lopez according to the fee schedule, and (5) whether Dr. Lopez's fee should be assessed as costs.

Evergreen objected to the inclusion of the issue of the payments to Dr. Lopez on remand, arguing that Dr. Lopez, not Mrs. Wallace, was the proper party to bring such an action, and that the issue was not included in any of Mrs. Wallace's pretrial filings. The trial court sustained the objection and denied Mrs. Wallace's claims regarding payment of Dr. Lopez's bills. The WCJ found that the unilateral termination of TTD benefits by Evergreen was arbitrary and capricious and awarded \$2,000.00 in penalties and \$6,500.00 in attorney fees. The WCJ found the STS therapy was reasonable and necessary and ordered Evergreen to pay for it, but did not award penalties for the failure to approve the treatment. The WCJ assessed Dr. Lopez's \$2,500.00 fee as costs. A judgment in conformity with the WCJ's oral reasons was signed on November 17, 2006. Evergreen filed a Motion for Suspensive Appeal, but that appeal has been abandoned. Mrs. Wallace has devolutively appealed from the judgment of the WCJ.

### **ASSIGNMENTS OF ERROR**

The appellant, Brenda Wallace, asserts three assignments of error:

1. The court erred in finding that the defendant was entitled to supplement [sic] earning benefits at zero earnings rather than finding Brenda Wallace temporarily totally disabled (TTD) or totally and permanently disabled [sic], and, therefore, is entitled to TTD benefits or totally and permanently disabled (TPD) under the odd-lot doctrine.
2. The court erred in reversing her ruling on an objection, in an effort to avoid ruling on the substance of the matter, and not making a finding that the defendant improperly made payments of medical bills under the fee schedule of Dr. Frank Lopez's bills.

3. The court committed clear legal error in only awarding \$2,000.00 in penalties and \$6,500.00 in attorney fees for the defendant's "sham rehab" proven at trial and the improper unilateral reduction of defendant's wages from \$217.33 per week to \$61.34 per week. The rehabilitationist, Karen Herron, admitted that she did not notify defendant of Dr. Gerald Nickerson's approval of one of the jobs she submitted nor did she check to see if the job was available following the approval by the doctor, as required under the law, thus, giving rise to penalties and attorney fees. The undersigned counsel put in an enormous amount of time, effort, skill and clearly demonstrated egregious conduct; yet, the trial court awarded a minimal amount given two trials and one appeal to achieve the judgment.

### **DISCUSSION**

In her first assignment of error, Mrs. Wallace argues that the symptoms of her condition are such that any employment she may be able to find would aggravate her condition and make her job performance inconsistent. This issue was litigated at the first trial. She suggests that the WCJ should have applied the odd-lot doctrine to find that she is incapable of working and therefore entitled to TTD or PTD benefits.

The evidence supports the WCJ's findings that Mrs. Wallace is capable of employment and therefore entitled to SEB and not total disability benefits. Dr. Lopez, her own treating physician, testified she was capable of some type of employment, though she may have to work in pain. Further, a functional capacity evaluation performed by New Day Rehabilitation found that she is capable of gainful employment with occasional sedentary lifting. We find no manifest error in the trial court's determination. This assignment of error lacks merit.

In the second assignment of error, Mrs. Wallace argues that Evergreen should be required to pay penalties and attorney fees for failing to pay for Mrs. Wallace's treatment with Dr. Lopez according to the fee schedule published by the OWC. In the original trial, Mrs. Wallace submitted explanations of benefits from F. A. Richard

and Associates (FARA), Evergreen's insurer, indicating network credits which Dr. Lopez testified were not applicable. Dr. Lopez testified that he had not billed Mrs. Wallace for any of the treatments. At the hearing following our remand to the OWC, the WCJ determined that the issue was not properly pled in pre-trial filings and that Dr. Lopez, not Mrs. Wallace, was the proper party to bring an action against Evergreen or FARA.

Louisiana Revised Statutes 23:1034.2 instructs the OWC to establish a reimbursement schedule for the payment of medical benefits due in workers' compensation cases. Section F of the statute states:

(1) Should a dispute arise between a health care provider and the employee, employer, or workers' compensation insurer, either party may submit the dispute to the office in the same manner and subject to the same procedures as established for dispute resolution of claims for workers' compensation benefits.

(2) In addition to any other occasion when consolidation of claims is otherwise allowed by applicable law, whenever multiple disputes exist between a single health care provider and a single "payor" as defined in R.S. 23:1142(A) concerning the proper amount payable pursuant to the reimbursement schedule, then either the health care provider or the payor shall have the right to have all such disputes between the payor and the health care provider consolidated and tried together. The venue for such consolidated claims shall be in either the workers' compensation district of the parish in which the domicile of the provider is located or the workers' compensation district of the parish in which the domicile of the payor or employer is located.

"Payor" is defined as the "entity responsible, whether by law or contract, for the payment of the medical expenses incurred by a claimant as a result of a work related injury." La.R.S. 23:1142.

Evergreen argues that section F entitles the health care provider to bring an action against FARA or Evergreen, not Mrs. Wallace. Mrs. Wallace has not been denied treatment because of these network credits (which on most of the bills was

\$6.80), and Dr. Lopez has not required her to pay the difference between the fee schedule and the amount he was paid. Furthermore, the reimbursement schedule was not entered into evidence, so it is impossible to tell what Dr. Lopez should have been paid. As the workers' compensation statute specifically provides a cause of action for Dr. Lopez to prove he was not paid according to the reimbursement schedule, we find he is the proper party to bring this action, not Mrs. Wallace. This assignment of error lacks merit.

In the third assignment of error, Mrs. Wallace argues she is entitled to penalties and attorney fees for the "sham rehab" provided by Karen Herron, and an increase in penalties and attorney fees for Evergreen's unilateral reduction of benefits.

The only time penalties and attorney fees have been awarded relative to rehabilitation is for discontinuation of rehabilitation, not for providing sham rehabilitation. *See Haynes v. Williams Fence and Aluminum*, 02-442 (La. 4/21/03), 851 So.2d 917. Mrs. Wallace has not cited a case which awards penalties and attorney fees for sham rehabilitation. Thus, we find that penalties and attorney fees are not available.

Finally, Mrs. Wallace seeks an increase in the amount of penalties and attorney fees awarded by the WCJ for Evergreen's improper reduction of benefits. The WCJ, in her judgment, found that Evergreen was arbitrary and capricious in unilaterally reducing benefits. Thus, penalties were awarded pursuant to La.R.S. 23:1201(I), which allows penalties up to \$8,000.00 and attorney fees. The amount award by the WCJ will not be disturbed unless we find that the WCJ abused her discretion. *George v. M & G Testing and Services, Inc.*, 95-31 (La.App. 3 Cir. 7/19/95), 663 So.2d 79, writ denied, 96-0039 (La. 3/8/96), 669 So.2d 403. We do not find an abuse of

discretion in the awards of penalties and attorney fees, and will not disturb the finding of the WCJ.

**CONCLUSION**

The judgment of the WCJ is affirmed in all respects. Costs of this appeal are assessed against Mrs. Wallace.

**AFFIRMED.**