

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 1436

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

* * * * *

Benny Hernandez
Downsville, Louisiana


Claimant/Appellant
In Proper Person

Mark C. Dodart
Jeffrey A. Clayman
New Orleans, Louisiana

Counsel for Defendant/Appellee,
CF Industries Nitrogen, LLC

* * * * *

BEFORE: GUIDRY, PETTIGREW, McDONALD,
HIGGINGOTHAM, AND CRAIN, JJ.

Guidry, J. Dissents and assigns Reason.
Pettigrew, J. dissents 

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CRAIN, J.

In this workers' compensation proceeding, Benny Hernandez appeals a judgment sustaining a peremptory exception of prescription and dismissing his claims against CF Industries Nitrogen, LLC. We affirm.

On September 16, 2014, Hernandez was injured while working at a plant in Donaldsonville. 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, but also adding several new parties, including CF Industries. CF Industries responded with a peremptory exception of prescription, which, following a hearing, was granted. In a judgment signed on June 16, 2017, Hernandez's claims against CF Industries 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 CF Industries was filed about 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.

The evidence introduced at the hearing by Hernandez is limited to three exhibits: a radiology report for a chest x-ray taken shortly after the accident, a memorandum filed by Hernandez in opposition to the exception of prescription, and a letter from Hernandez's attorney in the original proceeding summarizing a mediation conducted in that proceeding. None of this evidence establishes an interruption or suspension of the prescriptive period applicable to Hernandez's claim against CF Industries. Having failed to satisfy his burden of proof, Hernandez's claim against CF Industries is prescribed. 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, 499; *Ward v. McDermott*, 04-1189 (La. App. 1 Cir. 6/10/05), 916 So. 2d 246, 250.² The WCJ did not err in sustaining the exception of prescription and dismissing Hernandez's claims against CF Industries with

² We note the record contains references to a tort suit filed by Hernandez against CF Industries 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 CF Industries. 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 CF Industries was added as a party to that suit. Hernandez thus failed to prove he *timely* filed a tort suit against *CF Industries* 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.

prejudice. 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.

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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. Bernard v. Lafayette City-Parish Consolidated Government, 11-816, p. 5 (La. App. 3d Cir. 12/7/11), 80 So. 3d 665, 669. 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 CF Industries Nitrogen's objection of prescription, it was acknowledged that Mr. Hernandez had a pending tort suit based on the September 16, 2014 accident. The record further reveals that CF Industries Nitrogen is one of several defendants named in the pending tort suit, which CF Industries Nitrogen acknowledged in motions it filed in the underlying proceedings. 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).¹ Additionally, a stamped copy of the petition in the tort suit to which CF Industries Nitrogen acknowledged being a party is contained in the record and shows that the tort suit was fax filed on September 16, 2015.

Hence, as the record reveals the existence of a previously-filed, timely tort suit against CF Industries Nitrogen 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.

¹ Notably, in a motion to continue filed by CF Industries Nitrogen, it alleged that "[m]ultiple parties in the tort action have filed dispositive motions on statutory employer grounds."