STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0420

BIG 4 TRUCKING, INC. AND
NATIONWIDE AGRIBUSINESS INSURANCE COMPANY

VERSUS

NEW HAMPSHIRE INSURANCE COMPANY

Judgment Rendered: NOV 0 1 2017

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Appealed from the
The Office of Workers' Compensation
In and for the Parish of St. Tammany, Louisiana
Number 16-05319, District 06

Honorable Gwendolyn F. Thompson, Judge

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

WELCH, J.

In this workers' compensation matter, the plaintiffs, Big 4 Trucking, Inc. and Nationwide Agribusiness Insurance Company, appeal a judgment by the Office of Workers' Compensation ("OWC") sustaining a peremptory exception raising the objection of prescription and dismissing certain claims against the defendant, New Hampshire Insurance Company. For the reasons that follow, we reverse the judgment and remand this matter back to the OWC for further proceedings consistent with this ruling herein.

FACTUAL AND PROCEDURAL BACKGROUND

Successive Claims & Settlement

On March 27, 2014, Darrell Shanks sustained injuries as the result of an accident while in the course and scope of his employment with Big 4 Trucking, Inc. ("Big 4 Trucking"). At the time of Mr. Shanks' 2014 accident, New Hampshire Insurance Company ("New Hampshire") had in effect a policy providing workers' compensation coverage to Big 4 Trucking. As per the policy, New Hampshire paid indemnity benefits and medical benefits in connection with Mr. Shank's injuries. Relevant to the issues under consideration herein, New Hampshire made the last indemnity benefit payment to Mr. Shanks on April 25, 2014, and the last medical benefit was paid on behalf of Mr. Shanks by New Hampshire on August 12, 2014.[1]

On July 2, 2015, Mr. Shanks was involved in a second accident while still in the course and scope of his employment for Big 4 Trucking. At the time of the 2015 accident, Nationwide Agribusiness Insurance Company ("Nationwide")

[1] We note an inconsistency throughout the record regarding the last date that New Hampshire made benefit payments to Mr. Shanks. At various places in the record, New Hampshire asserts that the last indemnity payment was made to Mr. Shanks on April 22, 2014 and the last medical benefit was paid on May 9, 2014. However, at the December 5, 2016 hearing on New Hampshire's exceptions, the parties stipulated that the last indemnity benefit was paid on April 25, 2014 and the last medical benefit on August 12, 2014. We adopt the later dates as those dates were stipulated to by the parties at the December 5, 2016 hearing.

provided workers' compensation insurance coverage to Big 4 Trucking. Nationwide paid approximately $22,500.00 in indemnity benefits and $52,991.55 in medical benefits on behalf of Mr. Shanks following the 2015 accident. Nationwide and Big 4 Trucking eventually entered into a settlement agreement with Mr. Shanks. As required by La. R.S. 23:1274, the settlement was approved by the workers' compensation judge ("WCJ") on June 17, 2016. Under the terms of the settlement agreement, Mr. Shanks expressly released Nationwide and Big 4 Trucking from any obligation to pay past or future indemnity benefits or medical benefits claims in exchange for a lump sum payment of $245,000.00.

Claim for Contribution – Exception of Prescription

On August 9, 2016, Big 4 Trucking filed a disputed claim for compensation urging the claim for contribution at issue in the instant appeal.[2] On November 28, 2016, Nationwide was added as a named plaintiff via a second amended disputed claim for compensation. The attached petition for compensation alleged that Mr. Shanks sustained injuries in both the 2014 and 2015 accidents while in the course and scope of his employment with Big 4 Trucking. The complaint alleged solidary liability between all of the named parties on the basis that Mr. Shanks' claims arising out of the 2015 accident resulted from an aggravation of the injuries he sustained in the 2014 accident. The contribution claim asserted was for one half of all workers' compensation benefits and medical expenses paid by Big 4 Trucking and Nationwide in connection with Mr. Shanks' job related accidents. New Hampshire answered and urged peremptory exceptions raising the objections of prescription and no right of action.

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[2] In the initial disputed claim for compensation, Big 4 Trucking erroneously named "AIG Claims, Inc." as the defendant in the matter. In its answer, New Hampshire appeared and noted Big 4 Trucking's error in naming AIG Claims, Inc. in the disputed claim for compensation. The error was eventually corrected by an October 18, 2016 order granting Big 4 Trucking's motion for partial dismissal seeking the dismissal of AIG Claims, Inc. On November 11, 2016, Big 4 Trucking sought and was granted leave to file a first amended disputed claim for compensation that formally named New Hampshire as the sole defendant.

On December 5, 2016, a hearing was held on New Hampshire's exceptions of prescription and no right of action. New Hampshire's exception of no right of action was denied by the WCJ, and a judgment was signed on December 16, 2016. Regarding prescription, citing La. R.S. 23:1209 and **Larkin v. Regis Hair Stylists**, 2002-127 (La. App. 3rd Cir. 5/15/02), 817 So.2d 1266, New Hampshire argued a one year prescriptive period applied to all claims for contribution brought under the Workers' Compensation Act. New Hampshire argued that the action for contribution was prescribed because the action was filed more than one year after New Hampshire had made its last payment of benefits to Mr. Shanks. The WCJ took the matter under advisement and issued a judgment signed December 20, 2016, and for the reasons argued by New Hampshire, sustained the exception of prescription and dismissed the claims against Nationwide with prejudice. We observe that the judgment signed December 20, 2016, addressed and ruled on only those claims asserted by Nationwide; thus, the claims asserted by Big 4 Trucking remain pending before the WCJ.[3]

Nationwide and Big 4 Trucking filed this devolutive appeal of the WCJ's December 20, 2016 judgment, and assert that the WCJ erred as a matter of law in its finding that the claim for contribution "for supplemental earnings benefits and medical benefits paid to [Mr. Shanks] prescribed." As noted herein, there is no final judgment against Big 4 Trucking; thus, we limit our opinion to Nationwide's claims against New Hampshire on appeal.

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[3] While we find that the judgment signed December 20, 2016 is a final judgment as to Nationwide under La. C.C.P. art. 1915(A)(1), we find that there is no final judgment against Big 4 Trucking presented for this court's consideration on appeal. Review of the transcript reveals that the plaintiffs, Big 4 Trucking and Nationwide, were represented by shared counsel at the December 5, 2016 hearing; however, the December 20, 2016 judgment makes no reference to Big 4 Trucking in the body of the judgment or render any type of judgment with regard to Big 4 Trucking. Since there is no final judgment in the record dismissing Big 4 Trucking's claims against New Hampshire, we are constrained to find that the claims asserted by Big 4 Trucking remain pending.

DISCUSSION

Exception of Prescription – Standard of Review and Burden of Proof

Generally, when evidence is introduced at the hearing on an exception of prescription, the WCJ's findings of fact on the issue of prescription are reviewed under the manifest error-clearly wrong standard of review. See **Carter v. Haygood**, 2004-0646 (La. 1/19/05), 892 So.2d 1261, 1267. However, in a case involving no dispute regarding material facts, but only the determination of a legal issue, the reviewing court must apply the *de novo* standard of review. **State by and Through Caldwell v. Fournier Industrie et Sante and Laboratories Fournier, S.A.**, 2015-1353 (La. App. 1st Cir. 12/22/16), 208 So.3d 1081, 1084; **Cawley v. National Fire & Marine Ins. Co.**, 2010-2095 (La. App. 1st Cir. 5/6/11), 65 So.3d 235, 237; see also **TCC Contractors, Inc. v. Hospital Service Dist. No. 3 of Parish of Lafourche**, 2010-0685 (La. App. 1st Cir. 12/8/10), 52 So.3d 1103, 1108. Evidence in the form of a stipulation between the parties and a copy of the receipt and release agreement entered into between Mr. Shanks, Nationwide and Big 4 Trucking was entered into evidence at the hearing on the exception. However, the material facts of this case are not in dispute and the only issue is the legal issue regarding the proper prescriptive period applicable to contribution claims asserted between workers' compensation insurers under La. R.S. 23:1209; therefore, we conduct a *de novo* review herein. Under the *de novo* standard of review the WCJ's legal conclusions are not entitled to deference. See **Kevin Associates, L.L.C. v. Crawford**, 2003-0211 (La. 1/30/04), 865 So.2d 34, 43.

With regard to the burden of proof, if the facts alleged in a petition do not show that a claim has prescribed, the burden is on the party raising the objection of prescription to prove it. Conversely, if a claim is prescribed on the face of the pleadings, the burden is on the plaintiff to show that prescription has not tolled

because of an interruption or suspension of prescription. **Gay v. Georgia-Pacific**, 2012-1892 (La. App. 1st Cir. 10/10/13), 184 So.3d 39, 43; **Brister v. GEICO Ins.**, 2001-0179 (La. App. 1st Cir. 3/28/02), 813 So.2d 614, 616. At the trial of a peremptory exception, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition. La. C.C.P. art. 931. Prescription statutes, including La. R.S. 23:1209, are construed to maintain rather than to bar actions. **Albert v. Air Products and Chemicals**, 2015-0525 (La. App. 1st Cir. 1/21/16), 186 So.3d 743, 748, writ denied, 2016-0630 (La. 5/20/16), 191 So.3d 1071.

The facts alleged in the disputed and amended disputed claims for compensation do not show on their face that the claim for contribution has prescribed. Instead, the facts alleged in the disputed and amended disputed claims for compensation reference the dates of the 2014 and 2015 job related accidents, but there is no reference to the dates that disability benefit and medical expense payments were last made on behalf of Mr. Shanks by New Hampshire. As set forth in detail below, under La. R.S. 23:1209, the last date that indemnity and medical benefit payments were made serves as the definitive trigger for the running of prescription; therefore, without an allegation as to the date when prescription was triggered, the burden of proof remains with the mover, New Hampshire, to show that the claim against it is prescribed.

Louisiana Revised Statutes 23:1209

Louisiana Revised Statutes 23:1209 provides, in pertinent part, as follows:

> A. (1) In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed as provided in Subsection B of this Section and in this Chapter.
>
> (2) Where such payments have been made in any case, the limitation shall not take effect until the expiration of one year from the

time of making the last payment, except that in cases of benefits payable pursuant to R.S. 23:1221(3) this limitation shall not take effect until three years from the time of making the last payment of benefits pursuant to R.S. 23:1221(1), (2), (3), or (4).

(3) When the injury does not result at the time of or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within three years from the date of the accident.

(4) However, in all cases described in Paragraph (3) of this Subsection, where the proceedings have begun after two years from the date of the work accident but within three years from the date of the work accident, the employee may be entitled to temporary total disability benefits for a period not to exceed six months and the payment of such temporary total disability benefits in accordance with this Paragraph only shall not operate to toll or interrupt prescription as to any other benefit as provided in R.S. 23:1221.

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C. All claims for medical benefits payable pursuant to R.S. 23:1203 shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed with the office as provided in this Chapter. Where such payments have been made in any case, this limitation shall not take effect until the expiration of three years from the time of making the last payment of medical benefits.

According to La. R.S. 23:1209(A) and (B), a claim for indemnity benefits must be filed in the following time periods: (1) one year after the accident or death; or (2) one year after the last payment of indemnity compensation, except in claims for supplemental earnings benefits ("SEBs"), when the period of three years from the last weekly payment of indemnity benefits applies (regardless of the type of benefit previously paid); or (3) one year from the time the "injury develops" if the injury "does not result at the time of, or develop immediately after the accident," but in no event more than two years after the accident. See **Pal v. Stranco, Inc.**, 2010-1507 (La. App. 1st Cir. 8/3/11), 76 So.3d 477, 485, writ denied, 2011-1834 (La. 11/4/11), 75 So.3d 925. Similarly, under La. R.S. 23:1209(C), a claim for

medical benefits must be filed within the following time periods: (1) one year after the accident; or (2) three years after the last payment of medical benefits.

Although the language of La. R.S. 23:1209 only discusses claims by or on behalf of an employee for indemnity and medical benefits, both this Circuit and the Third Circuit have held that the prescriptive periods found in La. R.S. 23:1209 are applicable to cross-claims between employers or workers' compensation insurers for contribution. In the only two reported cases on the application of La. R.S. 23:1209 to contribution claims between insurers, **TIG Ins. Co. v. Louisiana Workers' Compensation Corp.**, 2009-0330 (La. App. 1st Cir. 9/11/09), 22 So.3d 981, and **Larkin v. Regis Hair Stylists**, 2002-127 (La. App. 3rd Cir. 05/15/02), 817 So.2d 1266, the First and Third Circuits concluded that the 1997 legislative amendment to La. R.S. 23:1310.3(E) granting original, exclusive jurisdiction to the WCJ over "cross claims between employers or workers' compensation insurers for indemnification or contribution" results in the application of La. R.S. 23:1209 to such claims, because La. R.S. 23:1209 governs prescription on all claims brought under the Workers' Compensation Act. See **TIG Ins. Co.**, 22 So.3d at 986-987; **Larkin**, 817 So.2d at 1268.[4]

Additionally, **Larkin** and **TIG Ins. Co.** addressed how the prescriptive period in La. R.S. 23:1209 applies to contribution claims. In **Larkin**, an employee was injured on October 21, 1999, while in the course and scope of her employment with Regis Hair Stylists. On March 23, 2000, the employee filed a disputed claim for compensation and sought TTD benefits from Regis. Regis, in turn, filed a third party demand on February 2, 2001, against the employee's previous employer, Books-A-Million, and its insurer, asserting the 1999 injury was a continuation, or, alternatively, an aggravation of a previous job related injury suffered by the

[4] In the absence of legislative action specifically addressing prescriptive periods for contribution claims between employers or workers' compensation insurers, we are constrained to continue to apply La. R.S. 23:1209 to cross claims between employers or insurers for contribution or indemnity.

employee in 1996, during her employment with Books-A-Million. **Larkin**, 817 So.2d at 1266-1267.

Books-A-Million and its insurer filed an exception of prescription arguing a one year prescriptive period applied to Regis' contribution claim under La. R.S. 23:1209. The Third Circuit agreed and held as follows:

> The amendment to R.S. 23:1310.3(E) clearly granted original and exclusive jurisdiction of claims between insurers for contribution to the Office of Workers' Compensation. R.S. 23:1209 provides that "*all claims* for payments shall be forever barred" unless brought within one year. R.S. 23:1209 does not grant any exceptions or extensions for a contribution claim filed by an insurer against another beyond the one year period.

Larkin, 817 So.2d at 1268.

As noted above, the WCJ relied upon the Third Circuit's holding in **Larkin** to find that Nationwide's contribution claim was prescribed. In its written reasons for judgment, the WCJ found that the prescriptive period for Nationwide's contribution claim ran one year from the date of the last workers' compensation benefit payment by New Hampshire. The WCJ's interpretation of La. R.S. 23:1209 did not appear to distinguish between claims for certain types of indemnity benefits and/or medical benefits. New Hampshire argues that **Larkin** is controlling here and mandates the application of a one year prescriptive period to all contribution claims regardless of whether the claims relate to the payment of indemnity or medical benefits. New Hampshire takes the position that only express claims for SEB benefits or medical benefits by or on behalf of an employee claimant would be subject to the three year prescriptive period set forth in La. R.S. 23:1209(A) and (C).

Nationwide maintains that the instant matter is governed by this court's holding in **TIG Ins. Co.**. Nationwide avers that under the holding of **TIG Ins. Co.**, any contribution claims for SEBs or medical benefits paid by Nationwide and Big 4 Trucking would be subject to a three year prescriptive period that runs from

the last date of the payment of the benefit in question by New Hampshire. Nationwide contends that its claim for contribution was timely filed less than three years after New Hampshire's last benefit payments. Nationwide asserts that the WCJ erred in dismissing its contribution action as there was no determination by the WCJ whether SEBs or medical benefits had been paid by Nationwide or Big 4 Trucking prior to dismissing the entire claim on the grounds that it was prescribed.

In **TIG Ins. Co.**, the employer had two overlapping policies in effect at the time of the employee's injury, one through TIG, and the other through Louisiana Workers' Compensation Corporation ("LWCC"). TIG paid the indemnity and medical benefits in connection with the employee's claim, and eventually settled with the employee. **TIG Ins. Co.**, 22 So.3d at 983. The last payment of benefits by TIG to the employee was on July 9, 2002. More than three years later, on April 25, 2006, TIG sued LWCC for contribution for one half of TIG's expenditures associated with the settlement and handling of the claim. TIG alleged solidary liability on the basis of overlapping coverage. The WCJ sustained LWCC's exception of prescription and found that TIG's contribution claim was prescribed under La. R.S. 23:1209. *Id.*

Recognizing the issue as *res nova*, this Court first reviewed and adopted the reasoning set forth by the Third Circuit in **Larkin** holding that La. R.S. 23:1209 governs the time for filing cross claims for employers and insurers for contribution. *Id.* at 986. However, this Court did not find that **Larkin** established a blanket one year prescriptive period for all contribution claims. Instead, this court in **TIG Ins. Co.** found that application in **Larkin** of the one year prescriptive period found in La. R.S. 23:1209 was appropriate therein because the only claim at issue in **Larkin** was a contribution claim for TTD benefits. See **Larkin**, 817 So.2d at 1267. This court explained:

> As the claim in **Larkin** was a claim for temporary total disability benefits, the one-year prescriptive period of La. R.S. 23:1209 was clearly applicable. However, as previously noted, there are different prescriptive periods applicable for supplemental earnings benefits and medical benefits that were not at issue in **Larkin**.

Id. at 987, n.5. To that end, this Court held that the contribution claim for TTD asserted by TIG were prescribed under the La. R.S. 23:1209. *Id.* at 988. However, this Court then observed that under La. R.S. 23:1209(A) and (C), TIG "would have had up to three years" from the last date of payment for any SEB and medical benefits to file a claim for contribution against LWCC. *Id.* The Court observed that the record was not clear as to what types of benefits had been paid by TIG in the settlement with the employee. This Court then found that TIG's claim for contribution was prescribed on its face because it was filed more than three years after the payment was made; however, the Court observed that prescription may have been interrupted by the initial filing of suit in the district court. *Id.* The Court remanded the matter back to the OWC to determine whether prescription had been interrupted as to any claims related to SEB and the medical benefits. *Id.* at 989.

New Hampshire's principal argument is that **Larkin** establishes a blanket one year prescriptive period for all contribution claims whether the claims be for indemnity benefits or medical benefits. We disagree. Instead, we find that this court in **TIG Ins. Co**. correctly observed that the holding of **Larkin** is limited to the one year prescriptive period applicable to contribution claims for TTD benefits. We also agree with the finding in **TIG Ins. Co.** that **Larkin** did not consider the application of La. R.S. 23:1209 to contribution claims related to SEBs or medical benefits. Based on our reading of this court's holding in **TIG Ins. Co.** and La. R.S. 23:1209, we conclude that a party can file a contribution claim for SEBs and medical benefits up to three years from the last payment of indemnity or medical benefits by a party against whom indemnity is sought.

Here, Nationwide's claim for contribution asserts that New Hampshire owes contribution for one half of the sums that were paid to Mr. Shanks. The receipt and release dated June 8, 2016, that was entered into evidence at the hearing on the exception of prescription provides that the $245,000.00 paid releases Nationwide and Big 4 Trucking from liability for all sums arising out of the July 2, 2015 accident, including compensation benefits and medical benefits. However, the terms of the receipt and release are fairly general and provide no indication as to whether the compensation benefits paid represent SEBs. Attached to New Hampshire's exception of prescription is a copy of the petition for settlement filed jointly by Mr. Shanks and Nationwide seeking approval by the WCJ for the settlement as required by La. R.S. 23:1274. The petition for settlement asserts that $22,500.00 in "compensation benefits" and $52,991.55 in "medical benefits" had been paid by Nationwide and Big 4 Trucking to Mr. Shanks prior to reaching the settlement. With regard to the lump sum settlement of $245,000.00, the petition for settlement asserted that $195,000.00 of the total represented "future indemnity benefits" and "substitutes for a payment of $480.77 per month of periodic indemnity compensation benefits" for the duration of a period 405.6 months (a negotiated time period).[5]

From the information in the record, it is clear that Nationwide paid medical benefits to Mr. Shanks for which it now seeks contribution from New Hampshire. Based on the reasoning set forth in **TIG**, we find Nationwide timely filed its contribution claim for medical benefits within three years from the last payment by New Hampshire; therefore, the WCJ legally erred in holding that this claim was prescribed. Further, we find that the mover, New Hampshire, failed to carry its burden of proof that prescription had run as to any SEB benefit claims. The

[5] The Louisiana Revised Statutes do not recognize a "periodic indemnity compensation benefit," and at oral argument before this Court, the parties categorized the payment of $480.77 identified in the motion to settle as an SEB. As noted herein, the nature of indemnity benefits paid for purpose of determining which claims are prescribed can be determined on remand.

record, including the petition for settlement and the receipt and release, suggests that Nationwide may have paid SEB payments to Mr. Shanks within the three year prescriptive period. Based on the above, we find that the WCJ erred in sustaining the exception of prescription and dismissing Nationwide's entire claim for contribution with prejudice.

CONCLUSION

For the above and foregoing reasons, we reverse the judgment signed on December 20, 2016 sustaining the peremptory exception raising the objection of prescription filed by New Hampshire Insurance Company and dismissing the contribution claim filed by Nationwide Agribusiness Insurance Company. We remand the matter for further proceedings consistent with this opinion and note that any contribution claims not subject to the three year prescriptive period in La. R.S. 23:1209 are prescribed. All costs associated with this appeal are assessed against New Hampshire Insurance Company.

REVERSED, MATTER REMANDED.