NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0256

LOUISIANA CONSTRUCTION & INDUSTRY SELF INSURERS FUND and MAC'S WRECKING YARD, INC.

VERSUS

LOUISIANA WORKERS' COMPENSATION SECOND INJURY BOARD

Judgment Rendered: DEC 30 2020

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On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 646270

Honorable Trudy M. White, Judge Presiding

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BEFORE: McDONALD, HOLDRIDGE, AND PENZATO, JJ.

McDonald, J. concurs

PENZATO, J.

Defendant, Louisiana Workers' Compensation Second Injury Board ("the Board"), appeals a summary judgment in favor of plaintiffs, Louisiana Construction & Industry Self Insurers Fund ("LCI") and Mac's Wrecking Yard, Inc. ("Mac's") (collectively "plaintiffs"), determining that plaintiffs are entitled to reimbursement from the Board for workers' compensation benefits paid to Paul Brown in the amount of $263,942.76. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

On June 25, 2014, Brown sustained an injury during the course and scope of his employment with Mac's. LCI, Mac's workers' compensation insurance fund, paid workers' compensation benefits to and on behalf of Brown. Plaintiffs filed a claim with the Board requesting reimbursement from the Workers' Compensation Second Injury Fund ("the Second Injury Fund").[1] The Board denied the claim on February 5, 2016. Plaintiffs appealed the denial to the trial court pursuant to La. R.S. 23:1378(E),[2] claiming they were entitled to reimbursement from the Second Injury Fund for the workers' compensation benefits paid to and on behalf of Brown.

The Board filed an answer and asserted that plaintiffs were not entitled to reimbursement from the Second Injury Fund because they did not meet the requirements for reimbursement relief set forth in La. R.S. 23:1371 and 23:1378.

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[1] La. R.S. 23:1377.

[2] Louisiana Revised Statutes 23:1378(E) provides:

> Written notice of the decision of the board shall be given to all parties to the hearing and the representatives designated by the party on the reimbursement form submitted to the board. 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. If an appeal is taken, the board shall be made party defendant, and service and citation shall be made in accordance with applicable law upon the attorney general or one of his assistants. 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.

Thereafter, plaintiffs filed a motion for summary judgment on the basis that they were entitled to reimbursement from the Second Injury Fund because no genuine issue of material fact existed that: (1) Brown had a preexisting permanent partial disability, specifically cognitive and intellectual disabilities that rendered him unable to read or write; (2) Brown incurred a subsequent injury arising out of and in the course of his employment resulting in liability for disability due to the merger of the subsequent injury with the preexisting permanent partial disability; and (3) Mac's had knowledge of Brown's preexisting permanent partial disability prior to the subsequent injury. Following a hearing, the trial court granted plaintiffs' motion for summary judgment, and rendered judgment in favor of plaintiffs and against the Board in the amount of $263,942.76, plus judicial interest from the date of judicial demand and all costs of the proceedings. On November 18, 2019, the trial court signed a final judgment in accordance with its ruling. The Board appealed.

On appeal, the Board asserts that the trial court erred in finding that no genuine issue of material fact existed and granting plaintiffs' motion for summary judgment; finding that plaintiffs were entitled to reimbursement in the amount of $263,942.76; and in finding that plaintiffs were entitled to legal interest from the date of judicial demand.

LAW AND DISCUSSION

The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2). After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Reynolds v. Bordelon*, 2014-2371 (La. 6/30/15), 172 So. 3d 607, 610. 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. *Succession of Hickman v. State Through Board of Supervisors of Louisiana State University Agricultural and Mechanical College*, 2016-1069 (La. App. 1 Cir. 4/12/17), 217 So. 3d 1240, 1244.

The motion for summary judgment in this case arose in plaintiffs' appeal from the Board's denial of plaintiffs' claim for reimbursement from the Second Injury Fund. The legislature created the Second Injury Fund to encourage the employment, re-employment, or retention of employees with a permanent, partial disability. La. R.S. 23:1371(A)(1). 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 reimbursement 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).

The employer's right to reimbursement from the Second Injury Fund is not automatic. *Nabors Drilling USA v. Davis*, 2003-0136 (La. 10/21/03), 857 So. 2d 407, 416. In order to be reimbursed from the Second Injury Fund, the employer bears the burden of proving the following three elements: (1) that the employee had a permanent partial disability as defined by statute at the time of the subsequent injury; (2) that the employer had actual knowledge of the employee's partial permanent disability before the occurrence of the second injury forming the

basis of the compensation claim; and (3) that the permanent partial disability merged with the subsequent injury to produce a greater disability. See La. R.S. 23:1371(A) and 23:1378(A); *National Fire Union Ins. Co. v. State Worker's Compensation Second Injury Bd.*, 2014-0631 (La. App. 1 Cir. 12/23/14), 168 So. 3d 585, 588.

A "[p]ermanent 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(3). Relevant hereto, there is a presumption that the employer considered the condition to be permanent and to be or likely to be a hindrance or obstacle to employment where the condition is that of an intellectual disability, provided the diagnosis of an intellectual disability is made on the basis of the following:

> (i) Significantly subnormal intellectual functioning, defined as an objective measure of cognitive status which falls at least two standard deviations below the mean of the national standardization sample based on valid results of a recognized individually administered test of intellectual function.
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> (ii) Objective evidence of concurrent impairment of adaptive functioning in at least two areas of functional behavior as measured by standardized, norm reference measures of adaptive function.
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> (iii) Evidence of an onset before the age of eighteen years.

See La. R.S. 23:1378(F)(34).

As the movers and the parties who bear the burden of proof at trial, plaintiffs' initial burden on the motion for summary judgment was to show that there was no genuine issue of material fact that Brown had a preexisting permanent partial disability as defined by La. R.S. 23:1371.1(3), 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 June 25, 2014.

In support of their motion for summary judgment, plaintiffs relied on the affidavits of Shirley McWilliams and Gary Kern. McWilliams attested that she is co-owner of Mac's, and has "hire/fire authority" over Brown. According to McWilliams, she has known Brown both personally and professionally for over twenty years, and Brown worked as a "parts puller" for Mac's for over twenty years. She attested that she has direct knowledge of Brown's illiteracy and that Brown's sister assists him with his everyday responsibilities. According to McWilliams, Brown's illiteracy is considered a hindrance and obstacle to employment in that he is now unable to find gainful employment due to his deficiencies.

According to Kern's affidavit, he is CEO of RiskSavers, LLC, the claims manager for Brown's claim, and retains a file on the matter. Kern attested that through his investigation of Brown's claim, he obtained a number of medical records that were kept in the RiskSavers file "per the ordinary course of business." Included in the records attached to Kern's affidavit were a letter to Kern by Dr. Kevin W. Greve, psychologist, dated September 8, 2015, and a "Psychological Pain Evaluation" prepared by Dr. Greve. In his September 8, 2015 letter, Dr. Greve stated:

> I completed a psychological evaluation of Mr. Brown ... related to his work injury of 06.25.2014, in which he sustained bilateral comminuted pelvis fractures and a left femur fracture. Mr. Brown has cognitive / intellectual limitations that are likely life-long and he is unable to read / write. He also has physical limitations related to the work accident. Mr. Brown's cognitive limitations and inability to read or write constitute a hindrance or obstacle to obtaining re-employment given his apparent physical limitations.

In the attached evaluation, Dr. Greve noted that Brown has limited education, and completed only the seventh grade in special education before leaving school. According to Dr. Greve's report, current psychological testing indicates that Brown's measured intelligence is in the borderline to extremely low range. Dr. Greve opined that Brown has cognitive/intellectual limitations that are likely life-

long as well as some limitation in adaptive function, but does not meet the criteria for mental retardation.

In opposition to the motion for summary judgment, the Board argued that the evidence provided by plaintiffs, specifically Dr. Greve's letter and evaluation, fail to prove that Brown suffered from a preexisting permanent partial disability.

Based upon our *de novo* review, we find that genuine issues of material fact exist as to whether Brown had a preexisting permanent partial disability as defined by statute at the time of his June 25, 2014 injury. Plaintiffs argue Brown's diagnosed intellectual disability is one of the presumed permanent partial disabilities listed in La. R.S. 23:1378(F). However, such a diagnosis must be made on the basis of significantly subnormal intellectual functioning, defined as an objective measure of cognitive status which falls at least two standard deviations below the mean of the national standardization sample based on valid results of a recognized individually administered test of intellectual function, and objective evidence of concurrent impairment of adaptive functioning in at least two areas of functional behavior as measured by standardized, norm reference measures of adaptive function. See La. R.S. 23:1378(F)(34)(a)(i) and (ii). While Dr. Greve opines that Brown has cognitive/intellectual limitations and the psychological testing he performed indicated that Brown's measured intelligence is in the borderline to extremely low range, the report fails to affirmatively show that Mr. Brown's intellectual limitations meet the requirements of La. R.S. 23:1378(F)(34).

Plaintiffs further argue that even if Brown's condition does not meet the definition of an "intellectual disability" pursuant to La. R.S. 23:1378(F)(34), it constitutes a permanent partial disability pursuant to La. R.S. 23:1371.1(3), because his cognitive disability constitutes a hindrance or obstacle to employment, retaining employment, and/or obtaining new employment. In support of this argument, plaintiffs rely primarily on McWilliams's affidavit testimony that

Brown's "illiteracy is considered a hindrance and obstacle to employment in that he is now unable to find gainful employment due to his deficiencies." While McWilliams's affidavit establishes that she is the co-owner of Mac's with "hire/fire authority" over Brown, her affidavit fails to set forth the basis of her competency to testify as to Brown's employability with an employer other than Mac's. Louisiana Code of Civil Procedure article 967(A) requires that affidavits filed in support of a motion for summary judgment show affirmatively that the affiant is competent to testify to the matters stated therein. Because McWilliams's affidavit fails to establish her competency with regard to this conclusory statement, the affidavit does not satisfy the requirements of Article 967(A) and does not provide competent summary judgment evidence to establish this fact. See *Unifund CCR Partners v. Perkins*, 2012-1851 (La. App. 1 Cir. 9/25/13), 134 So. 3d 626, 632.

Plaintiffs also point to Dr. Greve's opinion, as stated in his letter to Kern, that Brown's "cognitive limitations and inability to read or write constitute a hindrance or obstacle to obtaining re-employment given his apparent physical limitations." However, plaintiffs ignore Dr. Greve's preceding statements – that Brown's physical limitations were related to his June 25, 2014 work accident. There is no evidence in the record that Brown's "cognitive limitations and inability to read or write" constituted a hindrance or obstacle to obtaining re-employment prior to June 25, 2014, the date of his subsequent injury.

Because we find that summary judgment was improper, as genuine issues of material fact exist as to whether Brown had a preexisting permanent partial disability as defined by statute at the time of his June 25, 2014 injury, we pretermit consideration of the Board's assignments of error regarding the amount of reimbursement[3] and plaintiffs' entitlement to legal interest from the date of judicial

[3] We note, however, that the only evidence as to the amount of workers' compensation benefits paid to and on behalf of Brown was contained in Kern's affidavit. Kern's affidavit contains no facts or information setting forth the basis of his knowledge of payments made by LCI.

demand.

CONCLUSION

For the foregoing reasons, the November 18, 2019 judgment of the trial court granting plaintiffs' motion for summary judgment and finding that plaintiffs are entitled to reimbursement from the Louisiana Workers' Compensation Second Injury Board is reversed and this matter is remanded for further proceedings. Costs of this appeal are assessed to plaintiffs, Louisiana Construction & Industry Self Insurers Fund and Mac's Wrecking Yard, Inc.

JUDGMENT REVERSED AND REMANDED.