

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 1437

BENNY HERNANDEZ

VERSUS

ASAP EMPLOYMENT SERVICE, INC.,
LOUISIANA CONSTRUCTION & INDUSTRY,
CF INDUSTRIES, AND EXCEL FAB

Judgment Rendered: OCT 18 2018

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On Appeal from
The Office of Workers' Compensation, District 9
Parish of Ascension, State of Louisiana
Trial Court No. 16-05792
The Honorable Elizabeth C. Lanier,
Workers' Compensation Judge Presiding

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Benny Hernandez
Downsville, Louisiana

Claimant/Appellant
In Proper Person

Robert A. Dunkelman
Jessica D. Cassidy
Shreveport, Louisiana

Counsel for Defendant/Appellee
Xcel Erectors, Inc.

* * * * *

BEFORE: GUIDRY, PETTIGREW, CRAIN,
THERIOT, AND PENZATO, JJ.

*Guidry, J. Dissents and assigns reasons.
Pettigrew, J. dissents (WJ.)*

*WJ
p/hp
act*

CRAIN, J.

In this workers' compensation proceeding, Benny Hernandez appeals a judgment sustaining peremptory exceptions of prescription and *res judicata*, and dismissing his claims against Xcel Erectors, Inc. with prejudice. We affirm.

On September 16, 2014, Hernandez was injured while working at a plant in Donaldsonville, Louisiana. Hernandez, represented by counsel, filed a disputed claim for compensation against his employer, ASAP Employment Services, Inc., and ASAP's insurer, Louisiana Construction and Industry Self Insurers Fund ("LCI"). The parties negotiated a settlement, which was approved by the workers' compensation judge (WCJ), and Hernandez's claim was dismissed with prejudice on May 16, 2016.

Four months later, on September 15, 2016, Hernandez, appearing in proper person, filed another disputed claim for compensation based on the same accident, again naming ASAP and LCI as defendants. In an amendment filed on December 5, 2016, Hernandez included a claim against Xcel. Xcel responded with peremptory exceptions of prescription and *res judicata*, which, following a hearing, were sustained. In a judgment signed on August 7, 2017, Hernandez's claims against Xcel were dismissed with prejudice. Hernandez appeals.

A claim for workers' compensation indemnity benefits prescribes one year from the date of the accident or, if benefits have been paid, one year from the last payment or, for a claim for supplemental earnings benefits, three years from the last payment. *See* La. R.S. 23:1209A; *Putman v. Quality Distribution, Inc.*, 11-0306 (La. App. 1 Cir. 9/30/11), 77 So. 3d 318, 321.¹ A claim for medical benefits prescribes one year after the accident or, if such payments have been made, three years from the date of the last payment. *See* La. R.S. 23:1209C. Prescription is

¹ Certain exceptions, not applicable herein, apply to injuries that do not immediately manifest after the accident. *See* La. R.S. 23:1209A(3)-(4).

interrupted by filing a formal claim with the office of workers' compensation. *See* La. R.S. 23:1209A(1) and B.

Hernandez's claim against Xcel was filed more than two years after the accident and does not allege the payment of any benefits. The claim is thus prescribed on its face. When a workers' compensation claim is prescribed on its face, the claimant bears the burden of showing prescription was suspended or interrupted in some manner. *Borja v. FARA*, 16-0055 (La. 10/19/16), 218 So. 3d 1, 11. When, as here, evidence is received at the hearing on the exception, the appellate court reviews the WCJ's factual findings under the manifest error-clearly wrong standard of review. *Theodore v. Iberville Parish School Board*, 12-0746 (La. App. 1 Cir. 1/8/13), 112 So. 3d 270, 271.

Hernandez introduced the following exhibits at the hearing: a page from an accident report issued on the day of the accident, September 16, 2014; a radiology report for a chest x-ray taken on September 18, 2014; a "Return to Work" form signed on September 22, 2014; a client contract with his attorney in the original proceeding dated May 1, 2015; a memorandum filed by Hernandez in opposition to the exception of prescription; and a letter from Hernandez's previous attorney summarizing a mediation conducted in the original proceeding. Additionally, Hernandez testified that Xcel paid one of his medical bills after the accident; however, he later acknowledged he did not know who paid the bill and was unable to obtain any records confirming such a payment.

The WCJ was not manifestly erroneous in finding Hernandez failed to prove an interruption or suspension of the prescriptive period applicable to his claim against Xcel. Hernandez's claim against Xcel is thus prescribed and was properly dismissed with prejudice. *See* La. R.S. 23:1209A(1); *Gomez v. Our Lady of the Lake Regional Medical Center*, 05-1916 (La. App. 1 Cir. 9/15/06), 943 So. 2d 499;

Ward v. McDermott, 04-1189 (La. App. 1 Cir. 6/10/05), 916 So. 2d 246, 250.² In light of this finding, we pretermitt consideration of the alternative exception of *res judicata*. This memorandum opinion is issued in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed to Benny Hernandez.

AFFIRMED.

² We note the suit record contains references to a tort suit filed by Hernandez against Xcel apparently based on the same accident. Although a timely-filed tort suit may, in some instances, interrupt prescription for a workers' compensation claim arising out of the same circumstances, the record contains no evidence of the filing date for the tort claim against Xcel. Instead, the record contains only a copy of a petition filed against an unrelated party who was later dismissed from that proceeding. The record does not reveal when Xcel was added as a party to that suit. Hernandez thus failed to prove he *timely* filed a tort suit *against Xcel* that interrupted prescription for his workers' compensation claim. *Compare Isaac v. Lathan*, 01-2639 (La. App. 1 Cir. 11/8/02), 836 So. 2d 191, 195.

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GUIDRY, J., dissents and assigns reasons.

 **GUIDRY, J., dissenting.**

It is a well-settled principle that the provisions of the workers' compensation scheme should be liberally interpreted in favor of the worker. Gomon v. Melancon, 06-2444, p. 4 (La. App. 1st Cir. 3/28/07), 960 So. 2d 982, 984, writ denied, 07-1567 (La. 9/14/07), 963 So. 2d 1005. The standard controlling review of an objection of prescription requires that the court of appeal strictly construe the statutes against prescription and in favor of the claim that is said to be extinguished. Naquin v. Bollinger Shipyards, Inc., 11-1217, p. 4 (La. App. 1st Cir. 9/7/12), 102 So. 3d 875, 878, writs denied, 12-2676, 12-2754 (La. 2/8/13), 108 So. 3d 87, 93. Louisiana Revised Statute 23:1317(A) provides that a workers' compensation judge is not bound by technical rules of evidence or procedure other than as provided by workers' compensation law. So while all findings of fact must be based upon competent evidence, the judge is to decide the merits of a controversy equitably, summarily, and simply. The jurisprudence states that the legislative intent behind La. R.S. 23:1317 is to materially relax evidentiary and procedural rules and subordinate procedural considerations to discovery of the truth and protection of substantial rights. Peters v. Ruskin Manufacturing, 39,535, p. 4 (La. App. 2d Cir. 4/6/05), 899 So. 2d 780, 782-83.

Thus, considering the summary nature of the proceedings below and the fact that Mr. Hernandez has litigated this matter as a self-represented party, I believe the majority errs in failing to consider the objection of prescription in light of the entire record. See Sprowl v. Taylor, 07-857 (La. App. 3d Cir. 1/30/08), 2008 WL 241574, at *1 (wherein the court stated relative to the appeal of a pro se litigant, "we will examine the record using the applicable standard of review to determine whether the judgment of the trial court was reasonable in light of the record in its entirety"). At the hearing on its exceptions, counsel for Xcel acknowledged that Mr. Hernandez had previously filed a tort suit against the company premised on the September 16, 2014 accident. Counsel further introduced documentation from the tort proceedings¹ that established that the tort suit was still pending not only when Mr. Hernandez filed the underlying disputed claim, but also when he amended the disputed claim to name Xcel as a defendant. See Isaac v. Lathan, 01-2639, p. 6 (La. App. 1st Cir. 11/8/02), 836 So. 2d 191, 195 (wherein this court concluded that where both the tort action and workers' compensation action against the defendant were based on the same occurrence and where the defendant had notice of the factual elements of the action, the timely-filed tort action against the defendant interrupted prescription as to the subsequent workers' compensation claim against the same defendant). Additionally, a stamped copy of the petition in the tort suit to which Xcel acknowledged being a party is contained in the record and shows that the tort suit was fax filed on September 16, 2015.²

¹ The documentation introduced into evidence by Xcel included reasons and a judgment dated February 22, 2017, wherein the Twenty-Third Judicial District Court (23rd JDC) dismissed with prejudice Mr. Hernandez's tort claims against SPX Cooling Technologies, Inc., Excel Erectors, Inc., and James Meidl. Although Xcel is referred to as "Excel" in the tort proceedings, it was indicated that both companies are one and the same at the hearing before the WCJ.

² While the party named in the petition was not Xcel and that party was eventually dismissed from the tort suit on July 8, 2016, the record also reveals that prior to the tort suit, Mr. Hernandez's filed a worker's compensation action on November 14, 2014, which was not dismissed until May 16, 2016. It has been held that a workers' compensation suit can likewise interrupt prescription on a tort suit, and that solidary liability can exist as to direct and statutory employers. See Parker v. Southern American Insurance Co., 590 So. 2d 55 (La. 1991).

Hence, as the record reveals the existence of a previously-filed, timely tort suit based on the September 16, 2014 accident, I believe the majority's affirmance of the judgment sustaining the peremptory exception raising the objection of prescription is clear error, and for these reasons, I respectfully dissent.

Moreover, the interruption of prescription as to one joint tortfeasor is effective to all joint tortfeasors. La. C.C. art. 2324(C). Hence, in light of Xcel's admission that it remained a party to the tort suit at the time Mr. Hernandez filed his second claim for workers' compensation, I do not believe evidence of exactly when Xcel was added to the tort suit is needed. See Parker, 590 So. 2d 55; Isaac, 01-2639 at p. 8, 836 So. 2d at 196.