

**DENISIA ALLEN (MICHAEL
MACK, SR.)**

*

NO. 2017-CA-0833

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VERSUS

COURT OF APPEAL

*

BLIND PELICAN

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
THE OFFICE OF WORKERS' COMPENSATION
NO. 16-00027, DISTRICT "08"
Honorable Catrice Johnson-Reid, The Office of Workers' Compensation

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Judge Rosemary Ledet

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(Court composed of Judge Roland L. Belsome, Judge Rosemary Ledet, Judge
Tiffany G. Chase)

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REVERSED AND REMANDED

MARCH 14, 2018

This is a workers' compensation case. The claimant, Denisia Allen, on behalf of her minor child, Michael Mack, Jr. ("Ms. Allen"), appeals the June 30, 2017 judgment of the Office of Workers' Compensation ("OWC"), granting the motion for summary judgment filed by the employer, Blind Pelican, and dismissing Ms. Allen's claim for death benefits under La. R.S. 23:1231. For the reasons that follow, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

On December 26, 2015, Michael Mack, Sr. ("Mr. Mack") was employed as a prep cook by Blind Pelican, a restaurant. On that date, he worked his shift. At some point, he went into Blind Pelican's bathroom, where he suffered an apparent heart attack. He was transported by ambulance to Touro Hospital, where he died later that night. An autopsy revealed that the cause of death was "[h]emorrhagic infarct of the left basal ganglia with herniation"—a stroke or brain aneurysm. At the time of his death, Mr. Mack was thirty-three years old.

On January 4, 2016, Ms. Allen filed a disputed claim for compensation (Form 1008), seeking death benefits. On the Form 1008, the accident or injury was described as "[a]pparent heart attack while on the job on December 26, 2015" and the details were noted as "[d]ecedent was found dead on floor in bathroom." The only medical data listed on the Form 1008 was the "New Orleans Coroner." Blind Pelican answered, denying Ms. Allen's claim to death benefits. In its answer, Blind

Pelican raised as a defense, among other things, that Ms. Allen lacked procedural capacity to sue on the minor's behalf.

On January 30, 2017, Blind Pelican filed a motion for summary judgment, claiming that Ms. Allen could not show by clear and convincing evidence that the decedent's death was "an injury by accident arising out of and in the course of employment" pursuant to R.S. 23:1021 (8)(e).¹ On April 10, 2017, the hearing on the motion for summary judgment was held. Following the hearing, the OWC granted Blind Pelican's motion and dismissed Ms. Allen's claim. This appeal followed.

DISCUSSION

The sole issue presented is whether the OWC erred in granting Blind Pelican's motion for summary judgment. An appellate court reviews an OWC's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the OWC's consideration of whether summary judgment is appropriate. *Abney v. Gates Unlimited, L.L.C.*, 11-1242, p. 4 (La. App. 1 Cir. 5/4/12), 92 So.3d 1068, 1070.

¹ Given Mr. Mack's cause of death was a stroke or brain aneurysm, Blind Pelican contends that the governing statutory provision is La. R.S. 23:1021(8)(e), which provides as follows:

A heart-related or perivascular injury, illness, or death 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 it is demonstrated by clear and convincing evidence that:

(i) The physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and

(ii) The physical work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death.

In addition to deciding whether there is no genuine issue of material fact making summary judgment appropriate (as decided by the OWC here), this case also presents the issue of whether the claimant, Ms. Allen, had adequate time for discovery before the rendition of summary judgment. The OWC's decision to not continue the motion for summary judgment to allow additional discovery is reviewed under an abuse of discretion standard. *Baker Ready Mix, LLC v. Crown Roofing Servs., Inc.*, 15-0565, pp. 6-7 (La. App. 4 Cir. 12/16/15), 183 So.3d 622, 626 (quoting *Simoneaux v. E.I. du Pont de Nemours and Co.*, 483 So.2d 908, 912 (La. 1986)); *Roadrunner Trans. Sys. v. Brown*, 17-0040, p. 11 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1272 (observing that “[w]hen discovery is alleged to be incomplete, a trial court has the discretion either to hear the summary judgment motion or to grant a continuance to allow further discovery”). Because we find the prematurity issue dispositive, we limit our analysis to that issue.

The governing statutory provision, La. C.C.P. art. 966, provides that a motion for summary judgment shall be granted if, “[a]fter an opportunity for adequate discovery,” 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). This statutory provision further provides that “[f]or good cause shown, the court may order a continuance of the hearing.” La. C.C.P. art. 966(C)(2). In determining whether “good cause” exists for granting a continuance, the jurisprudence has identified the following factors to be considered: due diligence, good faith, reasonable grounds, fairness to both parties, and the need for the orderly administration of justice. *Rogers v. Hilltop Ret. & Rehab. Ctr.*, 13-867, p. 4 (La. App. 3 Cir. 2/12/14), 153 So.3d 1053, 1058.

This court has recognized that “while parties must be given fair opportunity to carry out discovery and present their claim, there is no absolute right to delay action on motion for summary judgment until discovery is complete.” *Hayes v. Sheraton Operating Corp.*, 14-0675, p. 4 (La. App. 4 Cir. 12/10/14), 156 So.3d 1193, 1197 (quoting *Thomas v. N. 40 Land Dev., Inc.*, 04-0610, p. 31 (La. App. 4 Cir. 1/26/05), 894 So.2d 1160, 1179). This court has further recognized, in applying La. C.C.P. 966, that “[u]nless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact.” *Orleans Parish Sch. Bd. v. Lexington Ins. Co.*, 12-1686, p. 30 (La. App. 4 Cir. 6/5/13), 118 So.3d 1203, 1223 (quoting *Simoneaux*, 483 So.2d at 912-13).

This court has still further recognized that summary judgment is premature when “the party opposing summary judgment was not afforded a reasonable opportunity to take relevant depositions prior to being required to defend against the motion for summary judgment.” *Schultz v. Cox Operating, LLC*, 17-0165, p. 8 (La. App. 4 Cir. 1/31/18), ___ So.3d ___, 2018 WL 651372, *3 (citing *Doe v. ABC Corp.*, 00-1905, p. 11 (La. App. 4 Cir. 6/27/01), 790 So.2d 136, 143).

In addressing a prematurity claim, this court has identified the following five factors to be considered:

- Whether the party was ready to go to trial;
- Whether the party indicated what additional discovery was needed;
- Whether the party took any steps to conduct additional discovery during the period between the filing of the motion and the hearing on it;
- Whether the discovery issue was raised in the trial court before the entry of the summary judgment; and

- Whether discovery has been hindered by a circumstance beyond an opponent's control.

Schultz, 17-0165 at p. 8 (La. App. 4 Cir. 1/31/18), ___ So.3d at ___ 2018 WL 651372 at *4; *Roadrunner Transp.*, 17-0040 at p. 14, 219 So.3d at 1274; *Bass P'ship v. Fortmayer*, 04-1438, p. 10 (La. App. 4 Cir. 3/9/05), 899 So.2d 68, 75 (citing *Greenhouse v. C.F. Kenner Assocs. Ltd. P'ship*, 98-0496, p. 3 (La. App. 4 Cir. 11/10/98), 723 So.2d 1004, 1006).

The first factor is premised on the fact that in a civil case a party generally certifies, as a prerequisite to setting the case for trial, that discovery is complete and that the case is ready for trial. *Greenhouse, supra.* (quoting an Orleans Parish Civil District Court local rule and observing that the plaintiff's filing of two motions to set trial was sufficient to suggest that all discovery had been completed); *see also Crawford v. City of New Orleans*, 01-0802, p. 6 (La. App. 4 Cir. 1/23/02), 807 So.2d 1054, 1057. This case, however, is a workers' compensation case. Workers' compensation cases are governed by La. R.S. 23:1317, which provides that "[t]he workers' compensation judge shall decide the merits of the controversy as equitably, summarily, and simply as may be." The first factor is thus inapposite here.²

Because our analysis of the remaining four factors overlaps, we address those factors together. On March 7, 2017, one month before the hearing, Ms. Allen filed an opposition to the motion for summary judgment, contending that Blind Pelican had failed to answer any discovery filed by her counsel in April 2016, one year before the hearing. In her opposition, she further stated that her counsel was

² Nevertheless, it is undisputed that Ms. Allen was not ready for the trial, which was set for July 2017. At the time of the hearing, no depositions had been taken by either party. Indeed, Blind Pelican's counsel, when questioned by the OWC whether there was any proof of the fact that Mr. Mack had "clocked out" when the incident occurred—as Blind Pelican contends—acknowledged that no depositions had been taken.

filing a motion to compel the discovery filed in April 2016 that was unanswered.

On that same date (March 7, 2017), Ms. Allen filed an amended opposition memorandum stating the following:

[H]er counsel has just received Answers to Interrogatories on the 6th day of March, 2017 after numerous requests. That the answers are incomplete and what answers do appear do not allow for the investigation of those individuals who were working with decedent at the time of his passing at the Blind Pelican, his employer. That she requests more time to determine the information of those individuals having personal knowledge of the death of Michael Mack, Sr.

At the hearing, Ms. Allen's counsel explained that he was thwarted in his attempts to find the individuals who were working with the decedent, Mr. Mack, due to Blind Pelican's failure to answer the interrogatories until March 2017. This information regarding Mr. Mack's co-employees was needed to establish the nature of Mr. Mack's work as a prep cook, in general, and on the day of the incident, in particular. Moreover, Ms. Allen's counsel explained that the name of one of the co-employees provided by Blind Pelican in March 2017 was incorrectly spelled "Chenery;" the correct spelling is "Cheneau." Ms. Allen's counsel further explained that he had recently, only days before the hearing, located this other employee, who was working at another restaurant. In response to the OWC's inquiry as to what he would do if granted a thirty-day continuance, Ms. Allen's counsel replied that he would take the deposition of Blind Pelican's manger.³

³ Ms. Allen's counsel also apologized to the court for the delay in pursuing the case caused by his own health problems—a shoulder replacement surgery—and thanked the court and opposing counsel for granting him a continuance due to his health problems. As to the continuances, we note that Blind Pelican represents in its appellee brief to this court that the case had been set for trial four times and continued three times; and it attaches the trial court's four notices of trial to its appellee brief. The record on appeal, however, does not contain a copy of those trial notices. This court is a court of record and can only consider evidence in the record. *Miccol Enterprises, Inc. v. City of New Orleans*, 12-0864, p. 6 (La. App. 4 Cir. 12/19/12), 106 So.3d 746, 750. Regardless, we note that the OWC, at the hearing, stated that the matter "has been continued a couple of times."

At the hearing, the OWC made an express finding that Blind Pelican failed to provide the discovery responses to Ms. Allen until March 7, 2016, a month before the hearing. Nonetheless, the OWC denied Ms. Allen's request for a brief, thirty-day continuance to conduct discovery. In so doing, the OWC, at least in part, relied on Ms. Allen's failure to provide proof of her procedural capacity to sue on the minor's behalf.

The issue of Ms. Allen's procedural capacity—her failure to secure a signed tutorship judgment—was raised by Blind Pelican's counsel at the hearing when the OWC was entertaining Ms. Allen's request for a brief continuance. At that juncture, Blind Pelican's counsel reminded the OWC that Ms. Allen's counsel was ordered to supplement the record with letters of tutorship several months earlier, yet he had failed to do so. Upon Ms. Allen's counsel confirming that he had failed to do so, the OWC granted Blind Pelican's motion for summary judgment. This procedural capacity issue, however, was not properly before the OWC. *See* La. C.C.P. art. 966(F) (providing that “[a] summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time”). The 2015 Comments to La. C.C.P. art. 966 state that “Paragraph F makes clear that, in deciding a motion for summary judgment, a court can consider only the issues raised in the motion or opposition filed by the parties. The court cannot rule on issues not raised by the parties.” The trial court thus erred in relying on this issue to grant the motion.

On appeal, Blind Pelican contends that Ms. Allen took no steps to conduct discovery between the time the motion for summary judgment was filed (January 2017) and the hearing on the motion (April 2017). This argument, however, overlooks that the OWC found Blind Pelican did not respond to Ms. Allen's earlier

filed discovery requests until March 2017, only a month before the hearing.

Moreover, Ms. Allen, in her supplemental opposition to the motion, asserted that the discovery responses were inadequate. Likewise, at the hearing, Ms. Allen's counsel voiced difficulty in locating Mr. Mack's co-employees with the limited information Blind Pelican belatedly provided him in March 2017.

Given Blind Pelican's hampering of Ms. Allen's discovery efforts by failing to respond to the discovery requests until March 2017 coupled with the OWC's reliance on an issue not properly before it to decide the motion, we conclude, under the particular facts of this case, that the OWC abused its discretion in rejecting Ms. Allen's request for a brief, thirty-day continuance to complete discovery.

DECREE

For the foregoing reasons, we reverse the judgment of the Office of Workers' Compensation, granting the Blind Pelican's motion for summary judgment, and remand.

REVERSED AND REMANDED