

SUPREME COURT OF LOUISIANA

No. 98-C-0454

LINDA S. KELLY

VERSUS

CNA INSURANCE COMPANY, ET AL.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
SECOND CIRCUIT, PARISH OF OUACHITA**

Calogero, C.J. dissenting

The majority opinion seems to be saying that 1988 amendments to the Workers' Compensation Act preclude this plaintiff's claim. But then it goes on to say that it is the facts of the instant case, when compared to those of *Weber v. State*, 93-C-0062 (La. 4/11/94), 635 So.2d 188, which preclude a finding that this plaintiff should prevail. I find this an inconsistency, and troubling.

In support of the proposition that there is no cause of action in this case, the majority states that the amendments to the workers' compensation scheme have made things better for claimants like the plaintiff because now the hearing officers are capable of making binding orders instead of mere recommendations. By implication, the majority finds these amendments to have obviated the need for allowing recovery in tort for cases where the employer has intentionally refused to pay for medical care with the knowledge or substantial certainty that the claimant's condition will substantially worsen as a result of its refusal. These changes in the law may have somewhat improved the position of an employee whose employer refuses to pay for necessary medicals, by affording the hearing officer the authority to "order" such treatment. However, they have not solved the problem for the employee whose employer has been ordered by the hearing officer to pay for necessary medical care, and who chooses to appeal that order rather than follow it, with the result for the employee a severe worsening of the medical condition.

Consequently, the question still remains as to whether *Weber* is applicable or should be extended to non-death cases where the employer's intentional refusal to pay medical expenses is substantially certain to result in a significant worsening of the claimant's condition. This was the reason why we granted this writ, and I do not see that the majority has answered the question. If the majority wants to say that the Workers' Compensation Act, as it reads today, precludes recovery in such cases, then it should do so. If not, then I think the case should be sent back to

the district court so that the plaintiff can be allowed to amend her petition and present her evidence, just as the court of appeal decided. Then, the case can be decided on a full evidentiary record and proceed anew into the appellate courts. In my opinion, the court of appeal did not err in its decision granting the exception of no cause of action, then remanding to the hearing officer to allow the plaintiff to amend her petition.