WORKER'S COMPENSATION - ARBITRARY & CAPRICIOUS

SEMINAR BY: **J. DOUGLAS SUNSERI**
NICAUD, SUNSERI & FRADELLA, L.L.C.
A Group of Professional Law Corporations
3000 18th Street
Metairie, Louisiana 70002
Telephone: (504) 837-1304

I. Standard - Arbitrary & Capricious ("A&C")

An Employee seeking penalties and attorney's fees for discontinuance of worker's compensation benefits by an Employer or its Insurer, must satisfy the requirements as set forth by LSA-R.S. 23:1201.2. The statute provides in relevant part that:

> Any Employer or Insurer who at any time discontinues payment of claims due and arising under this Chapter, when such discontinuance is found to be A&C or without probable cause, shall be subject to the payment of all reasonable attorney's fees for the prosecution and collection of such claims. The stated purpose of attorney's fees and penalties is combat indifference by Employers and Insurers toward injured Employees.

The Claimant carries the burden of proof to demonstrate that the Employer has been A&C for failure to pay the benefits due to him. A determination of whether denial of benefits is A&C depends on facts existing at the time benefits are denied.

The primary question that must be considered is whether the Employer has sufficient factual and medical information to reasonably counter the factual and medical information presented by the Claimant. Stated another way, did the Employer have a reasonable basis to believe the medical expenses and compensation benefits were not due to the Claimant?

Attorney's fees and penalties will not be assessed if:

1) the claim is reasonably controverted; or

1) payments were not made due to a condition over which the Employer has no control;

Although an Employer's decision for non-payment of benefits is ultimately found erroneous, attorney's fees and penalties are not automatically applied. The statute authorizing attorney's fees and penalties are penal in nature and must be strictly construed so that insurers are not penalized for contesting a close factual question and relying on valid defenses. Therefore, the Hearing Officer has great discretion in deciding whether to allow or disallow

penalties and attorney's fees. Moreover, the appellate court reviews said issue based on a manifest error standard.

II. Duty for Reasonable Investigation

The Employer is required to make a reasonable investigation to ascertain the Claimant's exact medical condition before benefits are terminated. The Employer has a duty to make a reasonable effort to assemble and assess factual and medical information to ascertain whether the claim is still viable. Further, the Employer is required to offer the results of the investigation.

The Employer complies with his duty to investigate a claim for compensation by conducting the following:

- contracting and interviewing the Employer
- contracting physicians
- contracting co-workers and obtaining statements
- obtaining opinions from physicians regarding medical causation
- gathering information which could be obtained with minimal effort.

Penalties and attorney's fees have been imposed when the Employer gathers incomplete data in preparing the claim.

a. The following is a sample of recent cases whereby the Employer was A&C for alleged failure to properly investigate.

In *Clark v. Town of Basile*, 812 So.2d 879 (La. App. 3rd Cir. 2002), the claims adjuster received a letter in January 2000 indicating that the Claimant may have been totally disabled as early as October 1998, as a result of a knee injury. The disputed issue was whether the Claimant was entitled to TTD v. SEB. The Hearing Officer assessed attorney's fees because the claims adjuster did not take any affirmative action to determine the nature and extent of TTD upon receiving the January 2000 letter. Further, the Hearing Officer took into consideration that weekly indemnity benefits were not re-instituted until 37 days after a knee replacement surgery. The claims adjuster could have avoided assessment of A&C by documenting investigation after receiving the report addressing disability.

In *Balthazar v. Guillory Racing Farms*, 802 So.2d 9 (La. App. 3rd Cir. 2001), the Hearing Officer awarded penalties and attorney's fees based on the calculation of wage issue. Specifically, Employer alleged that the Claimant's average weekly wage was $244.90. In discovery, the Claimant requested the Employer to describe the basis upon which the Carrier had established said average weekly wage. The only steps taken by the Employer was a recorded statement from the Claimant whereby the Claimant stated he received wages of $250.00 per week plus fringe benefits. The Hearing Officer ruled that the Employer had a duty to take further steps to determine the value of fringe benefits. A&C could have been avoided by simply requesting the Claimant's payroll records from the Employer with an explanation of fringe benefits.

In *Benjamin v. Wal-Mart*, 801 So.2d 624 (La. App. 3d Cir. 2001), the Hearing Officer ruled that the Employer failed to reasonably controvert the Claimant's need for chiropractic treatment for her back problems. Both the Claimant's treating physician and the IME physician opined that the Claimant should receive chiropractic treatment. However, the Employer's second opinion physician disagreed with such treatment. At trial, the IME physician testified as to objective findings of muscle spasms in the Claimant's cervical region. Interestingly, the Hearing Officer increased the award of attorney's fees due to the Employer's unreasonable claims of fraud.

In *Parfait v. Gulf Island Fabrication, Inc.*, 733 So.2d 11 (La. App. 1st Cir. 1999), the Employer knew of a possible injury on November 8, 1996. At the hearing, the claims adjuster testified that there was an indication that the Claimant was suffering from arthritis in his hip as a result of a motorcycle accident, and no proof existed to reflect that a work-related injury occurred. Through further testimony, the claims adjuster acknowledged never speaking with the job foreman nor the Claimant's treating physician. As a result, the Hearing Officer noted that a subsequent MRI revealed that the Claimant's hip pain was not related to arthritis, but a possible work-related injury. Therefore, the Hearing Officer ruled that the claims adjuster had the duty to properly investigate the incident upon receipt of the MRI.

In *Bergeron v. Watkins*, 731 So.2d 399 (La. App. 1st Cir. 1999), the Hearing Officer assessed penalties and attorney's fees against the Employer for failure to timely report a work-related accident to the Carrier. Further, the Hearing Officer assessed penalties and attorney's fees against the Carrier who failed to promptly process the claim upon notice. Interestingly, the court ruled that the Claimant was not required to avail himself for a recorded statement after a Disputed Claim for Compensation was filed provided the Claimant was available for deposition.

In *Wiltz v. Boudin Sausage Kitchen*, 763 So.2d 111 (La. App. 3d Cir. 2000), the court ruled that the Employer failed to reasonably controvert evidence establishing that the surgery recommended by the Claimant's treating physician was medically necessary. The court noted the IME report, which indicated surgery was not required, was based on assumptions and personal "predilections." In addition, the court noted that the Claimant's 2nd opinion physician did not render an opinion as to the necessity of surgery. The Hearing Officer ruled the Carrier had a duty to question the 2nd opinion physician on the issue of surgery prior to denying surgery. Accordingly, the court ruled that the Carrier was A&C for denying surgery.

In *Allen v. Misco Paper*, 660 So.2d 175 (La. App. 2d Cir. 1995), the court ruled that the Carrier was A&C for denying worker's compensation benefits absent evidence that the Claimant's fractured hand occurred in another event aside from the work-related accident. The claims adjuster testified that the decision not to pay worker's compensation benefits was based on his subjective belief that the hand was not fractured in the course and scope of his employment. The claims adjuster indicated that he gave more weight to the first doctor who did not find a fractured hand versus a subsequent physician. Unfortunately, the first doctor did not x-ray the Claimant's hand. Please note, it is fatal for a claims adjuster to render a subjective opinion of medical causation. Rather, the claims adjuster should rely on data stated in medical records.

In *Willis v. Alpha Care Home Health*, 789 So.2d 567 (La. 2001), the Hearing Officer denied the Claimant's claim for worker's compensation benefits for an alleged hand injury. Two physicians testified there were no objective signs of injury. The Hearing Officer found that the Claimant had a pre-existing injury to the hand without objective evidence of a work-related accident. Also, the Hearing Officer noted that the Claimant's complaints were inconsistent. Further, surveillance revealed normal activity level of the hand which contradicted his trial testimony. On appeal, the appellate court ruled that the Claimant had an asymptomatic pre-existing injury which became symptomatic after the work-related incident. The appellate court assessed attorney's fees and penalties. The Louisiana Supreme Court affirmed the appellate court's ruling of a compensable work-related accident, but denied the claims for attorney's fees and penalties.

In *Taylor v. Columbian Chemicals*, 744 So.2d 704 (La. App. So.2d 1999), the Hearing Officer imposed penalties and attorney's fees because the claims adjuster had made "not one shred of investigation" to assist the validity of the Claimant's claim of a knee injury. The Hearing Officer reasoned that if co-workers, whom the Claimant showed her bruises, would have been interviewed, this would have supported the claim and led to further questioning of physicians.

In *Sinegal v. Able Glass Co.*, 663 So.2d 393 (La. App. 3d Cir. 1999), the court ruled the Carrier was A&C for failing to investigate the exact medical condition of the Claimant prior to termination of benefits. The court noted the claims adjuster failed to make one (1) inquiry to determine the causation of the disabling condition.

In *Baker Hughes, Inc. v. Ardoin*, 758 So.2d 830 (La. App. 3d Cir. 2000), the Employer was A&C for a work-related accident which aggravated or accelerated a pre-existing condition causing disability. The court noted a timely report of a work-related incident involving horseplay. The court also noted the medical report indicating the Claimant's pre-existing condition was exacerbated in the work-related accident. The appellate court reversed the Hearing Officer's ruling that the claim was reasonably controverted by the Employer. The existence of a pre-existing injury would not be accepted as the sole reason for avoiding A&C.

In *Douglas v. Kitchen Brothers Manufacturing*, 715 So.2d 663 (La. App. 2d Cir. 1998), the court ruled the Carrier had a duty to investigate and make reasonable effort to ascertain the worker's exact condition before denying worker's compensation benefits. The court noted a physician's medical report assessing an impairment rating and disability. The Carrier alleged there was confusion as to whether the physician was the Claimant's choice of physician. However, the Hearing Officer ruled the Carrier had a duty to take action to clarify the choice of the physician.

In *McClendon v. Keith Hutchinson Logging*, 702 So.2d 1164 (La. App. 1st Cir. 1997), the Carrier was A&C for denying worker's compensation benefits when the performance of physical labor was a predominate cause of a heart attack. The Carrier alleged there was no evidence prior to filing the Disputed Claim that the heart attack was work-related. The court ruled the Carrier had a duty to investigate whether the heart attack was work-related. Further, the court noted the Carrier was unreasonable by not sending the Claimant to a doctor at the time he was

experiencing chest pains. The court indicated the Carrier had an affirmative duty to determine the nature of activity performed at the time of the heart attack, and ascertain a medical opinion as to whether said activity is a cause of a heart attack.

In *Moore v. Popeyes Fried Chicken*, 697 So.2d 5 (La. App. 1st Cir. 1997), the court ruled that the Employer was A&C when the Claimant's testimony was corroborated by medical evidence that an injury resulted from a work-related accident. The court noted that the Risk Manager admitted she normally makes no investigation prior to denying claims. Further, it was noted the Risk Manager did not request a medical report from any of the Claimant's treating physicians. The court ruled the Risk Manager denied the claim based on incomplete and inaccurate information and on the incorrect legal assumption that she could deny a claim if it was not reported immediately.

In *Brady v. Northland Frozen Food*, 688 So. 2d 1139, the LWCC was A&C for failing to reinstitute worker's compensation benefits based on the medical reports not directly addressing the Claimant's work status. The court ruled the LWCC had a duty to seek clarification as to the issue of work status from the Claimant's physician.

b. The following are cases whereby A&C was denied due to a determination that a reasonable investigation was conducted by the Employer.

In *Smith v. Jitney Jungle of America*, 802 So.2d 988, the court denied penalties and attorney's fees when the Employer took affirmative action to investigate whether the medical bill submitted by the Claimant was related to the work-related accident. The court ruled that the Employer was not A&C for not paying the medical bill within 60 days upon submission when they were taking steps to investigate whether the medical bill was related to the work-related accident.

In *McNeal v. Masson Construction Co.*, 738 So.2d 602 (La. App. 3d Cir. 1999), the court ruled that the Employer was not A&C for not paying its reimbursement for mileage since the notice by the Claimant was insufficient. The court ruled the notice requirement for reimbursement is satisfied when the Claimant submits medical reports, receipts, or other written evidence indicating he went to a physician visit, along with receipts documenting his travel expenses or evidence showing the distance traveled. In this case, the court ruled that the Claimant did not satisfy such criteria. Moreover, the Claimant is required to specifically provide reimbursement for expenses, and the Employer does not have to pay if it merely suspects travel expenses were incurred.

In *Brumley v. Med Express Ambulance Service*, 676 So.2d 662 (La. App. 3d Cir.1996), the Hearing Officer ruled that the LWCC was not A&C when a good faith attempt was made to tender payment based on permanent disfigurement. The Claimant rejected the tender and lump sum settlement, and instituted a Disputed Claim two (2) months thereafter. The court noted the Claimant's indecisiveness of a lump sum settlement versus weekly indemnity benefits was the cause of the delay in the ultimate payment of weekly indemnity benefits.

In *Mackie v. Coast Quality Construction*, 666 So.2d 1173, the claims adjuster temporarily

withheld payments of continuing medical bills due to concerns that the Claimant may have been addicted to pain medication. The court noted it was beyond the claims adjuster's competence to determine whether the Claimant was drug dependent. However, the court noted that the claims adjuster's assumption was not unreasonable pending further investigation.

In *J.E. Merrit Constructors, Inc. v. Hickman*, 776 So.2d 435 (La. 2001), the Louisiana Supreme Court ruled the Employer's actions in terminating the Claimant's SEB, and in calculating benefits based on part-time rather than full-time status was not A&C.

In *Hayes v. Louisiana Risk Management*, 635 So.2d 951 (La. App. 3d Cir. 1994), the court held the Carrier was not A&C for its alleged failure to contact the physician to schedule medical procedures on Claimant's behalf.

III. Employer Cannot Avoid Penalties and Attorney's Fees if it has Notice of Accident

In *LeBaron Louisiana Pacific Corp.*, 434 So.2d 496, the Carrier was A&C for denying worker's compensation benefits for the Claimant who reported the accident to his supervisor. Approximately two (2)weeks after the reported incident, the Claimant's back pain escalated. However, the Employer alleged, in an attempt to defend his actions, that the supervisor also testified the Claimant originally stated that he injured himself helping his father. The court ruled the plaintiff's doctor, wife, father and three co-employees testified as to the work-related accident and the Carrier was A&C in failing to pay benefits.

IV. Use of Vocational Rehabilitation Counselor

In terminating benefits upon identification of employment by a vocational rehabilitation specialist, the following factors must be demonstrated:

- availability of jobs;
- jobs open and available within the Employer's reasonable geographic region;
- job's within Claimant's physical capabilities;
- vocational rehabilitation specialist assist in job search;
- vocational rehabilitation specialist properly licensed;
- job within qualifications of Claimant;
- Claimant had experience to perform job;
- vocational rehabilitation specialist follow-up on contacts with prospective Employer; and
- "sham rehabilitation" will be deemed A&C.

Refusal to pay worker's compensation benefits based on information that an injured Employee is able to return to work is not A&C.

In *Wilton v. Boudin Sausage Kitchen*, 763 So.2d 111 (La. App. 3d Cir. 2000), the Hearing Officer ruled that the Carrier was A&C for denying weekly indemnity benefits notwithstanding the fact that the Carrier demonstrated the availability of several jobs, the jobs were open and

available, the jobs were within the Claimant's physical capabilities and geographic location. Further, the vocational rehabilitation expert demonstrated that the available jobs were 80-90% of the Claimant's pre-injury wage. In addition, the vocational rehabilitation specialist demonstrated numerous efforts to assist the Claimant in her job search but to no avail. Nevertheless, the Hearing Officer ruled that the Employer was A&C for terminating worker's compensation benefits since the Claimant was suffering from substantial chronic pain. Also, the court ruled that no physicians testified that the Claimant could perform the jobs identified by the vocational rehabilitation expert without experiencing substantial pain. Moreover, the court ruled the Employer had a duty to investigate whether the Claimant's constant pain would render her unable to perform the jobs identified by the vocational rehabilitation expert.

In *East-Garrett v. Greyhound Bus Lines*, 746 So.2d 715 (La. App. 3d Cir.1999), the Employer was A&C for its reliance on a labor market survey to determine that there were no jobs available that paid 90% or more of the Claimant's pre-injury wages. No evidence existed that the jobs identified on survey were still in existence at the time the treating physician approved them, and the only job that would have provided 90% of pre-injury wages was not identified as having actual openings.

In *Kelly v. Jackson Construction Co.*, 748 So. 2d 1270 (La. App. 2d Cir. 1999), the court ruled the reduction of weekly indemnity benefits was A&C due to insufficient follow-up by the vocation rehabilitation specialist. The vocational rehabilitation specialist notified the Claimant by mail of several potential jobs. However, the vocational rehabilitation specialist did not assist the Claimant in re-entering the work force. Further, the jobs identified by the vocational rehabilitation specialist were outside the Claimant's qualifications. The court ruled the vocational rehabilitation specialist would have been aware of such fact if she had follow-up meetings with the Claimant.

In *Alexander v. Roy O. Martin Lumber Co.*, 784 So.2d 872 (La. App. 3d Cir. 2001), the Employer retained an obligation to provide further rehabilitative services to Claimant as a result of the severity of her injury, and after an unsuccessful attempt to return the Claimant to work.

V. Clerical Errors and Underpayment -Hearing Officer Has Little Patience

Penalties and attorney's fees are generally assessed for underpayment of weekly indemnity benefits where the Employer did not offer proof the error in calculation of benefits was beyond control of Employer and the dispute was reasonably controverted. The courts generally have little patience for non-payment or underpayment due to clerical errors.

In *Davis v. City of New Orleans*, 706 So.2d 669, the Claimant received a judgment for payment of medical bills for the Claimant's treating physician. The City took no action to pay the bills. As a result, the Claimant filed a Motion to Enforce the Judgment . The Claimant cited LSA-R.S. 23:1201 (G) stating that the Employer had 30 days from the date of a final judgment to pay the medical bills. Further, said statute provides that if a judgment is not paid within 30 days after it becomes due, the court shall add an amount equal to 24% or $100.00 per day for each calendar day it remains unpaid, whichever is greater. The City unsuccessfully argued it was simply an oversight of a municipality.

In *Russell v. DOTD*, 782 So.2d 1099 (La. App. 3d Cir. 2001), the court ruled that a delay of 38 days by the Employer for paying the full amount of weekly indemnity benefits entitles the Claimant to penalties and attorney's fees. The Employer argued that the delay in paying full worker's compensation benefits due to a clerical error. The Hearing Officer noted the clerical error was not ascertained until after the Claimant filed a Disputed Claim for Compensation. The Hearing Officer noted clerical error was communicated to the Employer prior to filing the Disputed Claim.

In *Russo v. Sewerage and Water Bd. of New Orleans*, 813 So.2d 491 (La. App. 4th Cir. 2002), no late payment penalty should be awarded if nonpayment results from conditions over which Employer had no control. The late payment of the medical bills in question resulted from the Employer assigning the billing to an outside contractor that was in the business of negotiating price reductions with health care providers. Due to an unspecified computer glitch, the bills were not returned to the Employer for more than 2 months. The Court found that the late payment was not due to conditions over which the Employer had no control since the billing was processed by an outside company.

VI. Refusal to Pay Based upon Insurer's Conclusion from Medical Reports Available at Time of Refusal:

The courts have generally ruled an Employer may not deny a Claimant's worker's compensation benefits on the basis of inconclusive medical reports. Instead, the Employer must undertake reasonable effort to ascertain the extent of Claimant's medical condition.

a. The following are cases whereby the Employer was not A&C based on information contained in the medical records:

In *Holden v. International Paper Co.*, 720 So.2d 442 (Ala. App. 2d Cir., 1998), the Hearing Officer ruled the Employer was not A&C due to confusion regarding Claimant's reports concerning the nature of his injury and the cause. The Hearing Officer noted the Employer relied on the following to deny the claim: (1) medical records showed that Claimant reported pre-existing neck pain; (2) some medical reports reflected an inconsistent history of neck pain while Claimant was moving heavy equipment; (3) Dr. Goodman's bills stated that the condition was not work-related; (4) there were diagnoses of arthritis and stroke; and (5) Claimant failed to report any injury from a work-related incident, and did not clarify how the incident was work-related until long after the suit.

In *Dean v. K-Mart Corp.*, 720 So.2d 349 (La App. 4th Cir. 1998),the court ruled the Employer had reasonable basis for contesting the claim for benefits. The Claimant died about ten (10) years after his work-related injury from indirect causes and unclear circumstances, an apparent overdose on prescription drugs. The court ruled the Employer had a reasonable foundation for its defense of lack of causation. Also, at the time of his death, the Claimant apparently had not made any child support payments for his dependant's benefit for approximately 18 months. Thus, the Employer had a reasonable foundation for its defense of lack of dependency.

In *McCraney v. Sanderson Farms, Inc.*, 657 So.2d 1080 (La. App. 1st Cir. 1995), the court held that Employer's termination of Claimant's benefits was not A&C when the Employer had opinions from doctors that the Employee was not disabled, and the Claimant required only some temporary adjustment in work duties. Further, the Claimant refused light duty. The fact that a psychologist believed that the Claimant was disabled does not oblige the Employer to pay compensation.

In *LeBlanc v. Cajun Painting, Inc.*, 654 So.2d 800 (La. App. 1st Cir. 1995), the court held Employer's termination of benefits was not A&C when Claimant was exposed to toxic chemicals at work. The court relied on the complex nature of the Claimant's medical problems, the difficulty in separating the problems associated with rheumatoid arthritis from the symptoms of peripheral nervous system dysfunction and toxic encephalopathy, and the differing medical opinions on causation and disability.

In *Insurance Co. of North America v. Labit*, 772 So.2d 385 (La. App. 1st Cir. 2000), the Employer was not A&C when a videotape showed the Claimant working on a fence, sanding the fender of a car and shopping. The videotape was approximately one hour in length and was the result of seventy (70) to ninety (90) hours of surveillance by a private investigator. The treating physician reviewed the videotape and submitted a report stating that the activities seen on the videotape were of a light duty nature, and he still opined that the Claimant is totally disabled. The activities shown on the surveillance tape were found to provide insufficient cause to deny the claims for the medical treatment, as all those activities fall within the realm of light duty.

b. In the following cases, the Employer was A&C based on information available in medical reports:

In *Campbell v. Gootee Const. Co.*, 756 So.2d 449 (La. App. 5th Cir. 2000), the Employer relied on the results of an IME to establish that they had reasonably controverted the Claimant's claims for back surgery. However, there were several doctors who reviewed the diagnostic tests and found that Claimant had a herniated disc. In addition, the neurosurgeon, who had previously treated Claimant, continued to recommend surgery. The Hearing Officer found that the Employer had not sufficiently controverted Claimant's claim by relying on the results of the IME physician since he concurred in the diagnosis of a herniated disc but did not concur on surgery.

In *Peloquin v. Eunice News*, 737 So.2d 132 (La. App. 3d Cir. 1999), the Employer was A&C when it chose to disregard any opinions which did not favor his position that the Claimant did not need to see a neurologist. The decision not to pay for a visit to a neurologist was greatly influenced by a physician's general practitioner's limited opinion that the Claimant's headaches were not connected to a work-related injury.

In *Gross v. Maison Blanche, Inc.*, 732 So.2d 147 (La. App. 4th Cir. 1999), the court ruled that after an initial optimistic report, and later receiving medical information indicating a continuing disability, the Employer may not blindly rely on an earlier report to avoid penalties. The Employer relied on the medical discharge provided by only one (1) of the Claimant's treating physicians to base their discontinuance of her weekly wage benefits when subsequent reports disable the Claimant.

In *Harrison v. Frank and Janie Seafood Restaurant*, 718 So.2d 1003 (La. App. 2d Cir. 1998), the Employer was A&C for failure to approve an arthroscopic shoulder surgery on a timely basis. The Hearing Officer found two separate periods which constituted an unreasonable delay. The first unreasonable delay was found to be the period between the Employer's knowledge of the recommended surgery and the scheduling of the deposition, October 1995 through December 6, 1995. The second unreasonable delay was found to be the period between the Claimant's deposition and the surgery approval, December 6, 1995 through March 26, 1996.

In *Beddes v. Qwik Pantry*, 697 So.2d 695 (La. App. 2d Cir. 1997), the court ruled the Employer was A&C in denying benefits for failing to approve shoulder surgery. The Employer argued the Claimant gave an inaccurate medical history, there were no witnesses to the accident, there were long gaps in Claimant's subsequent medical treatment and Claimant continued to work throughout her treatment. However, the Claimant's symptoms remained consistent with the initial diagnosis of shoulder tendinitis with impingement and need of arthroscopic surgery. Further, the Claimant's treating physician recommended that Claimant be evaluated by another physician. Although the second opinion evaluation was recommended, the Employer would not grant authorization. The Court held that the Employer could not rely on the fact that Claimant gave an inaccurate medical history to controvert Claimant's claim.

In *Thibodeaux v. Wal-Mart Stores*, 693 So.2d 850 (La. App. 3d Cir. 1997), the Claimant's treating physician recommended surgery at two (2) disc levels. The Employer's 2nd opinion physician confirmed Claimant's lower back problem and surgery was necessary at one (1) level and not at two (2). Additionally the 2nd opinion physician recommended longer periods of conservative treatment. After engaging in further conservative treatment without reported improvement, the Claimant rescheduled the proposed surgery. However, the Employer refused to approve the surgery. Approximately one (1) year and one (1) month after the injury, the Employer obtained an order for an IME. The IME physician agreed that the surgery proposed by the treating physician was appropriate. Despite this finding, the Employer refused to approve the proposed surgery. The Court ruled the Employer's action was indefensible.

VII. Medical Information Indicates No Disability or if Medical Evidence Indicates that the Employee Can Return to Work

In *K-Mart Corp. v. Landry*, 807 So.2d 1000 (La.App. 5 Cir. 2002), the Employer was not A&C when the Employer determined that Claimant's migraine headaches were not related to the job accident. The Court referenced the differing opinions of the medical experts to support its decision to controvert the disability claim. Moreover, Claimant's own medical experts could not state with any certainty that her migraine headaches were related to her on the job injury.

In *Cloud v. Ringgold Nurse Care Center*, 792 So.2d 812 (La.App. 2 Cir. 2001), both the factual and the medical information available to Employer served to reasonably controvert the

claim for authorization of surgery. The Employer's decision was not dependent only on the medical opinion of the second opinion physician, but also relied upon the Claimant's treating physician who clearly believed that alternative treatments should be tried prior to the last resort of surgery. Upon Claimant's treating physician's final recommendation, the Employer promptly authorized the surgery. The Claimant's argument that the Employer delayed in requesting the IME was not persuasive since "any party" may request an IME pursuant to LSA-R.S. 23:1123.

In *Nunn v. CBC Services, Inc.*, 750 So.2d 474 (La. App. 2d Cir. 2000), LWCC refused to authorize the recommended ulnar decompression surgery only after receiving the report from their 2nd physician. The second physician concluded that Claimant's neuropathy had been developing for a year or more prior to the examination and asserted that Claimant's neuropathy was unrelated to his employment. There is no showing that this doctor's findings were unsupported by medical examination, medically incorrect or fraudulently obtained. The second opinion physician was merely less persuasive than the Claimant's treating physician.

In *Briscoe v. Thero-Kinetics, Inc.*, 737 So.2d 177 (La. App. 2d Cir.1999), the Claimant's source of treatment for an abscess was uncertain even up to the time of trial. Claimant's entitlement to SEB was also questionable based upon the Claimant's physician's release and the incomplete information LWCC received initially concerning Claimant's actual earnings. The Employer was not A&C although benefits were awarded.

VIII. If the Release to Work is Unclear or Conditional, or if Evidence in Favor of Disability is Unclear at Best

In *Adams v. Bayou Steel Corp*., 813 So.2d 1285 (La. App. 5th Cir. 2002), the Employer was aware of the Claimant's treating physician's opinion relating Claimant's elbow condition to the work-related incident. Despite the absence of any medical evidence reflecting that Claimant's condition was not work-related, the Employer questioned the "mechanism" of the elbow injury because the initial complaint was to the Claimant's back. Moreover, no physician released the Claimant to full unrestricted duty. Nevertheless, the Employer chose to delay payment of benefits until after the deposition of the Employer's 2nd opinion physician at which time his opinion relative to the cause of the elbow injury was unchanged. An unjustified belief that the Claimant's injury did not result from an accident does not excuse failure to pay worker's compensation benefits.

In *Baullion v. Old American Pottery Co.*, 801 So.2d 567 (La. App. 3d Cir. 2001), the Employer was A&C for their failure to authorize a psychological evaluation of the Claimant that was requested by Claimant's physician. A physical therapist issued a report that Claimant was overwhelmed with neck, arm and wrist problems and appeared depressed. The Claimant's treating physician noted that within the same year the Claimant had residual carpal tunnel syndrome and was severely depressed. Another physician recommended the Claimant undergo psychological evaluation due to her increased depression and anxiety attacks and placed the Claimant on an antidepressant, but recommended an evaluation to determine the exact cause of her depression. It was the Claimant's treating physician's opinion that her depression was related to her work injury. The Employer was A&C for their failure to authorize the medical treatment requested by the Claimant's treating physician.

In *Matherne v. Brown & Root*, 788 So.2d 550 (La. App. 5th Cir.2001), the court held that the Employer was A&C in refusing medical treatment entitled Claimant, and awarded penalties and attorney's fees. The Employer assigned the Claimant to the Shell Oil Company (Shell) chemical plant in Norco, Louisiana. The Claimant's respirator mask fit imperfectly and powder crept under the mask and suit. The Employer had the available MSDS information including the symptoms of phenol poisoning and instructions for exposure. Employer's conduct delayed Claimant from removing the substances from the Claimant. The Claimant was forced to wait at least 1 hour before being told to shower, and 31 hours before he was tested for the phenol levels. Although the Employer sought to assert that the exposure was minimal, the court ruled the Employer's lack of concern interfered with the ability to discover the actual levels of phenol. In addition, the Employer failed to immediately investigate exactly what was in the tank. Furthermore, there was no testimony as to why the medical treatment sought by Claimant was refused for more than 1 year. The court ruled the opinion of an expert toxicologist or medical doctor familiar with toxic exposure until after Claimant filed his claim. In addition, the Employer failed to follow the advice of their doctors whereby they opined it was unlikely that the headaches were caused by the exposure, but also that further research was needed.

In *Livaccari v. Alden Engineering Service*, 785 So.2d 915 (La. App. 4th Cir. 2001), the Claimant requested an authorization for a change in physician since the Claimant's treating physician expressed unwillingness to continue treating the Claimant, and a subsequent treating physician stated his inability to continue treatment. Further, any delay in Claimant's treatment would likely exacerbate his RSD. The Employer was A&C in withholding their consent to Claimant's request for a change in physician.

In *Landry v. Physicians Practice Management, Columbia/HCA*, 783 So.2d 619 (La. App. 3d Cir. 2001), the Employer did not have sufficient factual and medical information to warrant the denial of compensation and medical benefits. The Employer disregarded the opinion of 3 physicians stating that the Claimant (a nurse) had a recent work-related EBV infection. There was substantial evidence in the Employer's possession that Claimant's EBV infection was contracted at work. The Employer relied solely on the utilization review done by one of its own employee physicians to deny the Claimant her benefits and compensation. The Employer did not advance a reasonable alternative to the Claimant's version as to how the Claimant contracted EBV.

In *Johnson v. T.K. Stanley, Inc*.,781 So.2d 760 (La. App. 3 Cir. 2001), the Employer considered that the Claimant's alleged back injury was not related to the 1997 accident, but to a 1995 or 1998 accident notwithstanding that they did not have a chronology of the Claimant's complaints. The Claimant's treating physicians related the Claimant's condition to his 1997 accident. Accordingly, the court ruled the Employer was A&C when it relied on an Employer's 2nd opinion physician's findings to deny benefits..

In *Cannon v. Glass(AF & D)*, 776 So.2d 1181 (La. App. 3d Cir. 2000), the Employer took approximately 19 months from the time of Claimant's request on January 6, 1998 to authorize the recommended back surgery. During the19 month period, Employer took no action for approximately eight months and offered no reasonable excuse for its delay in providing the

requested medical treatment and was ruled A&C.

IX. "Bona-fide" Dispute as to Compensability or, if Legal Issue is Complex, or Novel.

The Employers were not A&C due to complex legal issues in the following cases:

In *Holley v. Tate & Lyle*, 797 So.2d 94 (La. App. 4th Cir. 2001), the Employer was not A&C when the Employer defended the claim based on prior jurisprudence interpreting the statute and had court holdings that generally accepted Employer's interpretation of statute.

In *J.E. Merit Constructors, Inc. v. Hickman*, 776 So.2d 435 (La.2001), the Employer's actions in terminating Claimant's SEBs based on the availability of other employment and in calculating benefits based on part-time rather than full-time status, even if legally incorrect, do not rise to the level of A&C.

In *Richard v. Workover & Completion*, 774 So.2d 361 (La. App. 3d Cir. 2000), the Employer was not A&C when the Claimant testified that several years earlier rubber boots caused ulcers to form on his leg on three separate occasions, and that he did not file claim with respect to those ulcers. Further, Claimant did not notify Employer that ulcer at issue was result of work-related accident until approximately 4 months after alleged accident.

In *Robinson v. Simmons Co.*, 762 So.2d 112 (La. App. 4th Cir. 2000), there are no witnesses to incident and the time, place, and the circumstances surrounding alleged incident are unknown. Employer's failure to pay worker's compensation benefits until after judgment is not A&C due to its diligent attempt to learn the facts.

In *Durham v. Plum Creek Mfg.*, 760 So.2d 564 (La. App. 2d Cir. 2000), the Employer was not A&C where co-workers and Claimant's supervisor stated that Claimant merely told them that his back was hurting from straightening stacks of wood and did not clearly communicate that he was claiming a work-related accident. Further, the Claimant did not seek to file an accident report and did not comply with the published procedures of HR for reporting an accident.

In *Mayo v. Casco Const. Co. Inc., 712 So.2d 169 (La. App. 2d Cir. 1998),* Employer was not A&C when it based its refusal to pay benefits upon substantial bona fide factual contention that Claimant forfeited his claim for benefits by making false statements on his second injury fund questionnaire.

X. Refusal without Substantial Reason -Raising of Frivolous Defense or Failing to be Current with Jurisprudence.

The following are cases whereby A&C was assessed for asserting a frivolous defense:

In *Carmean v. Enterprise Products Partners, L.L.P.*, 804 So.2d 95 (La. App. 1st Cir. 2001),
the Employer's failure to offer any factual or medical evidence to counter the expert testimony of

the treating physician was an indication that there was no basis for the denial of Claimant's claim as an occupational disease and was A&C. The Employer did not seek factual or medical evidence to support its contention that plantar fasciitis was not an occupational disease. The Employer did not insist that Claimant undergo an IME. The claims adjuster testified that he "investigated" the claim by reviewing Claimant's medical records and job requirements. He also called "two or three" unidentified attorneys to inquire whether plantar fasciitis was an occupational disease. The adjuster did not consult with a physician or other medical expert to determine whether a particular type of job lends itself to the condition. He did talk to a registered nurse in vocational rehabilitation case management who told him she was not aware of any cases she has handled in which plantar fasciitis was considered an occupational disease. The Employer did not consider the plantar fasciitis injury to be peculiar to Claimant's job so a decision was made to deny the claim.

In *Wyble v. Tunica Biloxi Gaming Economic Development*, 776 So.2d 501 (La. App. 3 Cir. 2000), the Employer was A&C when the Employer delayed payment of SEB for at least 6 weeks, warranting acceleration of benefits, based solely on fact that Employer was not sure if Claimant could receive benefits from 2 Employers at same time and wanted to get opinion as to whether he should be receiving SEBs.

In *Boise Cascade Corp. v. Dean,* 767 So.2d 76 (La. App. 3d Cir. 2000), the Employer was A&C and engaged in fraudulent behavior designed to deny worker's compensation benefits when Employer alleged that Claimant failed to follow proper safety procedures, and Claimant was fined $3,000 because the Employer claimed that the accident occurred because Claimant failed to lockout all power sources. A supervisor admitted that Claimant could not have locked out all power sources as he was only issued two locks.

a. **Tips and/or Techniques for Avoiding A&C**.

1. In early stage of litigation, do not “DENY” claim unless 100% sure a compensable work-related accident did not occur. It is advisable to state based on the information presently available, there is insufficient information to decide whether the claim is compensable.

1. In any letters denying compensability or awaiting compensability pending further investigation, do not provide a detailed analysis as to why payments are not being tendered.

1. Contemporaneously document communications regarding the claim for reference at trial. It is advisable to document date, time and method of communication. Further, document date, time and method of any action or communications involving investigation of claim.

1. Do not render a subjective opinion as to medical causation and extent of injuries. Always cite medical reports and data contained in medical reports.

1. Seek clarification from physicians on questions not directly addressing medical

causation, prognosis, physical restriction and disability. This is especially applicable to non-traditional injuries. (i.e. respiratory injury, heart attacks, hernia, headaches, hearing loss, etc.).

1. Obtain, index and cite objective medical data from the Claimant's physicians to substantiate the 2nd opinion physician or IME physician. (i.e. absence of objective symptoms).

1. At trial, do not isolate one factor as reason for not extending worker's compensation benefits. Prior to trial, formulate several bullet points for each and every reason why worker's compensation benefits were not extended. In reciting your reasons for denying benefits at trial, cite all of the factors as a reason for not extending the worker's compensation benefits.

1. At trial, present a positive, polite and upbeat demeanor. Do not refer to the Claimant as "Claimant." Refer to the Claimant as to his/her proper name.

1. Draft a summary sheet or index of dates of relevant communications or actions conducted in an effort to minimize time thumbing through the file. The index will provide reference points for quickly ascertaining information. Also, it counters the impression of disorganization or neglect.