

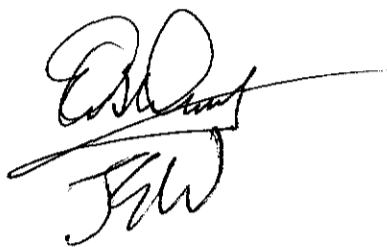
STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2012 CA 1978

LIONEL RICKS

VERSUS

HOMER COLLINS D/B/A HOMER'S CORNER



JUN 11 2013
Judgment Rendered: _____

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On Appeal from the
The Office of Workers' Compensation, District 6,
State of Louisiana
Docket No. 07-07751

The Honorable Gwendolyn F. Thompson,
Workers' Compensation Judge Presiding

* * * * *

J. Richard Kanuch
New Orleans, Louisiana

Attorney for Plaintiff/Appellant,
Lionel Ricks

Homer Collins D/B/A Homer's Corner
Covington, Louisiana

Defendant/Appellee,
In Proper Person

* * * * *

BEFORE: PARRO, WELCH, AND DRAKE, JJ.

Parro, J., concurs in the result.

DRAKE, J.

Claimant, Lionel Ricks, appeals a final judgment of the Office of Workers' Compensation ("OWC") that dismissed his claim for workers' compensation benefits for want of prosecution. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Claimant, Lionel Ricks, alleges he was involved in a work-related accident on October 17, 2006, while in the course and scope of his employment with Homer and Greg Collins D/B/A Homer's Corner. Mr. Ricks filed a disputed claim for compensation with the OWC on October 8, 2007. Mr. Ricks alleged that no wage benefits had been paid, nor had there been any authorization for his medical treatment. Mr. Ricks sought all workers' compensation benefits, including medical and permanent disability benefits.

On December 4, 2009, the Workers' Compensation Judge ("WCJ") for the OWC, District 5, dismissed Mr. Ricks's claim for failure to prosecute and ordered that his claim could be reinstated upon a showing of good cause within thirty days of the receipt of the order of dismissal. On February 1, 2010, Mr. Ricks filed a motion to reinstate claim and set the claim for trial on the merits. Following a hearing on his motion, the WCJ reinstated Mr. Ricks's claim on April 23, 2010, and transferred his case to the OWC, District 6. After his case was transferred, a hearing on a motion to dismiss Mr. Ricks's suit for failure to prosecute his claim was held on November 12, 2010. The WCJ ruled that the motion was moot, as Mr. Ricks was filing a request for a preliminary default judgment against his former employers.

A hearing on the confirmation of the preliminary default was scheduled for February 11, 2011. Mr. Ricks requested a continuance, which the WCJ granted, re-setting the hearing for April 1, 2011. Prior to the April 1, 2011 hearing, Mr.

Ricks requested a second continuance, which the WCJ granted, re-scheduling the confirmation of the preliminary default for July 22, 2011. At the hearing on July 22, 2011, the WCJ called Mr. Ricks's attorney, who was a "no-show" at court that day, to confirm that he could not attend the hearing. The WCJ continued the hearing on the confirmation of the preliminary default to September 19, 2011.

On September 19, 2011, no party or attorney involved in the case attended the hearing on the confirmation of the preliminary default. The WCJ ordered that Mr. Ricks show cause on October 21, 2011, why his claim should not be dismissed for failure to appear at the hearing held on September 19, 2011. The WCJ further ordered that Mr. Ricks's attorney show cause why he should not be assessed \$200 in court reporter fees. On the day of the dismissal hearing, Mr. Ricks's attorney called the WCJ and requested a continuance. The WCJ continued the hearing to December 7, 2011. The notices for this hearing were not sent out, so the hearing was continued to January 27, 2012.

Following the January 27, 2012 hearing regarding the dismissal of Mr. Ricks's claim, the WCJ ruled that his claim was not dismissed for lack of prosecution. The WCJ scheduled a phone status conference for April 20, 2012, to determine whether Mr. Ricks would voluntarily dismiss his claim for workers' compensation benefits. Following the phone status conference, neither Mr. Ricks nor his former employer provided the WCJ with any voluntary dismissal or settlement documents. The WCJ then ordered Mr. Ricks to show cause on June 22, 2012, why his claim should not be dismissed. Mr. Ricks requested a continuance of the June 22, 2012 dismissal hearing. The WCJ denied the continuance. Following the hearing, the WCJ dismissed Mr. Ricks's claim on June 27, 2012, without prejudice, for want of prosecution. Mr. Ricks filed a motion to reinstate claim on August 23, 2012. That same day, the WCJ issued an order

denying Mr. Rick's motion to reinstate claim. Mr. Ricks now appeals the June 27, 2012 dismissal of his claim for want of prosecution.

DISCUSSION

Pursuant to the Louisiana Workers' Compensation Act, a claimant has one year from the date of the accident to file a claim for compensation and medical benefits. La. R.S. 23:1209(A)(1). A WCJ may dismiss a workers' compensation claim, without prejudice, after a contradictory hearing for several reasons, including when no responsive pleadings have been filed and no default entered within sixty days after service of process, and when a claim has been pending six months without proceedings being taken within such period. Following an order of dismissal, a WCJ shall allow for reinstatement of the action within thirty days, for good cause shown. La. Admin. Code tit. 40, pt. I, § 5705(C); *See Drain v. Mid-South Wood Preservers, Inc.*, 27,307 (La. App. 2 Cir. 9/27/95), 661 So. 2d 632, 633. Additionally, when a petition for workers' compensation benefits is initiated, unless the claimant, in good faith, requests a hearing and final determination within five years from the date the petition is initiated, that claim shall be barred and dismissed by the OWC for want of prosecution, which operates as a final adjudication of the right to claim workers' compensation benefits. La. R.S. 23:1209(D).

Mr. Ricks argues that his claim cannot be dismissed for lack of prosecution pursuant to Louisiana Revised Statutes 23:1209(D) and because five years have not elapsed in which he failed to request a hearing and a final determination. In support, he cites the case of *Bruce v. Becnel*, 98-1349 (La. App. 5 Cir. 10/13/99), 747 So. 2d 647, writ denied, 99-3250 (La. 1/28/00), 753 So. 2d 830. The *Bruce* case stands for the proposition that when a tort suit was filed prior to the workers' compensation claim, the employee's filing of a tort suit against his statutory employer interrupted prescription as to a subsequently-filed workers' compensation

claim by the employee against the statutory employer. *Bruce v. Becnel*, 747 So. 2d at 649-50. Accordingly, on appeal, the court concluded that the employee's workers' compensation claim against the statutory employer was not barred by prescription. *Id.*; *Isaac v. Lathan*, 2001-2639 (La. App. 1 Cir. 11/8/02), 836 So. 2d 191, 195. The *Bruce* case is distinguishable from the case before us, as there are no issues of the interruption of prescription due to a previously filed related tort suit.

In this case, Mr. Ricks initiated his workers' compensation claim on October 8, 2007, which was within one year of his alleged work-related accident on October 17, 2006. The OWC dismissed Mr. Ricks's claim on December 4, 2009. On February 1, 2010, Mr. Ricks filed a motion to reinstate claim and set the claim for trial on the merits. The WCJ reinstated his claim on April 23, 2010, and transferred his case to the OWC, District 6. Also, a hearing on the confirmation of a preliminary default obtained by Mr. Ricks was originally scheduled for February 11, 2011. While that hearing date was continued several times, there is no indication that counsel for Mr. Ricks attempted, in bad faith, to prolong this litigation. Furthermore, the record indicates that Mr. Ricks's requests for continuances of hearings on both the confirmation of the preliminary default and the dismissal of his claim resulted because counsel for Mr. Ricks was waiting to receive certified medical records. The case was dismissed for non-prosecution on June 27, 2012. We acknowledge that there have been continuances and delays in this matter; however, it is clear that on the date the WCJ dismissed the claim for lack of prosecution, five years have not elapsed since Mr. Ricks filed his petition and requested hearings or a final determination of his claim. Accordingly, this claim cannot be dismissed for lack of prosecution pursuant to Louisiana Revised Statutes 23:1209(D).

DECREE

For the foregoing reasons, the judgment of the OWC dismissing the suit of Plaintiff/Appellant, Lionel Ricks, is reversed. We remand the case to the OWC for further proceedings consistent with this opinion. All costs of this appeal are assessed to Defendant/Appellee, Homer Collins D/B/A Homer's Corner.

REVERSED AND REMANDED.