

SUPREME COURT OF LOUISIANA

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No. 2010-C-0800

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AGILUS HEALTH (ALLISON TAYLOR)  
Plaintiff-Appellee

VERSUS

ACCOR LODGING NORTH AMERICA AND  
LIBERTY MUTUAL INSURANCE COMPANY  
Defendants-Appellants

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ON WRIT OF CERTIORARI FROM  
THE LOUISIANA COURT OF APPEAL,  
THIRD CIRCUIT, NO. 09-01049  
AND THE OFFICE OF WORKERS' COMPENSATION, DISTRICT 02, NO. 08-05824  
HEARING OFFICER JAMES BRADDOCK, PRESIDING

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ORIGINAL AMICUS CURIAE BRIEF ON BEHALF OF THE AMERICAN  
ASSOCIATION OF INDEPENDENT CLAIMS PROFESSIONALS SUPPORTING  
REVERSAL OF THE DECISION OF THE LOUISIANA COURT OF APPEAL, THIRD  
CIRCUIT

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Respectfully submitted,  
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### INTEREST OF AMICUS CURIAE

The American Association of Independent Claims Professionals (“AAICP”) is an association of independent claims adjustment and third-party claims administration companies that service claims for public entities, insurance carriers, and other businesses in the United States. The members of the AAICP handle workers’ compensation claims in Louisiana and around the country, in addition to other types of claims, such as disability, property and liability claims. The members of the AAICP adjust workers’ compensation claims in Louisiana on behalf of insurance companies, and Louisiana employers, including businesses which are self-insured for purposes of workers’ compensation, parishes, municipalities, school boards and other institutions such as churches and hospitals employing Louisiana workers.

The members and associate members of the AAICP have been at the forefront of the tens of thousands of health care provider claims filed in Louisiana regarding discounts taken pursuant to Preferred Provider Organizations (“PPO”) on workers’ compensation medical bills, such as the one at bar (sometimes referred to herein as ‘PPO suits’), and have borne much of the brunt of its effects concerning defense costs, settlements and judgments. With respect to members of the AAICP, the cost of defense of these claims and liability for the claims for penalties and attorney fees has often fallen to the members of the AAICP, based upon the contractual arrangements between the third party administrators and the employers. The substantial volume of PPO suits (many thousands), coupled with awards of approximately \$2,000.00 in penalties and \$3,000.00 in attorney fees at a minimum, means the potential collective effect of this litigation for the AAICP members is staggering.

In many of the PPO suits, the actual PPO discount is miniscule when compared to penalties and attorney fees. A typical PPO discount is 10% off the amount provided by the Louisiana workers’ compensation maximum reimbursement rate found at 40 La. Admin. Code § 5157.<sup>1</sup> If a provider such as a family physician charges \$80.00 for an office visit, the workers’ compensation maximum reimbursement rate to that physician for that visit may be \$56.00 according to 40 La. Admin. Code § 5157 at CPT Code 99201. Therefore, the PPO discount that may be taken under the usual PPO agreement from the maximum reimbursement rate may be as little as \$5.60. If the same doctor submitted his bill for this one examination separately to the employer, the AAICP member

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<sup>1</sup> The amount of the discount varies by PPO network, but typically ranges between 10% and 20%.

would face penalties and attorney fees totaling \$5,000.00 or more, merely for taking a discount of \$5.60 based upon the PPO agreement. As such, the majority of such a claim would be for penalties and attorney fees, and if the employer in such a case has retained a third party administrator, such as a member of the AAICP, the brunt of this claim would likely be borne by the third party administrator. Herein lies the interest of the AAICP in this case, as it will often be the member of the AAICP who may ultimately be responsible for the majority of the claim if the taking of a PPO discount is found to be unlawful.

Thus, the AAICP has a vital interest in the issues presented in this appeal and submits the following brief in support of Defendants-Appellants, Accor Lodging and Liberty Mutual Insurance Company.

#### **SUMMARY OF ARGUMENT**

The Louisiana Court of Appeal, Third Circuit, erred in finding that PPO discounts are not allowed in workers' compensation claims. This issue has been ably addressed by Defendants-Appellants, so will not be addressed further by Amicus Curiae herein. Amicus Curiae fully concurs and adopts the argument of Defendants-Appellants on this issue.

No award of penalties or attorney fees is warranted in the present claim as the claim was reasonably controverted. The claim was reasonably controverted because the defense of the claim was based upon a reasonable interpretation of the law, a law that the appellate courts had not previously interpreted. As such, no penalties and attorney fees should have been awarded. Finally, even if taking a PPO discount in a workers' compensation claim is found to be unlawful by this Honorable Court, an award of penalties and attorney fees should apply prospectively only to discounts taken after the rendering of the decision of this Honorable Court, when the reason for the taking of the discount was based upon a reasonable interpretation of the law at the time the discount was taken.

The amount of the award in this case was excessive based upon the ratio of the punitive-type award to the amount of the underlying discount. An award of penalties and attorney fees is penal in nature, and therefore the analysis for excessiveness of the award should follow the analysis for punitive damages, even though the award of penalties and attorney fees is not a punitive damages award. The actual amount of the punitive-type award must be considered in view of the thousands of other similar cases now pending, which makes the ratio of nearly 47 to 1 astounding. In similar

PPO suits, the ratio will be even greater based upon the minimal value of the discount as compared to the statutory amount of the penalty plus attorney fees. When evaluated under the *Mosing*<sup>2</sup> factors, the amount of the punitive-type award is excessive. The purposes of an award of punitive damages, to punish and deter, are not served by any award of punitive-type damages in this case.

#### STATEMENT OF FACTS

The facts of this case have been thoroughly and correctly set forth in the brief filed by the Defendants-Appellants. Therefore, the facts underlying this matter will not be detailed here.

#### LAW AND ARGUMENT

##### A. THE TAKING OF PPO DISCOUNTS SHOULD BE ALLOWED IN WORKERS' COMPENSATION CLAIMS.

Amicus Curiae agrees with the Defendants-Appellants that Louisiana law supports a finding that discounts taken pursuant to PPO contracts are allowed under the Louisiana Workers' Compensation Act. This issue has been excellently briefed by Defendants-Appellants, and Amicus Curiae adopts the brief of Defendants-Appellants herein.

##### B. PENALTIES AND ATTORNEY FEES ARE UNAVAILABLE AND UNWARRANTED IN THE PRESENT CASE.

As outlined above, and by Defendants-Appellants, Amicus Curiae submits that the taking of discounts pursuant to PPO agreements is lawful under the Louisiana Workers' Compensation Act. Despite this, even if this Honorable Court finds that the taking of such discounts is not allowed, an award of penalties and attorney fees is unwarranted in this case. The Defendants-Appellants reasonably controverted the claim as they relied upon a reasonable interpretation of the law to justify the taking of the PPO discount. The trial court erred in awarding penalties and attorney fees for the underpayment of medical fees when the sole reason for the underpayment was the contractual agreement specifically allowing for a discounted payment. The issue of the propriety of taking a PPO discount is an unsettled question of law, one not previously addressed on the merits by this Honorable Court. Accordingly, no penalties or attorney fees should have been awarded in this case, nor would it be proper to award penalties and attorney fees in any similar case until and unless this Honorable Court declares discounting invalid.

As this Honorable Court is aware, penalties and attorney fees in workers' compensation claims are not allowed unless the defendant fails to reasonably controvert the claim for benefits. La.

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<sup>2</sup> *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967.

R.S. 23:1201. Awards of attorney fees in workers' compensation cases are essentially penal in nature, and are intended to deter indifference and undesirable conduct by employers and insurers toward injured employees. *Langley v. Petro Star Corp. of La.*, 01-0198, p. 3 (La. 6/29/01), 792 So. 2d 721, 723; *J.E. Merit Constructors, Inc. v. Hickman*, 00-0943, p. 5 (La.1/17/01), 776 So. 2d 435, 438; *Williams v. Rush Masonry, Inc.*, 98-2271, pp. 8-9 (La.6/29/99), 737 So. 2d 41, 46; *Sharbono v. Steve Lang & Son Loggers*, 97-0110 (La. 07/01/97), 696 So. 2d 1382, 1386; *Smith v. Quarles Drilling Co.*, 04-0179 (La. 10/29/04), 885 So. 2d 562, 565. Although the benefits in the Workers' Compensation Act are to be liberally construed, penal statutes are to be strictly construed. *Langley v. Petro Star Corp. of La.*, 01-0198 at 4, (La. 06/29/01), 792 So. 2d 721, 723; *Williams v. Rush Masonry, Inc.*, 98-2271 at 9, (La. 06/29/99), 737 So. 2d 41, 46; *Smith v. Quarles Drilling Co.*, 04-0179 (La. 10/29/04), 885 So. 2d 562, 565.

When the employer has reasonably relied upon a reasonable interpretation of the statute and absent any appellate court guidance, there should never be an award of penalties and attorney fees, even when that interpretation is subsequently found to be erroneous. In this regard, some courts have previously held that an employer who relies upon a reasonable interpretation of a statute has reasonably controverted the workers' compensation claim. *Clark v. Atlantic Painting Co.*, 521 So. 2d 505, 511 (La.App. 4 Cir. 1988). In other areas of Louisiana law, courts have found that an insurer has a right to a judicial determination of the issues based upon a reasonable interpretation of its policy without being arbitrary and capricious. *Bonura v. United Bankers Life Insurance Company*, 552 So. 2d 1248, 1254 (La.App. 1 Cir. 1989), writ denied, 558 So. 2d 1125 (1990); *Crawford v. Blue Cross Blue Shield*, 770 So. 2d 507, 515 (La.App. 1 Cir. Nov. 3, 2000).<sup>3</sup> In another case, the Third Circuit has found that an insurer cannot rely upon the unsettled issue of law defense to an award of penalties and attorney fees once the Louisiana Supreme Court has issued a ruling, merely because there is a writ pending before the U.S. Supreme Court on the issue. *Wells v. Houston*, 95-202 (La.App. 3 Cir. 6/7/95), 657 So. 2d 474. However, in the present case, this Honorable Court has never ruled on the merits of the issue for which the trial court and Third Circuit awarded penalties and attorney fees. Indeed, this Honorable Court has previously determined that it is not fair or proper to assess penalties in workers' compensation claims when the

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<sup>3</sup> "Where an insurer's interpretation of its policy is reasonable and not contrary to any existing jurisprudence, the denial of a claim is not arbitrary so as to require the imposition of penalties, and the insurer has a right to a judicial determination of the issues. While a court may disagree with the interpretation the insurer places upon its policy, its actions in refusing to pay should not necessarily subject it to the penalty provisions of the statute."

state of the jurisprudence was unsettled at the time the litigation was commenced. *Sumrall v. J. C. Penney Co.*, 239 La. 762, 772 (La. 1960).<sup>4</sup> Amicus Curiae certainly agrees in part to that statement, however, it is submitted that such a statement should be extended to the present case and those like it, because in most of the thousands of pending similar PPO suits, the discounts were taken many years ago, and are only now being litigated. As such, the date of the filing of the case is not the point that should be determinative of whether penalties and attorney fees should be imposed for the taking of the PPO discount. Rather, the determinative period is the relationship between the date the PPO discount is taken and the date a decision is rendered establishing the propriety of such discounts.

If this Honorable Court concludes that nothing in the Louisiana Workers' Compensation Act precludes discounting, then it will vacate the entire judgment and will not need to address the propriety of the award of penalties and attorney fees. That would be the right result. But, even were the Court to conclude that discounting is invalid, it should still vacate the award of penalties and attorney fees. The Defendants-Appellants have submitted a non-frivolous legal argument supporting discounting, an argument that many judges have accepted. Among them are a number of judges of the OWC, Judge Trimble of the U.S. District Court<sup>5</sup>, and Judge Amy, in dissent, in the present case<sup>6</sup>. Accordingly, any award of penalties or attorney fees should have only prospective effect.

### **C. THE AMOUNT OF THE AWARD FOR PENALTIES AND ATTORNEY FEES IN THIS CASE WAS UNCONSTITUTIONALLY EXCESSIVE.**

As previously addressed, no award for penalties and attorney fees is warranted in this case. However, if the discounts are unlawful and an award of penalties and attorney fees is allowed, the amount of penalties and attorney fees taken in the present case is unconstitutionally excessive. As a

<sup>4</sup> Nonetheless, the Third Circuit has awarded penalties and attorney fees in just such a case, finding an employer has failed to reasonably controvert a claim when it denies benefits based upon a "misinterpretation of the law" which was instead a reasonable interpretation of an unsettled area of law. *McCarty v. State, Office of Risk Management*, 643 So. 2d 886, 889 (La.App. 3 Cir. Oct. 5, 1994); citing *McKenzie v. Bossier City*, 585 So. 2d 1229, 1237 (La.App. 2 Cir. 1991). In *McCarty*, the Third Circuit awarded penalties and attorney fees to an employee for the employer's failure to pay indemnity benefits when the employer had a policy allowing an employee to choose to use accrued paid leave in lieu of workers' compensation benefits, when the employee had chosen to use accrued leave in lieu of receiving worker's compensation benefits, an issue that had not been specifically addressed previously by the courts. The court in *McCarty* relied upon *McKenzie* to award penalties and attorney fees. In *McKenzie*, a case arising out of the Second Circuit, the adjuster relied upon a misinterpretation of settled law, being which party bears the burden of proof under the heart-lung statute, to award penalties and attorney fees. There is a clear distinction, as there should be, between a misinterpretation of settled law and the misinterpretation of unsettled law, i.e., reasonable interpretation of a novel issue of law, which was ignored by the Third Circuit.

<sup>5</sup> *Liberty Mutual Ins. Co., et al v. Dr. Clark Gunderson, et al*, 2009 U.S. Dist. LEXIS 46780 (W.D. La. 2009). (Granting summary judgment in favor of insurers that the Louisiana Workers' Compensation Act does not prohibit discounts pursuant to PPO agreements below the Fee Schedule.)

<sup>6</sup> *Agilus Health (Allison Taylor) v. Accor Lodging North America*, 09-1049 (La. App. 3 Cir. 3/10/10), 32 So. 3d 1120, 1123.

matter of pure ratios, the punitive-type award in this case exceeds the amount allowable. The punitive-type amounts awarded in this case, \$8,500.00 versus the amount of the discount taken, \$181.20, results in a ratio of nearly 47 to 1. An application of the *Mosing* principles to the facts of this case mitigates against any punitive-type award in this case.<sup>7</sup> Finally, no punitive award is necessary to deter the discounting, should the Court conclude the discounts are invalid.

The actual dollar value of the purported underpayment in this case, \$181.20, and the punitive-type award, \$8,500.00, is itself unconstitutional, as the Defendants-Appellants have asserted. Indeed, the ratio alone is nearly 47 to 1. But, the collective amount of the total penalties that the medical providers are seeking in this litigation is truly breathtaking: if the other ten thousand or so cases involved the same discount, \$181.20, and punitive awards, \$6,000.00 (\$2,000.00 in penalties, \$4,000.00 in attorney fees), the collective underpayment would be \$1,812,000.00, whereas the collective punitive amount would be a staggering \$60,000,000.00.<sup>8</sup>

In *Mosing*, this Court listed four factors to be considered in reviewing an award of exemplary damages for excessiveness under Louisiana law: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm and/or potential harm suffered by the plaintiff and the exemplary damages awarded; (3) the difference between the exemplary damages awarded the civil or criminal penalties authorized or imposed in comparable cases; and (4) the defendant's economic wealth. *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967, 978. None of these factors suggests any award of exemplary damages is appropriate, much less the nearly 47 to 1 ratio here. First, the conduct of Defendants-Appellants was not reprehensible; it was laudable. The Defendants-Appellants entered into contracts with the providers, through intermediaries, and then performed exactly as the contracts prescribed. Amicus Curiae submits this is exactly how one would expect and encourage a sophisticated party to act in the performance of a contract. As this Honorable Court noted in *Mosing*, reprehensibility may be the most important factor in evaluating the propriety of the amount of punitive damages. *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967. Indeed, it is difficult to conceive how Defendants-Appellants could have acted reprehensively toward the plaintiff when Defendants-Appellants have for years successfully litigated the very issue in this case. It would not be just or proper to penalize a party in

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<sup>7</sup> *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967.

<sup>8</sup> The additional amount of attorney fees added by the Third Circuit for defense of the appeal in this case, below, are not included as such appeals would seemingly not be necessary in future cases.

forum A for conduct officially approved by forum B. Certainly it is for this Court ultimately to say whether discounting is valid, but there should be no question that the Defendants-Appellants have acted entirely appropriately.

Concerning the second factor, the provider was not harmed by receiving exactly what it agreed to accept, and there was no other potential harm to others, whereas the plaintiff was awarded \$8,500.00 as a punitive amount. The plaintiff was not harmed even by the amount of the discount, \$181.20, as that was the amount it contracted to discount its fees under the PPO agreement. There was no potential harm to anyone else by the taking of the PPO discount: the contract applied only to the parties. There was no potential harm to the employee in this case, because the employee received all of the treatment to which she was entitled, whether the discount was taken or not. There is a great disparity between the purported harm being the discount, \$181.20, the ostensible harm, \$0.00, and the exemplary damages awarded in this case, \$8,500.00. Accordingly, this element or review mitigates against any punitive-type award in this case, or if any, a far lesser amount.

In comparing the punitive damages award to the potential criminal award for the same action, the punitive-type award is excessive. There was no criminal action in this case. There have been no allegations of any criminal activity, or even tortious conduct in this case. The only issue is whether the otherwise legal PPO discounts were lawful when taken in the course of a workers' compensation claim. Accordingly, as there was no tortious or criminal conduct in this case, no punitive award is warranted, and even if warranted, the amount awarded, \$8,500.00 is excessive.

The last issue, the defendants' wealth has no bearing in this case. It is generally relevant only as an issue raised by the defense to mitigate a punitive award; absent that information (and there is none in this case), the factor is neutral. *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967, 983.

The underlying purpose of a punitive award is to punish and to deter future conduct of the party and others. *Mosing v. Domas*, 2002-0012 (La. 10/15/02), 830 So.2d 967, 978. Under the circumstances, there does not appear to be any basis for punishment. The Defendants-Appellants simply took a discount that was agreed upon between them and the plaintiff (through intermediaries). Absent a prior definitive pronouncement that taking such discounts is not allowed in workers' compensation claims, it would be an injustice to impose any punishment on discounts

taken prior to such a definitive ruling. If the Court declares the discounts invalid, the prospect of future punishment will itself be a sufficient deterrent.

### CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully submits that the Defendants-Appellants properly paid the provider in accordance with the PPO agreement that the provider voluntarily executed knowing that parties that would access such PPO agreement. Alternatively, should this court find for whatever reason that no discounts should have been taken, Amicus Curiae urges this court to reverse the award of penalties and attorney fees as the reliance by the Defendants-Appellants on the PPO contract was reasonable. Finally, Amicus Curiae submits that the amount of the punitive award in this case was excessive, and the principles for a punitive award are not served by imposing such penalties retroactively.

Respectfully submitted,

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VERIFICATION

Roger A. Javier, a resident of the Parish of Orleans, State of Louisiana, and a person of the full age of majority, who being first duly sworn by me, did depose and say:

He is an attorney for Amicus Curiae, the American Association of Independent Claims Professionals, in the above and foregoing, that all of the allegations contained herein are true and accurate and that a copy of this Brief has been mailed to the following:

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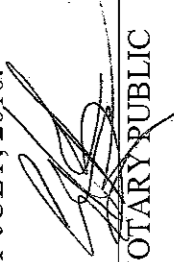
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This 13<sup>th</sup> day of July, 2010.

  
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SWORN TO AND SUBSCRIBED  
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OF JULY, 2010.

  
\_\_\_\_\_  
NOTARY PUBLIC