NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JEW

NUMBER 2014 CA 0033

NATIONAL UNION FIRE INSURANCE COMPANY

VERSUS

LOUISIANA WORKERS' COMPENSATION SECOND INJURY BOARD

Judgment Rendered: SEP 19 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 615,103

Honorable Todd Hernandez, Judge

* * * * * * *

KUHN, J CONCURS & ASSIGNS REASONS

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Pettigrew J. Concurs with the results, and assigns reasons

WELCH, J.

The defendant, Louisiana Workers' Compensation Second Injury Board ("the Board"), appeals the judgment of the district court granting a motion for summary judgment filed by the plaintiff, National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and determining that National Union established that it was entitled to reimbursement from the Board for workers' compensation benefits it paid to Louis Charles Kliebert, Jr. For reasons that follow, we reverse the judgment of the district court.

FACTUAL AND PROCEDURAL HISTORY

On February 22, 2010, Mr. Kliebert was involved in a work-related accident during the course and scope of his employment with Noranda Alumina, LLC ("Noranda"). Mr. Kliebert was subsequently diagnosed with right shoulder impingement, L4-5 and L5-S1 degenerative disc disease, low back pain, left lower extremity radiculopathy, and L4-5/L5 herniated disc. As a result of those conditions, Mr. Kliebert underwent surgery on his shoulder and eventually, epidural steroid injections for his lower back.[1] On November 24, 2010, Mr. Kliebert was involved in another work-related accident during the course and scope of his employment with Noranda. National Union, Noranda's workers' compensation insurance carrier at the time of the accident, commenced paying weekly workers' compensation benefits to Mr. Kliebert and medical expenses on his behalf.

National Union filed a claim with the Board requesting reimbursement from the Workers' Compensation Second Injury Fund ("the Second Injury Fund") for payments it made.[2] The Board denied the claim on August 9, 2012, therefore, on

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[1] The record does not reflect whether Mr. Kliebert was paid workers' compensation benefits or medical expenses resulting from this accident and injuries.

[2] The Board is a legislatively created entity that administers the Second Injury Fund. See La. R.S. 23:1372 and La. R.S. 23:1377.

September 5, 2012, National Union filed a petition to appeal the Board's denial of the claim in district court.[3] In the petition, National Union essentially claimed that Mr. Kliebert had a preexisting permanent partial disability prior to the November 24, 2010 accident of which Noranda was aware, and that the injuries from the November 24, 2010 accident would not have occurred but for the preexisting permanent partial disability. National Union alternatively claims that the disability resulting from the November 24, 2010 accident and injury in conjunction with the preexisting permanent partial disability was materially and substantially greater than that which would have resulted had the preexisting permanent partial disability not been present and National Union has been required to pay and has paid compensation for that greater disability.[4] Thus, National Union claimed that it was entitled to the relief provided by the Second Injury Fund.

The Board filed an answer and asserted that National Union was not entitled to reimbursement from the Second Injury Fund because it did not meet the requirements for reimbursement relief as set forth in La. R.S. 23:1371 and 23:1378. Thereafter, on April 30, 2013, National Union filed a motion for summary judgment on the basis that the undisputed facts established that National Union was entitled to reimbursement from the Second Injury Fund.[5] By judgment

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[3] See La. R.S. 23:1378(E) (providing that although the decision of the Board is final, any party may appeal the Board's decision to the Nineteenth Judicial District Court within thirty days after the date of the decision by the Board, the trial of which shall be *de novo*); **Home Depot v. State Workers' Comp. Second Injury Bd.**, 2005-0674 (La. App. 1st Cir. 3/29/06), 934 So.2d 125, 127 (interpreting a trial *de novo*, as set forth in La. R.S. 23:1378(E), to mean "an entire trial, from the beginning, wherein the whole case is retried as if there had been no prior trial.")

[4] National Union's original petition was amended to correct the date of the subsequent work-related accident and injury.

[5] While the appeal of the Board's decision to the Nineteenth Judicial District Court is required to be by trial *de novo*, see La. R.S. 23:1378(E), summary judgment in such an appeal is appropriate when there are no genuine issues of material fact. That is because "[t]he summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of ***every action***, except those disallowed by [La. C.C.P. art.] 969." La. C.C.P. art. 966(A)(2). Since an appeal of a decision of the Board is not listed in La. C.C.P. art. 969 as one of the cases for which summary judgment cannot be granted, National Union was entitled to "move for summary judgment in [its] favor for all or part of the relief for which [it] has prayed." See La. C.C.P. art. 966(A)(1).

rendered on October 9, 2013, the district court rendered judgment granting National Union's motion for summary and finding that all required elements for reimbursement from the Board had been met. A final judgment in accordance with the district court's ruling was signed on October 9, 2013, and it is from this judgment that the Board has appealed.[6]

On appeal, the Board asserts that the district court erred in: (1) finding that Mr. Kliebert had a preexisting permanent partial disability prior to his subsequent injury on November 24, 2010; (2) finding that Noranda had knowledge of Mr. Kliebert's permanent partial disability prior to his subsequent injury on November 24, 2010; (3) finding that Nation Union proved that there was a merger between Mr. Kliebert's preexisting permanent partial disability and his subsequent injury on November 24, 2010; and (4) finding that National Union proved all three statutory requirements for reimbursement from the Board and in granting National Union's motion for summary judgment.

II. LAW AND DISCUSSION

A. Summary Judgment

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Granda v. State Farm Mutual Insurance Company**, 2004–2012 (La. App. 1st Cir. 2/10/06), 935 So.2d 698, 701. Summary judgments are reviewed on appeal *de novo,* with the appellate court using the same criteria that govern the district court's determination of whether summary judgment is appropriate. *Id.* Summary judgment is proper only

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[6] National Union filed a Motion to Strike an attached document (and comments relating to that document) from the Board's appellate brief on the basis that the attachment at issue was not contained in the record. As a court of review, this court may consider on appeal only that which is contained in the record and is unable to review evidence not in the record or to accept new evidence. See **Denoux v. Vessel Mgmt. Servs., Inc.**, 2007-2143 (La. 5/21/08), 983 So.2d 84, 88; **State v. Vampran**, 491 So.2d 1356, 1364 (La. App. 1st Cir.), writ denied, 496 So.2d 347 (La. 1986). Because the attachment at issue is not contained the record, we grant National Union's motion to strike the exhibit from the Board's original appellate brief, as well as any references to that exhibit in the Board's brief.

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits admitted for purposes of the motion for summary judgment, show there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C .P. art. 966(C)(2); **Buck's Run Enterprises Inc. v. MAPP Construction, Inc.**, 99–3054 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn–Dixie Louisiana, Inc.**, 2000–0078 (La. 6/30/00), 764 So.2d 37, 40; see also La. C.C.P. art. 967(B).

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038 (La. App. 1st Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

B. Entitlement to Reimbursement from the Second Injury Fund

The motion for summary judgment in this case arose in the appeal by National Union from the Board's denial of a claim for reimbursement from the Second Injury Fund for workers' compensation benefits paid. Generally, when an employee is injured while in the course and scope of employment, an employer or its insurer must pay compensation benefits to the employee pursuant to La. R.S. 23:1031, *et seq.* However, in order "to encourage the employment of physically handicapped employees who have a permanent, partial disability by protecting

employers ... and casualty insurers from excess liability for workers' compensation for disability [which may result] when a subsequent injury to such an employee merges with his preexisting permanent physical disability to cause a greater disability than would have resulted from the subsequent injury alone," the legislature created the Second Injury Fund. La. R.S. 23:1371(A); see also La. R.S. 23:1377.

An employer who "knowingly employs, re-employs, or retains in his employment" an employee who suffers from a permanent partial disability, as defined by statute, is entitled to be reimbursed from the Second Injury Fund if that employee "incurs a subsequent injury arising out of and in the course of his employment resulting in a greater liability due to the merger of the subsequent injury with the preexisting permanent partial disability." La. R.S. 23:1378(A). See also **Nabors Drilling USA v. Davis**, 2003-0136 (La. 10/21/03), 857 So.2d 407, 413.

The employer's or insurer's right to reimbursement from the Second Injury Fund is not automatic. **Nabors Drilling USA**, 857 So.2d at 416. The employer is not entitled to reimbursement from the Second Injury Fund merely because an employee with a preexisting disability is subsequently injured. *Id.* In order to be reimbursed from the Second Injury Fund, an employer or insurer has the burden of proving three elements. *Id.*

First, the employer or insurer must prove that the employee had a preexisting permanent partial disability at the time of the subsequent injury. *Id.;* La. R.S. 23:1378(A). A permanent partial disability is "any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment, to retention by an employer, or to obtaining re-employment if the employee becomes unemployed." La. R.S. 23:1371.1(5). In addition, La. R.S. 23:1378(F) further provides for a presumption

of permanent partial disability when the condition is one of thirty-four enumerated conditions of which the employer had knowledge prior to the subsequent injury.[7] One of the enumerated conditions is a "[r]uptured or herniated intervertebral disc." La. R.S. 23:1378(F)(25).

Second, the employer or insurer must prove that the employer had actual knowledge of the employee's preexisting permanent partial disability before the occurrence of the injury forming the basis of the compensation claim. La. R.S. 23:1378(A)(2); see also **Nabors Drilling USA**, 857 So.2d at 416. To satisfy this element, the employer or insurer must prove that the employer knowingly hired a worker with a permanent partial disability or that he acquired actual knowledge of the permanent partial disability during the worker's employment but prior to the subsequent injury and that he retained the employee notwithstanding knowledge of the permanent partial disability.[8] See **Louisiana Workers' Compensation Corporation v. Louisiana Workers' Compensation Second Injury Board**, 2008-1276 (La. App. 1st Cir. 12/23/08), 5 So.3d 211, 215.

Finally, the employer or insurer must prove that the permanent partial disability merged with the injury to produce a greater liability or disability. La. R.S. 23:1371(A); La. R.S. 23:1378(A); **Nabors Drilling USA**, 857 So.2d at 416. This last element requires proof that the subsequent injury would not have occurred but for the preexisting permanent partial disability or that the disability resulting from the subsequent injury in conjunction with the preexisting permanent partial disability is materially and substantially greater than that which would have resulted had the preexisting permanent partial disability not been present and the

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[7] The "condition" must be diagnosed by a qualified physician within the scope of his practice or another person properly licensed and certified to make such diagnosis. See La. R.S. 23:1378 (F).

[8] For injuries occurring after December 31, 2010, the employer's actual knowledge of the employee's preexisting permanent partial disability must be established as set forth in La. R.S. 23:1378(A)(2).

employer has been required to pay and has paid additional medical or indemnity benefits for that greater disability. La. R.S. 23:1371(C).

C. Discussion of the Record

In this case, National Union filed the motion for summary judgment and is the party that will bear the burden of proof at trial. Thus, National Union's burden on the motion for summary judgment was to show that there was no genuine issue of material fact that (1) Mr. Kliebert had a preexisting permanent partial disability as defined by La. R.S. 23:1371.1(5) or a diagnosed condition for which there was a presumption of permanent partial disability, as set forth in La. R.S. 23:1378(F), at the time of his subsequent injury on November 24, 2010; (2) that Noranda had actual knowledge of Mr. Kliebert's preexisting permanent partial disability prior to Mr. Kliebert's subsequent injury of November 24, 2010; and (3) that Mr. Kliebert's preexisting permanent partial disability merged with the subsequent injury of November 24, 2010 to produce a greater disability, *i.e.*, that the injuries from the November 24, 2010 work-related accident would not have occurred but for his preexisting permanent partial disability **or** that the disability resulting from his November 24, 2010 accident in conjunction with his preexisting permanent partial disability is materially and substantially greater than that which would have resulted had the preexisting permanent partial disability not been present and Noranda (through National Union) has been required to pay and has paid additional medical or indemnity benefits for that greater disability.

In support of its motion for summary judgment, National Union relied on the affidavits of Dr. Kyle Girod, Dr. Kevin McCarthy, and Shawn Kostelak.[9] Dr.

[9] In support of its motion for summary judgment, National Union also offered copies of Mr. Kliebert's medical records from Baton Rouge Orthopedic Clinic, St. James Parish Hospital, River Region Orthopedics, and River Parishes Hospital. However, those records were not affidavits or sworn to in any way, were not certified or attached to an affidavit, and therefore, had no evidentiary value on a motion for summary judgment. Accordingly, we find those records are not proper summary judgment evidence and will not be considered by this court on a *de novo* review. See **Bunge North America, Inc. v. Board of Commerce & Industry, and**

Girod is a board certified orthopedic surgeon, and in that capacity, he rendered medical treatment to Mr. Kliebert for the injuries that he sustained in his work-related accident on November 24, 2010. Dr. Girod stated in his affidavit that he was aware that Mr. Kliebert had a pre-existing L4-5 and L5-S1 herniated nucleus pulposus and left lumbar radiculopathy, that the pre-existing L4-5 and L5-S1 herniated nucleus pulposus and left lumbar radiculopathy constituted a pre-existing permanent partial disabilities, and that the preexisting L4-5 and L5-S1 herniated nucleus pulposus and left lumbar radiculopathy merged with the subsequent herniated nucleus pulposus at L4-5 and L5-S1, lumbar pain and lumbar radiculopathy resulting from the November 24, 2010 injury to create a materially and substantially greater disability.

According to the affidavit of Dr. McCarthy, he is a board certified orthopedic surgeon, and in that capacity, he evaluated Mr. Kliebert for a second medical opinion for the injuries Mr. Kliebert sustained in his work-related accident on November 24, 2010. Dr. McCarthy stated that he was aware that Mr. Kliebert had preexisting L4-5 and L5-S1 degenerative disc disease with herniated nucleus pulposus and left lumbar radiculopathy, that the preexisting L4-5 and L5-S1 degenerative disc disease with herniated nucleus pulposus and left lumbar radiculopathy constituted preexisting permanent partial disabilities, and that the preexisting L4-5 and L5-S1 degenerative disc disease with herniated nucleus pulposus and left lumbar radiculopathy merged with the subsequent degenerative disc changes, herniated nucleus pulposus at L4-5 and L5-S1, lumbar pain and lumbar pain and lumbar radiculopathy resulting from the November 24, 2010 injury to create a materially and substantially greater disability.

Louisiana Department of Economic Development, 2007-1746 (La. App. 1st Cir. 5/2/08), 991 So.2d 511, 527, writ denied, 2008-1594 (La. 11/21/08), 996 So.2d 1106; **Pecue v. Plantation Management Co., L.L.C.**, 2013-0977 (La. App. 1st Cir. 2/18/14) (*unpublished*), writ denied, 2014-0586 (La. 4/25/14), 138 So.3d 1323.

Shawn Kostelak was the Production Manager for Noranda prior to November 24, 2010 and as the Production Manager, he knew Mr. Kliebert, who was an employee of Noranda. Mr. Kostelak stated that, prior to November 24, 2010, he would have been in a position to hire and fire[10] Mr. Kliebert and he was aware that Mr. Kliebert had a work-related accident on February 22, 2010, while working for Noranda, wherein he sustained right shoulder impingement, L4-5 and L5-S1 degenerative disc disease, left lower extremity radiculopathy, and L4-5 and L5-S1 disc herniations. Mr. Kostelak further stated that the prior right shoulder impingement, L4-5 and L5-S1 degenerative disc disease, left lower extremity radiculopathy, and L4-5 and L5-S1 disc herniations constituted hindrances to Mr. Kliebert's employment at Noranda prior to the November 24, 2010 accident because Mr. Kliebert was restricted to sedentary or light duty pursuant to the February 22, 2010 work injury.

In opposition to National Union's motion for summary judgment, the Board relied on the deposition testimony of Dr. Girod.[11] During Dr. Girod's deposition, he testified that Mr. Kliebert first presented to him on May 3, 2010 and reported a history of back and leg pain stemming from an accident at work. Upon examination, he found that Mr. Kliebert had tenderness in his lower back, specifically in the left lumbar paraspinal muscles; that he was limited somewhat with his motion, *i.e.*, flexion and extension; that he had a "small limp" on the left side; that he had some tenderness around the "left sciatic notch"; and that he had

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[10] See La. R.S. 23:1371.1(2) (defining authority to hire and fire as "the authority of the representative of the employer who plays an integral part in fulfilling the business of the employer with the responsibility to have closely controlled the injured employee regarding his physical conduct and time, as well as providing significant input into the hiring, retention, and firing decisions regarding that employee).

[11] The Board also relied on Mr. Kliebert's medical records from Baton Rouge Orthopedic Clinic. However, those records were not affidavits or sworn to in any way, were not certified or attached to an affidavit, and therefore, had no evidentiary value on a motion for summary judgment. Accordingly, we find those records are not proper summary judgment evidence and will not be considered by this court on a *de novo* review. See **Bunge North America, Inc.**, 991 So.2d at 527; **Pecue**, 2013-0977; footnote 9.

pain while raising his leg straight, although strength and sensation were maintained. Dr. Girod ordered x-rays and noted a small amount of "disc space collapse at L5-S1 level." Dr. Girod also reviewed the results of Mr. Kliebert's previous MRI and noted that Mr. Kliebert had some disc degeneration at L4-5 and L5-S1 levels and that he had disc herniations (to the left side) at both levels, which were trauma related. Dr. Girod testified that he maintained Mr. Kliebert on "light duty at work" and that he prescribed Mr. Kliebert anti-inflammatory and pain medications and physical therapy.

Dr. Girod testified that he saw Mr. Kliebert again on May 25, 2010 and that Mr. Kliebert reported that he had gone to physical therapy, but it had increased his pain. On examination, Dr. Girod found Mr. Kliebert was "pretty much the same" although he was having more subjective findings in his lower extremities. Dr. Girod testified that at this appointment, his assessment of Mr. Kliebert was the same—L4-5 and L5-S1 nucleus pulposis with the back pain and radiculopathy—and that he recommended epidural steroid injections, which Mr. Kliebert did receive.[12]

On August 9, 2010, Dr. Girod saw Mr. Kliebert again and on that date, Mr. Kliebert reported that was having no radicular symptoms at all and Dr. Girod found that he had "very mild ... tenderness to palpation of his low back." Dr. Girod stated that his assessment of Mr. Kliebert was the same, but that his "lower extremity radiculopathy had resolved[,]" and Dr. Girod released Mr. Kliebert to light-duty work.[13] When Dr. Girod saw Mr. Kliebert on October 9, 2010, Mr. Kliebert still had a "mild amount of back pain," his "leg pain was still resolved[,]" and therefore, Dr. Girod returned him to work without restrictions.

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[12] In the meantime, Mr. Kliebert apparently also had surgery on his shoulder.

[13] According to Dr. Girod, Mr. Kliebert may have been out of work at the time due to his shoulder surgery.

Dr. Girod testified that he saw Mr. Kliebert on December 2, 2010 wherein Mr. Kliebert reported that he had returned to work, that he had pulled on "something," and that his pain had returned. Mr. Kliebert reported that his pain was worse in his back (mostly in the center of his low back) and that he had a little leg pain. Upon examination, Dr. Girod found no objective changes in Mr. Kliebert when compared to a visit on October 11, 2010, where Mr. Kliebert had been released to full duty. But because Mr. Kliebert was having subjective complaints of pain, Dr. Girod placed Mr. Kliebert on light duty at work. Dr. Girod stated that he also recommended another steroid injection, but that it was not performed at that time because "they considered it a new injury."

When Dr. Girod saw Mr. Kliebert again on January 20, 2011, Mr. Kliebert reported additional leg pain and was having "basically the same pain pattern" as when he first saw Mr. Kliebert on May 3, 2010. Another MRI on February 7, 2011 revealed that Mr. Kliebert "[s]till had left sided L4-5, L5-S1 herniated nucleus pulposis with impingement of the left L5 and S1 nerve roots." After the MRI, Dr. Girod saw Mr. Kliebert on February 14, 2011 and again recommended steroid injections. After Mr. Kliebert had the steroid injection, Dr. Girod saw Mr. Kliebert on April 18, 2011, and Mr. Kliebert reported that he still had some back and left leg pain, but that the pain had improved and Mr. Kliebert believed that he could go back to work. Dr. Girod recommended a work hardening program through physical therapy so that he could return to full duty at work. Dr. Girod testified that he last saw Mr. Kliebert around July 28, 2011 and that Mr. Kliebert still had back pain, but "his work hardening wasn't improved."

With regard to Mr. Kliebert's "second injury," Dr. Girod opined that Mr. Kliebert "got into a position where he reaggravated [his back]. ***It didn't make his disc herniations worse.*** It just made him more symptomatic from the condition

that was already present." (Emphasis added). In other words, Dr. Girod opined that "the second [injury] was just a temporary aggravation of his first [injury]."

Based on our *de novo* review of the record before us, we find no genuine issues of material as to whether Mr. Kliebert had a preexisting permanent partial disability prior to November 24, 2010, the date of his subsequent injury, and that Noranda had knowledge of that preexisting permanent partial disability prior the subsequent injury. The affidavit of Dr. McCarthy and the affidavit and deposition testimony of Dr. Girod establishes that Mr. Kliebert was diagnosed with herniated discs at L4-L5 and L5-S1—a condition for which there was a presumption of permanent partial disability—prior to the subsequent injury of November 24, 2010. See La. R.S. 23:1378. The affidavit of Mr. Kostelak, the authorized representative of Noranda, establishes that he and Noranda had knowledge of this condition or preexisting permanent partial disability prior to the subsequent injury.

However, we find that genuine issues of material fact exist as to whether Mr. Kliebert's preexisting permanent partial disability merged with the subsequent injury of November 24, 2010 to produce a greater disability than that which would have resulted had the preexisting permanent partial disability not been present. The affidavits of Drs. Girod and McCarthy state that Mr. Kliebert's condition was a preexisting permanent partial disability and that this condition merged with the subsequent degenerative disc changes, herniated nucleus pulposus at L4-5 and L5-S1, lumbar pain and lumbar radiculopathy from the November 24, 2010 injury to create a materially and substantially greater disability. However, according to Dr. Girod's deposition testimony, Mr. Kliebert's second injury *did not make his condition worse*, bur rather, it made his condition more symptomatic—or rather, it *temporarily aggravated* the condition that was already present. Thus, the Board produced evidence of a material factual dispute as to whether Mr. Kliebert's second injury merged to produce a "materially and greater disability."

Furthermore, we note that National Union failed to offer any evidence establishing that Noranda or National Union has been required to pay and has paid additional medical or indemnity benefits for a greater disability, as required by La. R.S. 23:1371.[14] Thus, summary judgment determining that National Union established that it was entitled to reimbursement from the Board for workers' compensation benefits it paid on behalf of Mr. Kliebert was improper.

CONCLUSION

For all of the above and foregoing reasons, the October 9, 2013 judgment of the district court granting National Union's motion for summary and finding that all required elements for reimbursement from the Board had been met is hereby reversed and this matter is remanded for further proceedings.

All costs of this appeal are assessed to the plaintiff/appellee, National National Union Fire Insurance Company of Pittsburgh, PA.

MOTION TO STRIKE GRANTED; JUDGMENT REVERSED AND REMANDED.

[14] We note that in lieu of providing evidence to establish that the disability resulting from Mr. Kliebert's November 24, 2010 accident in conjunction with his preexisting permanent partial disability was materially and substantially greater than that which would have resulted had the preexisting permanent partial disability not been present, and that Noranda or National Union has been required to pay and has paid additional medical or indemnity benefits for that greater disability, National Union could have alternatively established that the injuries from Mr. Kliebert's November 24, 2010 work-related accident would not have occurred but for his preexisting permanent partial disability. However, the record contains no such evidence of this alternative element of merger.

NATIONAL UNION FIRE INSURANCE COMPANY	**FIRST CIRCUIT**
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LOUISIANA WORKERS' COMPENSATION SECOND INJURY BOARD	**STATE OF LOUISIANA**
	NO. 2014 CA 0033

KUHN, J., concurs.

Appellate review of a decision of the Workers' Compensation Second Injury Board (the Board) is governed by La. R.S. 23:1378E, which provides, in pertinent part:

> The decision of the board shall be final; however, an appeal therefrom may be taken by any of the parties within thirty days after the date of the decision of the board.... The appeal shall be to the Nineteenth Judicial District Court, parish of East Baton Rouge. All appeals in all such cases shall be tried de novo.

Pursuant to express statutory provisions governing the appeal of decisions of the Board, the review by the district court shall be by trial de novo. **Black's Law Dictionary** 392 (5th ed. 1979) defines the term de novo: "Anew; afresh; a second time." A de novo trial is defined as "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered." ***Id.*** It is clear the statute contemplates an entire trial, from the beginning, wherein the whole case is retried as if there had been no prior trial. ***Home Depot v. State Workers' Comp. Second Injury Bd.***, 2005-0674 (La. App. 1st Cir. 3/29/06), 934 So.2d 125, 127.

In ***Home Depot***, this court noted that even if the employer's motion for summary judgment were properly reviewable it was untimely on its face. ***Id.*** Apparently relying on this language to undertake a full blown review of the propriety of the district court's grant of summary judgment, the lead opinion

overlooks the actual holding, i.e., that the district court committed reversible error by simultaneously considering both the employer's motion for summary judgment and summarily affirming the Board's decision because there was no opportunity for a trial anew under the procedure undertaken by the district court. This approach fails to appreciate that the reference to the mandatory summary-judgment filing time was to underscore the district court's error of *simultaneously* hearing both the motion for summary judgment and the merits of the Board's appeal. See ***Home Depot***, 934 So.2d at 127.

Because the lead opinion properly remands for a trial on the merits of the appeal by the employer's insurer to the district court for a trial de novo, I concur in the result.

NATIONAL UNION FIRE INSURANCE COMPANY

VERSUS

LOUISIANA WORKERS' COMPENSATION SECOND INJURY BOARD

NUMBER 2014 CA 0033

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: JUDGES KUHN, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J., CONCURS WITH THE RESULTS, AND ASSIGNS REASONS.

I concur in the results reached by the majority but for different reasons.

This case involves an appeal from a decision of the Louisiana Workers' Compensation Second Injury Board (Board) to the 19th Judicial District Court. This type of appeal is controlled by Louisiana R.S. 23:1378(E), which mandates a "trial de novo" at the 19th Judicial Court. See **Home Depot v. State Workers' Comp. Second Injury Bd.**, 2005-0674 (La. App. 1 Cir. 3/29/06), 934 So.2d 125, 127. I see no authorization for use of a motion for summary judgment in an appeal from a decision of the Board. The appellant was entitled to a trial anew at the 19th Judicial District Court. I would reverse and remand for these reasons.