NOT DESIGNATED FOR PUBLICATION

BERTHA HANKTON	*	**NO. 2004-C-1536**
VERSUS	*	**COURT OF APPEAL**
CITY OF NEW ORLEANS, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 02-13311, DIVISION "C"
Honorable Christopher J. Bruno, Judge Pro Tempore
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong,
Judge Dennis R. Bagneris Sr., and Judge David S. Gorbaty)

JOSEPH G. ALBE
P.O. BOX 19966
NEW ORLEANS, LA 70179
COUNSEL FOR BERTHA HANKTON

SHERRY S. LANDRY
CITY ATTORNEY
ALBERT A. THIBODEAUX
CHIEF DEPUTY CITY ATTORNEY
CHARLENE C. LARCHE
DEPUTY CITY ATTORNEY
1300 PERDIDO STREET
ROOM 5E03 – CITY HALL
NEW ORLEANS, LA. 70112
COUNSEL FOR CITY OF NEW ORLEANS, ETC.

DECEMBER 1, 2004

WRIT APPLICATION GRANTED; RELIEF DENIED

The City of New Orleans seeks review from the denial of its Exception of Res Judicata and No Cause of Action. For the following reasons, we grant the writ application, but deny relief.

FACTS

The plaintiff, Bertha Hankton, previously filed a claim for workers' compensation against the City of New Orleans ("the City") seeking workers' compensation benefits for mental and physical disability. The case was tried, and the workers' compensation judge found that Ms. Hankton had sustained a compensable mental injury. Also, the court found that Ms. Hankton had failed to prove that she sustained a compensable physical injury. Both parties appealed, and this court sustained the judgment of the OWC denying Ms. Hankton's claim of a physical injury and reversed the judgment with respect to Ms. Hankton's mental injury.

This court's decision turned on the proper application of the facts of the case to La. R.S. § 23: 1021(7)(b), which reads:

> (b) Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter, unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the

> employment and is demonstrated by clear and convincing evidence.

This court determined that "the OWC committed manifest error by finding, apparently based on a subjective standard, that Ms. Hankton's mental injury was the result of sudden, unexpected and extraordinary stress as required by La. R.S. 23:1021(7)(b)." *Hankton v. City of New Orleans*, 2001-0714 (La. App. 4 Cir. 6/19/02), 821 So.2d 730, *writ denied*, 2002-2004 (La. 10/25/02), 827 So.2d 1157. Subsequently, Ms. Hankton filed a tort suit for damages arising from the same facts, which were the subject of her previous workers' compensation claim, in the Civil District Court for the Parish of Orleans against that City and her previous supervisor, Lynn Simon.

DISCUSSION

The City contends that Ms. Hankton is barred by the exclusive remedy provisions of the Louisiana Workers' Compensation Act, La. R.S. 23:1021, *et. seq.*, from suing her employer, the City, in tort. The City cites *Tumbs v. Wemco, Inc.*, 1997-2437 (La. App. 4 Cir. 4/22/98) 714 So.2d 761, a case involving very similar facts. In *Tumbs*, the plaintiff, who had been denied workers' compensation benefits, sued her employer alleging both negligent and intentional infliction of emotional distress through harassment. The trial court refused to allow the plaintiff to present the negligent infliction claim to the jury. At trial, the jury found for the plaintiff's employer. The plaintiff

appealed, assigning as error the trial court's ruling limiting her claim to intentional infliction of emotional distress.

In *Tumbs*, the plaintiff claimed she was not subject to the exclusive remedy rule because the harassment inflicted on her was chronic and her injury was therefore not compensable under the workers' compensation scheme as it requires that employment related mental injury be caused by "sudden, unexpected, and extraordinary stress related to the employment." She claimed that because her type of mental disability fell outside the ambit of the workers' compensation scheme, she was entitled to pursue her claim in tort.

In denying relief, this court ruled that the plaintiff's "failure to meet the burden of proving that her emotional distress arose out of 'sudden, unexpected, and extraordinary stress' as required by the compensation statute" did "not take the plaintiff out of the ambit of the exclusive remedy rule." *Tumbs*, 1997-2437, p. 7, 714 So.2d at 764. This court reasoned that:

> Because the purpose of the compensation law is to make it easier for the claimant to collect on employment related claims than would be the case were the same claim brought in negligence (the trade-off being the exclusive remedy rule), there is no merit to plaintiff's argument that the purpose of LSA-R.S. 23:1021(7)(b) was to permit her to prove a negligence claim when she failed to prove a compensation claim arising out of the same facts.

Id., 1997-2437, p 6-7, 714 So.2d at 764.

This court reasoned further as follows:

> Plaintiff's argument would mean that if the plaintiff failed to prove her compensation claim by 'clear and convincing evidence' which is also a requirement of LSA-R.S. 23:1021(7)(b), it would then entitle her to bring a claim in ordinary negligence, i.e., she might be rewarded for having a weak case. Carried to its ultimate logical conclusion, plaintiff's position is equivalent to suggesting that anytime a claimant's compensation claim is rejected for any reason, the exclusive remedy rule would not apply to claims arising in the course and scope of employment. Such a result would make a mockery of the exclusive remedy rule.

Id., 1997-2437, p 7, 714 So.2d at 764-765.

Although *Tumbs* is on point, it was effectively reversed by the Louisiana Supreme Court in *O'Regan v. Preferred Enterprises, Inc*., 1998-1602 (La. 3/17/00), 758 So.2d 124. In *O'Regan,* the court considered the claim of a worker, who had been denied compensation benefits under La. R.S. 23:1031.1(D) for an occupational disease after being employed for less than twelve months, and the court found that the worker could in fact proceed in tort against her employer. *O'Regan*, 1998-1602, pp. 14-15, 758 So.2d 134. La. R.S. 23:1031(D) provides as follows:

> Any occupational disease as herein listed contracted by an employee while performing work for a particular employer in which he has been engaged for less than twelve months shall be presumed to be non-occupational and not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months' limitation as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during

> the course of the prior twelve months' employment by an overwhelming preponderance of evidence.

Initially, the court noted that while "the Legislature has the authority to limit codal remedies" it can do so only "as long as it does not leave the injured party entirely without a remedy." In other words, "the Legislature cannot completely deprive citizens of the right to seek a remedy either under the Act or under our general law."

Analyzing §1031(D), the court found two points were made perfectly clear:

> First, although the Workers' Compensation Act provides coverage for occupational diseases pursuant to LA. REV. STAT. 23:1031.1(A), LA. REV. STAT. 23:1031.1(D) creates a category of employees who are "otherwise eliminated from the benefits of this Chapter," LA. REV. STAT. 23:1031(A), by virtue of their employment for less than a year. This elimination is created by virtue of the legislatively crafted presumption that in such an instance the disease is non-occupational and presumed "not to have been contracted in the course of and arising out of such employment." The statute further provides that it only "**become[s]** compensable" if a heightened burden of proof is reached. LA. REV. STAT. 23:1031.1(D). Simply stated, by virtue of the presumption that is operative because of the Legislature's creation of the temporal requirement, such disease has been identified as a risk that falls outside the protection of the compensation act. In this regard, we find that the Legislature has not only imposed a higher burden of proof, it has created a category which presumptively eliminates certain employees from workers' compensation benefits. *Cf.* LA. REV. STAT. 23:1021(7)(b) (mental injury caused by mental stress), LA. REV. STAT. 23:1021(7)(c) (mental injury caused by physical injury), and LA. REV. STAT. 23:1021(7)(e) (heart-related or perivascular injuries) for examples of a legislatively crafted higher burden of

> proof (clear and convincing standard) without a non-occupational presumption. (FN13) Second, if an employee attempts to be brought under the Act and fails to meet the heightened burden of proof, the disease **remains** "to be non-occupational and not to have been contracted in the course of and arising out of such employment." LA. REV. STAT. 23:1031.1(D). Such conclusion is inescapable by virtue of the presumption and the specific words that the Legislature has chosen to use in this statute.

O'Regan, 1998-1602, p. 12-13, 758 So.2d at 132-133 (emphasis in original).

As noted by the court, §1021(7)(b) compares favorably with §1031.1 (D) as each creates a statutory presumption against compensability. Where § 1031.1(D) provides that for those who have been employed less than twelve months, their disease "shall be presumed to be non-occupational," §1021(7) (b) provides a similar presumption against compensability by stating that a mental injury or illness "shall not be considered a personal injury by accident arising out of and in the course of employment." Furthermore, like §1031.1(D), §1021(7)(b) operates such that if the claimant attempts and fails to bring herself under the Act, the mental injury remains "not compensable."

In finding that the plaintiff could pursue her negligence claim, the court stated:

> The defendant's argument that the Act provides the exclusive coverage for occupational diseases is misplaced with respect to LA. REV. STAT. 23:1031.1(H). Although the Act provides coverage for occupational diseases, it does not provide the exclusive remedy if the work-related disease falls outside the basic coverage of the Act. The Act does not and cannot

> foreclose all types of civil actions between employers and employees. Rather, the exclusivity provisions of the Act preclude only those civil tort actions premised upon the fault of the employer vis-a-vis the employee for workplace injuries compensable under the Act. A compensable injury under the Act is one contracted in the course of and arising out of the employment and for which the injured employee is entitled to receive compensation. LA. REV. STAT. 23:1031.1(D).
>
> The exclusive remedy provision refers only to injuries for which the employee or his dependent is entitled to be compensated, and the Act becomes the exclusive remedy for employees against their employers *only* for such diseases. *See* LA. REV. STAT. 23:1031.1(H). Accordingly, injuries non-compensable under the Act by LA. REV. STAT. 23:1031.1(D) are also excluded from the shield against tort liability provided to employers by the exclusivity clause in LA. REV. STAT. 23:1031.1(H). Because O'Regan's injuries were presumptively excluded from coverage under the Act by LA. REV. STAT. 23:1031.1(D) by presuming that they were "non-occupational and not to have been contracted in the course of and arising out of" her employment, and her inability to overcome this presumption by an "overwhelming preponderance of evidence," we conclude that she is not precluded from bring a suit in tort against her employer. Simply stated, the presumption throws the employee outside of the act; therefore, the exclusivity provision of LA. REV. STAT. 23:1031.1(H) is not applicable to the employee, and the employee may proceed in tort against her employer.

O'Regan, 1998-1602, pp. 14-15, 758 So.2d at 134.

Although the court analyzed the exclusivity argument by utilizing § 1031.1(H), as it is tailored to the particular question of occupational diseases, the same result is reached when the general provision regarding the exclusivity of the workers' compensation remedy contained in La. R.S.

23:1032 is utilized. Like §1031.1(H), the exclusive remedy provision of § 1032 refers only to an employee's injuries "for which the employee or his dependent is entitled to be compensated," and the Act becomes the exclusive remedy only for such injuries. As in the case of §1031.1(D), the presumption that Ms.Hankton's mental injury "is not compensable" or that it "shall not be considered a personal injury by accident arising out of and in the course of employment" places Ms. Hankton outside the act.

For these reasons, we find no error in the trial court's judgment, which overruled the City of New Orleans' Exceptions of No Cause of Action and Res Judicata.

WRIT APPLICATION GRANTED; RELIEF DENIED