

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 0725

DONALD W. CLARK

VERSUS

VULCAN CHEMICAL INVESTMENTS LLC AND  
CONTROLLED MAINTENANCE INC.

Judgment Rendered: February 9, 2007.

\* \* \* \* \*

On Appeal from the  
23rd Judicial District Court,  
in and for the Parish of Ascension  
State of Louisiana  
District Court No. 77,796

The Honorable Ralph Tureau, Judge Presiding

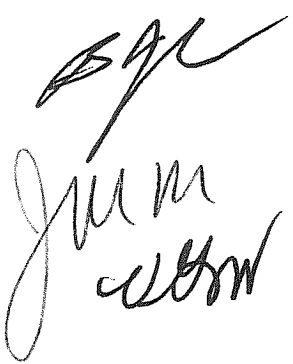
\* \* \* \* \*

Terrence J. Lestelle  
Andrea S. Lestelle  
Jeffery B. Struckhoff  
Louis Gerber  
Metairie, La.  
and  
Charles W. Seaman  
Natchitoches, La.

Counsel for Plaintiff/2<sup>nd</sup> Appellant,  
Donald Clark

Bradley C. Myers  
Lana D. Crump  
Baton Rouge, La.

Counsel for Defendant/Appellee,  
Vulcan Materials Company



Darrell R. Sims  
Baton Rouge, La.

Counsel for Intervenor/1<sup>st</sup> Appellant,  
Liberty Mutual Insurance Company

\* \* \* \* \*

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

**CARTER, C.J.**

Plaintiff, Donald W. Clark, and intervenor, Liberty Mutual Insurance Company, appeal the trial court's grant of defendant, Vulcan Materials Company's, motion for summary judgment. The sole issue for review is whether plaintiff's "Employee's Notice of Injury or Occupational Disease and Claim for Compensation," filed with the Texas Workers' Compensation Commission as required under the Texas Workers' Compensation Act of the Texas Labor Code, sections 409.001 and 409.003, qualified as the filing of a lawsuit in "a court of competent jurisdiction" so as to interrupt prescription on plaintiff's tort suit. See LSA-C.C. arts. 3462-3463.

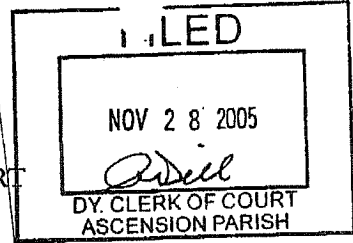
After a de novo review of the record and the applicable law and jurisprudence, we agree with the trial court's conclusion that the Texas document is in the nature of a notice of injury filed with the Louisiana Office of Workers' Compensation pursuant to LSA-R.S. 23:1301, not in the nature of a disputed claim for compensation filed pursuant to LSA-R.S. 23:1310. Therefore, plaintiff's action is prescribed, and the defendant is entitled to summary judgment in its favor. Contra **Scott v. Sears, Roebuck and Co.**, 99-0571 (La. App. 1 Cir. 12/22/00), 778 So.2d 50, 54.

The trial court's November 28, 2005, reasons for judgment, which we adopt and have attached hereto as Exhibit A, thoroughly and adequately explain the decision. For this reason, we affirm the trial court's judgment by summary disposition in accordance with Rule 2-16.2A(5) of the Uniform Rules of Louisiana Courts of Appeal. Costs of this appeal are to be divided equally by appellants.

**AFFIRMED.**

EXHIBIT A

23RD JUDICIAL DISTRICT COURT  
PARISH OF ASCENSION  
STATE OF LOUISIANA



NO.: 77,796

DIVISION "A"

DONALD W. CLARK

VERSUS

VULCAN MATERIALS COMPANY  
AND CONTROLLED MAINTENANCE, INC.

---

CLARK'S MOTION FOR NEW TRIAL

---

REASONS FOR JUDGMENT

---

Statement of the Case

On April 9, 2002, the plaintiff, DONALD W. CLARK ("Clark"; a Texas resident), allegedly sustained injuries while in the course and scope of his employment with NISSHIN GULF COAST ("Nisshin"; a corporation with its main office in Houston, Texas) when his foot slipped from a rung of a rope ladder and he fell onto a platform inside a vessel/tank at a facility belonging to VULCAN CHEMICAL INVESTMENTS, LLC ("Vulcan") in Geismar, Louisiana. Clark timely filed a notice of injury and claim for workers' compensation on May 30, 2002 by submitting a document entitled "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" to the Texas Workers Compensation Commission (TWCC), and Nisshin's workers compensation insurer began to pay indemnity benefits to Clark in July 2002. On April 29, 2004, Clark filed a tort action against Vulcan for its negligence.

11/26/05 Scanned CV 1

The instant Motion for New Trial was filed by Clark on August 26, 2005 requesting the court to set aside the summary judgment rendered and signed on August 22, 2005 on the ground that the judgment is clearly contrary to the law and evidence.<sup>1</sup>

Relevant Law and Analysis

I. The Motion for New Trial

Pursuant to Louisiana Code of Civil Procedure article 1971, a new trial may be granted, upon contradictory motion of any party or by the court on its own motion, to all or any of the parties and on all or part of the issues, or for reargument only. Furthermore, La. Code of Civ. Pro. article 1972 lists peremptory grounds for granting a new trial and provides:

A new trial shall be granted, upon contradictory motion of any party, in the following cases:

- (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
- (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
- (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

La. Code of Civ. Pro. article 1973 then provides the trial court discretion to grant a new trial in any case if there is good ground therefor, except as otherwise provided by law.

Louisiana jurisprudence does not favor new trials, especially when the judgment is supported by the record.<sup>2</sup> A trial court has virtually unlimited discretion to grant a new trial when it is convinced that a miscarriage of justice has resulted, and, unless an abuse of discretion can be demonstrated, a trial court's action in granting or denying a new trial on discretionary grounds will not be reversed.<sup>3</sup>

<sup>1</sup> Summary judgment was granted based on this Honorable Court's finding that the "Employee's Notice of Injury and Claim for Compensation" filed by Clark with the TWCC did not interrupt prescription with regard to Clark's negligence claim against Vulcan.

<sup>2</sup> *Broussard v. Stack*, 95-2508 (La.App. 1 Cir. 9/27/96), 680 So.2d 771; *Fletcher v. Langley*, 93-624 p.3 (La.App. 3rd Cir. 2/2/94); 631 So.2d 693, 695, writ denied, 94-0521 (La. 4/7/94); 635 So.2d 1139.

<sup>3</sup> *Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries*, 95-0484, p. 3 (La.App. 1st Cir.11/16/95), 665 So.2d 523,

## II. Interruption of Prescription

Under Louisiana law, prescriptive statutes are to be strictly construed against prescription and in favor of the obligation sought to be extinguished; of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted.<sup>4</sup>

Louisiana Civil Code Article 3492 provides a one-year prescriptive period for delictual actions, such as Clark's claim against Vulcan. Because Clark's suit for tort damages was filed more than one year after the accident, the action was prescribed on its face. In such a circumstance, the plaintiff carries the burden of proving that prescription was interrupted.<sup>5</sup> Pursuant to La. Civ. Code art. 3462<sup>6</sup>, prescription is interrupted by the filing of a lawsuit in a court of competent jurisdiction. The interruption of prescription resulting from the filing of suit in a court of competent jurisdiction within the prescriptive period continues as long as the suit is pending.<sup>7</sup>

## III. Overview of Workers' Compensation Claims Process in Louisiana

In Louisiana, an employee is required to notify his employer of his injury within thirty (30) days after the date of injury.<sup>8</sup> This notice shall (1) be made in writing, (2) contain the name and address of the employee, (3) state in ordinary language the time, place, nature, and cause of the injury, and (4) be signed by the person giving or making the notice.<sup>9</sup> If, at any time after the notice of injury is filed, a bona fide dispute occurs an injured employee may file a claim for compensation with the Office of Workers'

526, writ denied, 96-0415 (La.3/29/96), 670 So.2d 1233.

<sup>4</sup> *August v. Star Enterprise, Inc.*, 899 F.Supp. 1540, 1542 (E.D.La.1995); *Francis v. Health Care Capital, Inc.*, 933 F.Supp. 569, 573 (E.D.La. 1996).

<sup>5</sup> *Lima v. Schmidt*, 595 So.2d 624, 628 (La. 1992).

<sup>6</sup> La. Civ. Code art. 3462 provides: "Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period."

<sup>7</sup> La. Civ. Code art. 3463.

<sup>8</sup> La. R.S. 23:1301.

<sup>9</sup> La. R.S. 23:1303.

Compensation (OWC).<sup>10</sup>

The matter is then set for a mediation conference, unless waived by all parties, and the mediator will issue a report of the results.<sup>11</sup> If the parties are unable to resolve the dispute, a workers' compensation judge shall be vested with original, exclusive jurisdiction over the claim.<sup>12</sup> Upon the completion of a hearing, the workers' compensation judge shall make a decision, which is final unless an appeal is made to the appropriate circuit court of appeal.

#### IV. Overview of Workers' Compensation Claims Process in Texas

In Texas, an employee is required to submit a "notice of injury" to his employer within thirty (30) days of the injury<sup>13</sup> and a "claim for compensation" with the TWCC within one (1) year of the date of injury.<sup>14</sup> If a dispute arises about the injured employee's claim for workers' compensation, the Texas Workers' Compensation Act provides a detailed dispute resolution process.

First, the employee may request a benefit review conference (BRC), which is an informal meeting.<sup>15</sup> If an agreement cannot be reached at the BRC, the employee may choose arbitration<sup>16</sup> or to attend a formal contested case hearing. If arbitration is chosen, the decision of the arbitrator is binding on all parties and is final and cannot be appealed. If arbitration is not chosen, a contested case hearing (CCH) is the next step of dispute resolution. The CCH is a formal hearing, which is recorded an official record is made, and at which sworn testimony is taken.

<sup>10</sup> La. R.S. 23:1310(A) addresses the requisites for the filing of a claim with the OWC and provides: "If, at any time after notification to the office of the occurrence of death or injury resulting in excess of seven days lost time, a bona fide dispute occurs, the employee or his dependent or the employer or insurer may file a claim with the state office, or the district office where the hearing will be held, on a form to be provided by the director."

<sup>11</sup> La. R.S. 23:1310.3.

<sup>12</sup> *Id.*

<sup>13</sup> Texas Workers Compensation Act Section 409.001.

<sup>14</sup> Texas Workers Compensation Act Section 409.003.

<sup>15</sup> Texas Workers Compensation Act Sections 410.021 - 410.034, Rules 141.1 - 141.7.

<sup>16</sup> Texas Workers Compensation Act Sections 410.101 - 410.121, Rules 144.1 - 144.6.

If a party disagrees with the decision and order of the Hearing Officer, the dissatisfied party may request review of the decision by the Appeals Panel.<sup>17</sup> The Appeals Panel decision is the final step in the Division's dispute resolution process. If a party disagrees with the Appeal Panel's decision, the decision may be appealed to a district court. However, workers' compensation claim disputes may not be heard in court unless the dispute has first gone through the dispute resolution process and the Appeals Panel has issued a decision.<sup>18</sup>

V. Louisiana jurisprudence regarding the interruption of prescription of a claim against a third party tortfeasor by a timely filed workers' compensation claim

The Louisiana Supreme Court has concluded that prescription is interrupted with regard to an injured employee's claims against a third party tortfeasor when the employee filed a timely suit seeking workers' compensation benefits from his employer.<sup>19</sup> In *Gary*, *supra*, the Louisiana Supreme Court declared:

"When a lawsuit is filed against the employer, prescription is interrupted as to claims against the employer pursuant to Article 3462. Because the third-party tortfeasor is a solidary obligor, the interruption of prescription is applicable also to a claim against a third-party tortfeasor, as this court held in *Williams*.<sup>20</sup> When a lawsuit is filed against the employer in a competent court, prescription is interrupted because the legal system is put into motion and the purposes of prescriptive laws are satisfied."

Thus, what constitutes a "suit" or "claim" for workers' compensation sufficient to interrupt prescription must be determined. While the term "claim" is not defined the Louisiana Workers Compensation Act, Louisiana jurisprudence regarding interruption of prescription by filing a claim for workers' compensation is clear; prescription of a tort claim against a third-party tortfeasor is interrupted by the filing of a claim for workers' compensation with the OWC, pursuant to La. R.S. 23:1310.

<sup>17</sup> Texas Workers Compensation Act Sections 410.201 - 410.209, Rules 143.1 - 143.5.

<sup>18</sup> Sections 410.251 - 410.258, Rules 147.1 - 147.11.

<sup>19</sup> *Williams v. Sewerage & Water Bd. of New Orleans*, 611 So.2d 1383 (La. 1993); *Gary v. Camden Fire Ins. Co.*, 676 So.2d 553 (La.4/2/96).

<sup>20</sup> 611 So.2d at 1387. See also La. Civ. Code arts. 1799 and 2324C.



As provided above, La. R.S. 2310 allows an injured employee to file a "claim" for workers' compensation with the OWC if a bona fide dispute occurs after filing a notice of injury. The First Circuit has consistently held that the claim filed with the OWC that interrupts prescription is a claim made pursuant to La. R.S. 23:1310 on Form 1008, which is entitled "Disputed Claim for Compensation."<sup>21</sup> In *Scott v. Sears, Roebuck and Co.*<sup>22</sup>, the First Circuit declared, "The filing of a Disputed Claim for Compensation would have the same effect on prescription as the filing of a lawsuit." Furthermore, in *Kratzer v. PPM Contractors, Inc.*<sup>23</sup>, the claimant had filed a disputed claim, and the court held, "When an injured employee timely files a claim seeking workers' compensation benefits from his employer, prescription is interrupted with regard to an injured employee's claim against the third party tortfeasor."

While not controlling, this Honorable Court recognizes the decisions of Second and Third Circuits, which have held the same. In *Segura v. Cleco Power, LLC*<sup>24</sup>, the Second Circuit held, "When an injured employee timely files a claim seeking workers' compensation benefits from his employer, prescription is interrupted with regard to the injured employee's claim against the third party tortfeasor." In *Gray v. Mounir*<sup>25</sup>, the plaintiff had filed a claim with the OWC, and the Third Circuit declared, "Because the OWC is the only forum where an employee can bring a claim for a work-related injury, we conclude that the OWC is a court of competent jurisdiction for the purposes of interrupting prescription against a third party tortfeasor who is jointly or solidarily liable."

Thus, it is clear and uniform law in Louisiana that a claim for workers' compensation timely filed with the OWC, pursuant to La. R.S. 23:1310, interrupts prescription with regard to an injured employee's claims against a third-party tortfeasor.

<sup>21</sup> *Dietrich v. Apex Electric*, 632 So.2d 795 (La.App. 1<sup>st</sup> Cir. 1993).

<sup>22</sup> 778 So.2d 50, 1999-0571 (La.App. 1 Cir. 12/22/00), rehearing denied (Mar 01, 2001).

<sup>23</sup> 803 So.2d 1147, 1148 (La. App. 1<sup>st</sup> Cir. 12/28/01).

<sup>24</sup> 900 So.2d 897, 900 (La.App. 3<sup>rd</sup> Cir. 3/2/05).

11/20/05 3:00 PM CIVIL

VI. Analysis

The issue presented is whether the "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" filed by Clark with the TWCC is sufficient to interrupt prescription with regard to Clark's tort claim against Vulcan.

In Louisiana, an injured employee must file a notice of injury within thirty (30) days after the date of the injury and may file a claim for workers' compensation, pursuant to La. R.S. 23:1310, *only after a bona fide dispute arises*. If the employee files a disputed claim, such claim is sufficient to interrupt prescription under La. Civ. Code art. 3462. In Texas, however, every injured employee must file a notice of injury and a claim for workers' compensation, *regardless of whether a dispute exists*. Because a bona fide dispute is required to file a claim for workers' compensation in Louisiana, such claim is analogous to filing a suit in a court of competent jurisdiction, which puts the legal system into motion.

In the case at bar, Clark timely filed a notice of injury and claim for workers' compensation with the TWCC, in accordance with the Texas Workers' Compensation Act. The evidence reflects that after Clark filed his notice of injury and claim for workers' compensation, Nisshin's workers' compensation insurer began making indemnity benefits to Clark from July 1, 2002 through August 11, 2004. In fact, Clark admitted in his deposition that he began receiving compensation benefits in July or August of 2002 and continued to receive them through August 2004. However, there is no evidence in the record that any step of the dispute resolution process was taken with regard to Clark's claim.

This Honorable Court therefore finds that Clark's "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (which is required by Texas law to be filed by every injured employee) is not the equivalent to filing claim with the OWC,

<sup>25</sup> 746 So.2d 746, 749 (La.App. 3<sup>rd</sup> Cir. 11/3/99).

11/29/05 9:44:11 AM

pursuant to La. R.S. 23:1310 (which may be filed only after a bona fide dispute has arisen). Thus, prescription with regard to Clark's negligence claim against Vulcan was not interrupted when Clark filed his notice of injury and claim for compensation on May 30, 2002.

Conclusion

Because Clark's "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" is insufficient to interrupt prescription under La. C.C. 3462, his claim had prescribed when it was filed on April 29, 2004, more than two years after the event giving rise to his claim. Accordingly, Clark's Motion for New Trial is DENIED.

Signed at Gonzales, Louisiana this 28 day of ~~October~~ November 2005.



JUDGE RALPH TUREAU  
23RD JUDICIAL DISTRICT COURT  
DIVISION "A"

NOTICE ALL COUNSEL OF RECORD