

NOT DESIGNATED FOR PUBLICATION

RICHARD J. BORJA * **NO. 2015-CA-0435**
VERSUS * **COURT OF APPEAL**
FARA * **FOURTH CIRCUIT**
ST. BERNARD PARISH * **STATE OF LOUISIANA**
GOVERNMENT *
* * * * *

APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 2013-08697, DISTRICT "SEVEN"
Honorable Sylvia T. Steib Dunn, Workers' Compensation Judge
* * * * *

Judge Dennis R. Bagneris, Sr.
* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

MCKAY, C.J., CONCURS IN PART AND DISSENTS IN PART

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AFFIRMED

DECEMBER 09, 2015

Claimant, Richard J. Borja, appeals a workers' compensation court judgment that sustained his employer's exception of prescription and exception of *res judicata*. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Mr. Borja was employed by St. Bernard Parish Government ("St. Bernard") as a firefighter.¹ In March of 2004, Mr. Borja filed a disputed claim for compensation alleging that he injured his right knee and right thumb in an accident on June 2, 2002 and noted that he also had an occupational disease. Mr. Borja described his injuries on the 2004 disputed claim for compensation as a "torqued knee," caused by "carrying [a] spine board down steps to stretcher and picking up syringes" and "Heart and Lung." St. Bernard answered the 2004 litigation by admitting that Mr. Borja sustained an injury to his right knee on June 2, 2002, but disputed the thumb injury as well as any heart and lung claims as being related to his employment. Specifically, St. Bernard responded as follows:

¹ According to Mr. Borja's disputed claims for compensation, he was hired by St. Bernard on July 2, 1973.

Further, defendant has no knowledge as to plaintiff's claim for an alleged right thumb injury of 6-2-02 nor occupational disease nor heart and lung claim and alternatively, they are prescribed.

Throughout the 2004 litigation, Mr. Borja argued that his heart and lung conditions were related to his employment. On May 4, 2005, Mr. Borja's counsel wrote: "Additionally, Mr. Borja has heart and lung conditions which were caused by his employment as well." Further, on July 31, 2006, Mr. Borja's counsel wrote: "You will also note in his personal file that he was hospitalized twice for toxic smoke inhalation,[and] has suffered with chronic throat and lung problems since that date. He has had pneumonia on several occasions and has been actively been [sic] treated by Dr. Jeannine Parker for these lung conditions for some time." On October 6, 2008, Mr. Borja filed a motion to dismiss the 2004 litigation noting "that this matter has been settled in full," which the trial court granted on October 9, 2008.

On August 27, 2013, Mr. Borja's Supplemental Employee Benefits ("SEB") ended due to the fact that he had received the full 520 weeks of payments. Thereafter, on November 22, 2013, Mr. Borja again filed a disputed claim for compensation citing "knees, heart and lung" as his injuries. In response, St. Bernard filed exceptions of prescription and *res judicata*. After a hearing on the motions, the workers' compensation judge signed a written judgment on December 1, 2014, which granted the exception of *res judicata* for the knee injury, and granted the exception of prescription under the "Heart and Lung Statute." In her reasons for judgment, the workers' compensation judge stated as follows:

The claimant, Richard Borja, hereinafter referred to as claimant, was injured by accident, on June 2, 2001.² The claimant retired from the work force, effective January 1, 2003. A form 1008 was filed on April 1, 2004, alleging right knee and right thumb pain, and heart and lung

² According to the record, as well as the parties, the accident occurred on June 2, 2002 and not on June 2, 2001 as stated in the reasons for judgment.

issues. The case was settled and dismissed on October 9, 2008. The claimant was paid medical benefits and indemnity benefits for his right knee. The last payment of medicals to the claimant was May 22, 2009. The claimant's last indemnity payment was August 26, 2013, for his knee injury. Another claim was filed by the claimant on November 22, 2013, alleging that the claimant was entitled to indemnity benefits, under the Heart & Lung statute for permanent disability....

Findings of Fact

1. When a workers' compensation claim to recover benefits has prescribed on its face, the burden of proving that prescription has been interrupted in some manner is on the claimant
2. No medical benefits have been paid for any accident or injury under the worker's compensation Act since 2009.
3. Payment by the health insurer does not have any effect on the accrual of prescription for the worker's compensation medical benefits.
4. The claimant's right to medical benefits prescribed by the passage of three years under LA-R.S. 23:1209 (C).
5. The claimant's right to medical benefits prescribed as to occupational injury claims under LA-R.S. 23:1031.1
6. The payment of benefits for a 2002 knee injury does not interrupt the running of prescription for the payment of permanent and total disability benefits for heart and lung conditions, which is a separate and distinct occupational disease claim related to the employment in 2004.
7. The claimant's claim for medical and indemnity benefits are Res Judicata.

Conclusion

The claimant's Workers Compensation claim, which was filed on April 1, 2004, included claims for a "right knee" injury and "heart and lung" injuries. A dismissal was signed on October 9, 2008, indicating that the case was settled. The claimant continued to receive indemnity benefits until, August 26, 2013. The parties voluntarily entered into the settlement and they are bound by its'

terms. The ‘Exception of Res Judicata,’ is granted for the knee injury, and the ‘Heart and Lung Statute.’ The ‘Exception of Prescription’ is granted, under the Heart and Lung Statute.

Mr. Borja now appeals this final judgment alleging that the workers’ compensation judge erred in granting St. Bernard’s exception of prescription under the Heart and Lung Statute, and St. Bernard’s exception of *res judicata* with regards to his knee injury.

STANDARD OF REVIEW

An appellate court may not set aside a finding of fact by the trier of fact absent manifest error. *Ardoin v. Firestone Polymers, L.L.C.*, 10-245, p.6 (La. 1/19/11), 56 So.3d 215, 219. In reviewing a finding for manifest error, the appellate court must find from the record both that a reasonable factual basis exists for the finding and that the finding is not clearly wrong. *Id.* Findings on an exception of prescription for which evidence is introduced are also subject to the manifest error review. However, where legal error interdicts the fact-finding process, the manifest error standard is no longer appropriate and the appellate court will conduct a *de novo* review. *Banks v. Children’s Hospital*, 13-1481, p.13 (La. App. 4 Cir. 12/17/14), 156 So.3d 1263, 1272.

DISCUSSION

St. Bernard’s exception raising the objection of prescription alleges that Mr. Borja’s claims for medical benefits are prescribed on their face pursuant to La. R.S. 23:1209(C,) since more than three years passed between the May 22, 2009 payment of medical benefits for his knee injury and the November 22, 2013 filing of the disputed claim for compensation. Also, St. Bernard argues that the 2013 claim for an occupational injury under the Firefighter’s Heart & Lung Act claim clearly prescribed pursuant to La. R.S. 23:1031.1, since Mr. Borja admitted that: (1) he had heart and lung issues on his 2004 disputed claim for compensation; (2)

on May 4, 2005, he acknowledged that he had “heart and lung conditions which were caused by his employment;” and (3) he took disability retirement in 2003.

Further, St. Bernard’s exception raising the objection of *res judicata* argues that the November 2013 claims were previously the subject of litigation between the same parties in 2004, and were resolved through a settlement and dismissal of the litigation in 2008.

Mr. Borja filed oppositions to the exceptions of prescription and *res judicata* arguing that there has always been a dispute over his disability classification and that he “has always contended that he is permanently and totally disabled, while defendant [St. Bernard] still classified him as temporarily, totally disabled.”

According to Mr. Borja’s opposition, the 2008 settlement and dismissal of litigation pertained only to his dispute for back pay and reinstatement of benefits and that “[t]he parties agreed to fight this battle [of whether Mr. Borja was temporarily or permanently disabled] at another date when needed, as Mr. Borja was already receiving the maximum benefits available and had received his back pay.” Mr. Borja also argues that even though his “SEB benefits may have expired, a claim for total and permanent benefits has not because this claim was filed shortly after his weekly compensation was discontinued.”

PRESCRIPTION

It is well settled in Louisiana jurisprudence that the purpose of a prescription statute is to afford a defendant economic and psychological security if a cause of action is not pleaded timely and to protect the defendant from stale claims and the loss of relevant proof. *Findley v. City of Baton Rouge*, 570 So.2d 1168, 1170 (La. 1990). The applicable prescriptive period for making claims for workers’ compensation benefits is provided by La. R.S. 23:1209, which states in pertinent part:

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.

* * *

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.

D. When a petition for compensation has been initiated as provided in R.S. 23:1310.3, unless the claimant shall

in good faith request a hearing and final determination thereon within five years from the date the petition is initiated, that claim shall be barred as the basis of any claim for compensation under the Worker's Compensation Act and shall be dismissed by the office for want of prosecution, which action shall operate as a final adjudication of the right to claim compensation thereunder.

The applicable prescriptive period for making claims for an occupational disease is provided by La. R.S. 23:1031.1, which states in pertinent part:

A. Every employee who is disabled because of the contraction of an occupational disease as herein defined, or the dependent of an employee whose death is caused by an occupational disease, as herein defined, shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.

B. An occupational disease means only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease....

* * *

E. All claims for disability arising from an occupational disease are barred unless the employee files a claim as provided in this Chapter within one year of the date that:

- (1) The disease manifested itself.
- (2) The employee is disabled from working as a result of the disease.
- (3) The employee knows or has reasonable grounds to believe that the disease is occupationally related.

Medical Benefits

In Mr. Borja's 2013 disputed claim for compensation, he is claiming permanent and total disability benefits as well as seeking medical benefits for an occupational disease claim under La. R.S. 33:2581, the Fireman's Heart and Lung

Act.³ However, it is undisputed that St. Bernard's last payment of medical benefits for Mr. Borja's knee injury was made on May 22, 2009. Because Mr. Borja's claim for payment of additional medical benefits was not filed until September 11, 2013, the claim for medical benefits is prescribed on its face. When a workers' compensation claim is prescribed on its face, the claimant bears the burden of showing the running of prescription was suspended or interrupted in some manner. *See Causby v. Perque Floor Covering*, 97-1235 (La. 01/21/98), 707 So.2d 23, 25.

In this case, Mr. Borja fails to provide evidence of any medical benefit payment made under the Louisiana Worker's Compensation Act by St. Bernard after 2009. Instead, Mr. Borja argues that a medical payment made by his health insurer interrupts prescription on a workers' right to seek payments under the Louisiana Worker's Compensation Act. However, like the workers' compensation judge, we find no merit in Mr. Borja's argument that a payment made by a health insurer interrupts prescription for the workers' compensation medical benefits. Although not binding, we agree with St. Bernard that the Third Circuit Court of Appeal's decision in *Leblanc v. Lafayette Consolidated Government* 07-1608 (La. App. 3 Cir. 5/28/02), 983 So.2d 1022, is on point on this issue. In *Leblanc*, the Third Circuit found the wording of La. R.S. 23:1209(C) clear and held that the medical payments referenced in the prescriptive statute were only "payments made

³ La. R.S. 33:2581, the Fireman's Heart and Lung Act, states as follows:

Any disease or infirmity of the heart or lungs which develops during a period of employment in the classified fire service in the state of Louisiana shall be classified as a disease or infirmity connected with employment. The employee affected, or his survivors, shall be entitled to all rights and benefits as granted by the laws of the state of Louisiana to which one suffering an occupational disease is entitled as service connected in the line of duty, regardless of whether the fireman is on duty at the time he is stricken with the disease or infirmity. Such disease or infirmity shall be presumed, prima facie, to have developed during employment and shall be presumed, prima facie, to have been caused by or to have resulted from the nature of the work performed whenever same is manifested at any time after the first five years of employment.

pursuant to an employer's obligation under the Louisiana Workers' Compensation Act, and not to payments such as those made here pursuant to a group health plan.” Accordingly, after a review of the record and the jurisprudence, we find no error in the workers' compensation court's determination that all medical benefits are prescribed since the last medical payment made by St. Bernard for Mr. Borja was in May of 2009.

Indemnity Benefits

Mr. Borja also argues that under La R.S. 23:1209(2) where such payments have been made to an injured worker, the limitation for seeking total, permanent disability shall not take effect until the expiration of one year from the time of making the last payment. Thus, Mr. Borja argues that because his claim for total disability under the Heart and Lung Statute was filed within one year of the termination of his SEB benefits, his claim has not prescribed.

St. Bernard argues that although it has paid in full all indemnity benefits for Mr. Borja's knee injury, these payments do not interrupt the running of prescription for the payment of permanent and total disability benefits for heart and lung conditions, which is a separate and distinct occupational disease claim related to his employment in 2004. St. Bernard argues that Mr. Borja failed to present any evidence establishing medical or disability payments made in relation to his heart and lung claim. Thus, St. Bernard argues that the 2013 filing by Mr. Borja to collect medical and indemnity benefits related to his alleged occupational injury are simply time barred. We agree.

The record evidences the fact that Mr. Borja's doctors placed him at maximum medical improvement in February of 2008. Thereafter, Mr. Borja also accepted vocational rehabilitation and was sent information about registering and recording his job search efforts. Mr. Borja fails to present any evidence establishing disability payments ever made for a permanent heart and lung

disability. Rather, St. Bernard presented evidence of paying ten years of SEB benefits for the knee injury and the justifications for the stoppage of those benefits upon their legal expiration. Like the trial court, we find that even though Mr. Borja may have an ongoing claim for his 2002 knee injury which ended in August 2013, that claim does not have any effect on the accrual of prescription for a separate and distinct occupational disease claim for a heart and lung condition. *See also Daigle v. Shelby J. Gaudit Contractors, Inc.*, 01-2052 (La. App. 1 Cir. 9/27/02), 835 So.2d 554 (whereby the court found that claimant had two separate and distinct incidents and that one accident cannot serve to interrupt prescription as to a state workers' compensation claim based on a second accident). After a review of the record and jurisprudence, we find that Mr. Borja's 2013 claim for a heart and lung condition prescribed since the record evidences the fact that he was aware of this occupational disease in 2004, and again in 2008, when he dismissed the litigation regarding the occupational disease as a permanent disability.

For these reasons, we find no error in the workers' compensation judge's finding that Mr. Borja's heart and lung claims are prescribed. Further, we find no error in the workers' compensation judgment granting the exception of *res judicata* in regards to Mr. Borja's knee injury since all parties agree that they settled that claim in 2008 and that St. Bernard has paid the SEB benefits in full.

AFFIRMED