

JIMMY BOYKIN * **NO. 2007-CA-0619**
VERSUS * **COURT OF APPEAL**
RAY PLESCIA AND LWCC * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 05-4185, DISTRICT "EIGHT"
Honorable Gwendolyn F. Thompson, Workers' Compensation Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and
Judge Leon A. Cannizzaro, Jr.)

CANNIZZARO, J., CONCURS WITH REASONS

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AFFIRMED

The Appellants, Ray Plescia and the Louisiana Workers' Compensation Corporation appeal the judgment of the trial court denying their Motion for Summary Judgment and granting a Motion for Summary Judgment in favor of the Appellee, Jimmy Boykin. We affirm

The facts of this case are not in dispute. Mr. Boykin was injured while employed by Mr. Plescia on May 8, 1996. The Louisiana Workers' Compensation Corporation (the "LWCC") insured Mr. Plescia and as a result of the accident, Mr. Boykin was awarded a total of \$236,000 in medical expenses and indemnity benefits. On May 13, 2005, the LWCC terminated Mr. Boykin's benefits when it learned that Mr. Boykin settled a case that the arose from Mr. Boykin's accident. Mr. Boykin filed a 1008 dispute in an effort to have his benefits reinstated. He then filed a Motion for Summary Judgment which was denied by the trial court and again by this Court holding that the "...judge did not err in the denying relator's motion for summary judgment pending discovery."¹ After discovery, both parties filed cross Motions for Summary Judgment. In a judgment signed November 28, 2006, the trial judge denied summary judgment as to the LWCC and granted as to Mr. Boykin finding that Mr. Boykin's termination of benefits was in error, that his benefits were to be fully reinstated, that the LWCC is not entitled to any credit from Mr. Boykin and that the LWCC was arbitrary and capricious in terminating Mr. Boykin's benefits.² It is from this judgment that the Mr. Plescia and the LWCC take the instant appeal.

¹ *Jimmy Boykin v. Ray Plescia, et al.*, 2006-C-0893

² The judgment was designated by the trial court as a "Partial Appealable Summary Judgment pursuant to C.C.P. 1915 B."

The Appellants offer the following three assignments of error, (1) that the trial court erred in denying the defendant's Motion for Summary Judgment when it is undisputed that there was no written consent by the LWCC of the tort litigation of the May 8, 1996 work accident; (2) that the trial court erred in granting the claimant's Motion for Summary Judgment and ignoring La. R.S. 23:1101 regarding the forfeiture of worker's compensation benefits; and (3) the trial court erred in holding that the LWCC was "arbitrary" and "capricious" for the proper termination of worker's compensation benefits in accordance with the Louisiana Workers' Compensation Act.

Although the Appellants offer three assignments of error, we find that the sole issue before this Court is whether the district court erred in granting Mr. Boykin's summary judgment in light of La. R.S. 23:1101.

Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is appropriate." *Independent Fire Insurance Co. v. Sunbeam Corp.*, 99-2181, 99-2257, p. 7 (La.2/29/00), 755 So.2d 226, 230; *Schroeder v. Board of Supervisors of Louisiana State University*, 591 So.2d 342, 345 (La.1991); *DeClues v. Carubba Engineering, Inc.* 2006-1336 (La.App. 4 Cir. 3/28/07) 955 So.2d 711.

The record reveals that Mr. Boykin hired Van Robichaux as an attorney to represent him in a third-party tort action arising from Mr. Boykin's accident. Mr. Robichaux filed Mr. Boykin's claim against the improper parties and the matter prescribed. Afterwards, Mr. Boykin hired Attorney Glynn Godwin to represent him in a malpractice case against Mr. Robichaux. Mr. Godwin dismissed the claim and it was later determined that the legal malpractice claim against Mr. Robichaux had

prescribed. From there, Mr. Boykin hired Attorney Dan Robin who represented him in a malpractice suit against Glynn Godwin which was settled on March 3, 2004, for a total of \$399,000. In an affidavit by Dan Robin he swore that the settlement for the legal malpractice claim was for Mr. Boykin's "pain and suffering, disability rating, loss of consortium claims of his wife and children and unpaid portions of his salary. The settlement did not include any funds for medical expenses and/or wage benefits paid by the LWCC."

La R.S. 23:1101, *Employee and employer suits against third persons; effect on right to compensation*, states:

A. When an injury or compensable sickness or disease for which compensation is payable under this Chapter has occurred under circumstances creating in some person (in this Section referred to as "third person") other than those persons against whom the said employee's rights and remedies are limited in R.S. 23:1032, a legal liability to pay damages in respect thereto, the aforesaid employee or his dependents may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the said employee or his dependents, relations, or personal representatives against such third person, nor be regarded as establishing a measure of damages for the claim; and such employee or his dependents, relations, or personal representatives may obtain damages from or proceed at law against such third person to recover damages for the injury, or compensable sickness or disease.

B. Any person having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit in district court against such third person to recover any amount which he has paid or becomes obligated to pay as compensation to such employee or his dependents. The recovery allowed herein shall be identical in percentage to the recovery of the employee or his dependents against the third person, and where the recovery of the employee is decreased as a result of comparative negligence, the recovery of the person who has paid compensation or has become obligated to pay compensation shall be reduced by the same percentage.

The amount of any credit due the employer may be set in the judgment of the district court if agreed to by the parties; otherwise, it will be determined pursuant to the provisions of R.S. 23:1102(A).

C. For purposes of this Section, **"third person" shall include any party who causes injury to an employee at the time of his employment or at any time thereafter provided the employer is obligated to pay benefits under this Chapter because the injury by the third party has aggravated the employment related injury.** (emphasis added).

La R.S. 23:1102A(1), *Employee or employer suits against third persons*

causing injury; notice of filing, states:

If either the employee or his dependent or the employer or insurer brings suit against a third person as provided in R.S. 23:1101, **he shall forthwith notify the other in writing of such fact and of the name of the court in which the suit is filed, and such other may intervene as party plaintiff in the suit.**

The trial court determined in its Reasons for Judgment that the lawsuit against Mr. Godwin did not constitute a third-party suit under the statute, it concluded:

Clearly the legal malpractice by Robichaux and the subsequent legal malpractice by Godwin did not cause injury to claimant **at the time of his employment.**³ Hence the lawsuit against Glyn [sic] Godwin was not against a “third person” because the timing of the events of malpractice occurred long after the employment ended.

The trial court is correct. This Court finds that the suit for malpractice filed by Mr. Boykin is a separate and distinct action that arose from his initial accident but manifested itself into a claim that went beyond the scope of his injuries. The LWCC’s argument that “Mr. Robichaux, his (Mr. Boykin’s) original legal malpractice attorney, caused him (Mr. Boykin) injury and the injury by the third

³ Emphasis added by the trial court.

party has aggravated the employment related injury,” is without merit. Further, the record supports that the LWCC had ample notice of the pending litigation and could have intervened if it so desired (even if the LWCC would have been dismissed by the district court).

Specifically, the LWCC seeks reimbursement of its \$236,000 lien for payment or in the alternative, a credit in the amount of \$300,000 of the settlement Mr. Boykin received. The LWCC maintains that Mr. Boykin admitted that he never received written approval of the settlement from his employer or the insurer as required by law. However, we have determined, as did the district court, that the malpractice suit and subsequent settlement was not a suit against a third-party under the statute discussed above and no written approval was warranted. Further, in a letter dated February 7, 2003, counsel for the LWCC assured Mr. Boykin that “[i]t is my understanding that Mr. Robin’s client is only seeking damages for pain and suffering and unpaid portions of his salary. If this is the case, then I agree that LWCC is not entitled to any portion of the third party settlement funds...”

A *de novo* review reveals that Mr. Boykin supported his Motion for Summary Judgment by submitting evidence of correspondence to the LWCC of his pending claim in which he received a response. Further, Mr. Plescia and the LWCC failed to provide the trial court with evidence sufficient to dispute Mr. Boykin’s claim and to support their Motion for Summary Judgment.

Decree

For the reasons above, we affirm the judgment of the district court granting summary judgment as to Jimmy Boykin. Further, we find that there was no error by the district court in denying summary judgment as to Mr. Ray Plescia and the

Louisiana Workers' Compensation Corporation. The Appellants are not entitled to any reimbursement of relief.

AFFIRMED