STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 2215

LAWRENCE D. TALBERT

VS.

G.A.T. AIRLINE GROUND SUPPORT, INC.

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JUDGMENT RENDERED: NOV - 3 2006

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ON APPEAL FROM THE
OFFICE OF WORKERS' COMPENSATION ADMINISTRATION, DISTRICT 5
DOCKET NUMBER 04-08566
STATE OF LOUISIANA

HONORABLE JASON OURSO,
WORKERS' COMPENSATION JUDGE

****

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BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

Whipple, J. concurs for reasons assigned.
Carter J. Concurs for reasons assigned by Whipple J.

MCDONALD, J.

This is an appeal from the Office of Workers' Compensation Administration. Lawrence D. Talbert filed a disputed claim for compensation against his employer, G.A.T. Airline Ground Support, Inc. (G.A.T.). On May 4, 2004, the parties entered into a consent judgment that found Mr. Talbert temporarily, totally disabled and provided for indemnity payments by G.AT. to Mr. Talbert, along with other, related matters.

In April 2005, Mr. Talbert filed a motion to accelerate benefits, in accordance with La. R.S. 23:1333, asserting that G.A.T. had failed to pay six or more successive weekly indemnity payments. After a hearing, the workers' compensation judge found that the consent judgment provided that G.A.T. would continue to pay benefits as long as benefits were compensable under the Louisiana Workers' Compensation Act and that G.A.T. had proven that Mr. Talbert was no longer temporarily, totally disabled. Thus, the workers' compensation judge denied the motion to accelerate benefits. Mr. Talbert appealed that judgment.

After a thorough review, we find that the record does not demonstrate that the workers' compensation judge was clearly wrong or manifestly erroneous in its judgment. Accordingly, finding no error, we affirm the judgment in accordance with Uniform Rules - Courts of Appeal, Rule 2-16.1.B. Costs are assessed against appellant, Lawrence D. Talbert.

AFFIRMED.

LAWRENCE D. TALBERT

VERSUS

G.A.T. AIRLINE GROUND SUPPORT, INC.

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Whipple, J. Concurring.

The majority affirms the workers' compensation judge's refusal to accelerate benefits pursuant to LSA-R.S. 23:1333 under a judgment awarding claimant TTDs as long as benefits were compensable, where the employer established that the claimant was no longer temporarily, totally disabled. While I find the better course would be to require that a payor defendant/employer file a request for modification once a judgment has been rendered or entered, under the applicable jurisprudence, the result reached by the majority is correct.

In Dixon v. King, 178 La. 1, 150 So. 385, 386 (1933), the Louisiana Supreme Court interpreted section 33 of the Workers' Compensation statute (now LSA-R.S. 23:1333) and determined that where the judgment itself provides for weekly disability benefits **payable only during the period of disability** and where, in fact, the claimant's disability has come to an end, the acceleration statute does not authorize a judgment making the whole amount of benefits which would have been payable executory. The court further stated that considering that the acceleration statute is in the nature of a penalty, it should be strictly construed. Dixon, 150 So. at 386.

Thereafter, in Lytell v. Strickland Transportation Company, Inc., 373 So. 2d 138, 142 (La. 1979), the supreme court discussed its holding in Dixon. The court noted that in Dixon, the employer had **improperly** ceased paying compensation without filing proceedings to modify the judgment. Nonetheless, the court restated the holding of Dixon that "the employer is not liable for the full mandatory penalties, if at the time the penalty is invoked to make the remaining weeks of the

disability judgment become executory and immediately due, **the employer proves that the employee is no longer disabled**." Lytell, 373 So. 2d at 142 (emphasis added).

Again in Duncan v. State, Department of Transportation and Development, 615 So. 2d 305, 311 (La. 1993), the supreme court stated that "in order for defendant to avoid a judgment against him for the maximum number of weekly payments, it was necessary for it to establish that **plaintiff's entitlement had already terminated** or would terminate at a future determinable date earlier than the maximum recovery period." (Emphasis added).

Accordingly, I agree with affirming the workers' compensation judge's refusal to accelerate payments where the judge ultimately determined that the employer proved that claimant was no longer disabled.

With regard to the Third Circuit case of Lewis v. Cornerstone Village, Inc., 2002-1162 (La. App. 3rd Cir. 5/21/03), 846 So. 2d 970, 972-973, the court therein did impose penalties and attorney's fees pursuant to LSA-R.S. 23:1201(G) where the LWCC terminated benefits without first seeking a modification of the compensation judgment pursuant to LSA-R.S. 23:1310.8. The Third Circuit held that the appropriate inquiry was not whether the claimant was still incapable of returning to work, but was whether the LWCC had terminated benefits without seeking a modification of the prior award. Lewis, 2002-1162, 846 So. 2d at 972. While this holding seems at odds with the holdings in Dixon, Lytell, and Duncan, I note that the Third Circuit was interpreting a different penalty statute (LSA-R.S. 23:1201, not the acceleration statute, LSA-R.S. 23:1333). Additionally, to the extent that Lewis is at odds with these other cases, we are bound by Dixon, Lytell and Duncan, in that they are the pronouncements of the supreme court.

Thus, I respectfully concur in the result.