

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0836

LIBERTY MUTUAL INSURANCE COMPANY

VERSUS

STATE OF LOUISIANA WORKERS' COMPENSATION
SECOND INJURY BOARD

JEW
JH
JMC

Judgment Rendered: December 21, 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 594,760

Honorable Todd Hernandez, Judge

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Second Injury Board

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

The plaintiff, Liberty Mutual Insurance Company (“LMIC”), the workers’ compensation insurance administrator for Tiger Offshore Rentals (“Tiger Offshore”), appeals a judgment of the district court sustaining the peremptory exception raising the objection of prescription filed by the defendant, Louisiana Workers’ Compensation Second Injury Board (“the Board”), and dismissing LMIC’s appeal of the denial of its claim for reimbursement of workers’ compensation benefits paid. We affirm the judgment of the district court in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

Generally, when an employee is injured while in the course and scope of employment, an employer or its insurer must pay compensation benefits to the employee pursuant to La. R.S. 23:1031, *et. seq.* However, in order to encourage the employment of individuals with permanent partial disabilities, the Workers’ Compensation Second Injury Fund (“the Second Injury Fund”) was established in accordance with La. R.S. 23:1371, *et seq.* The Board is a legislatively created entity that administers the Second Injury Fund. See La. R.S. 23:1372 and La. R.S. 23:1377.

When an employer who knowingly hires or retains in its employment an employee who suffers from a preexisting permanent physical disability (as defined by statute), and that employee becomes injured while in the course and scope of his latest employment, resulting in a greater liability for workers’ compensation benefits due to the merger of the subsequent injury with the preexisting permanent partial disability, the employer can apply to the Second Injury Fund for reimbursement of benefits paid to the employee. See La. R.S. 23:1371 and La. R.S. 23:1378.

The procedure for applying for reimbursement is set forth in La. R.S. 23:1378. Initially, notice to the Board by the employer or its insurer is required.

The Board may hold hearings to determine if the employer is entitled to reimbursement from the Second Injury Fund, and the Board is required to provide written notice of its decision to all parties to the hearing and the representatives designated by the party on the reimbursement form submitted to the Board. An appeal of a decision of the Board is governed by La. R.S. 23:1378(E), which provides, in pertinent part:

The decision of the [B]oard 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 [B]oard. If an appeal is taken, the [B]oard 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, [P]arish of East Baton Rouge. All appeals in all such cases shall be tried de novo.

On September 16, 2010, LMIC commenced these proceedings seeking judicial review of a decision of the Board relating to Melissa McCullough, an employee of Tiger Offshore. According to LMIC's petition, Ms. McCullough was injured on September 22, 2008, while in the course and scope of her employment with Tiger Offshore and sustained an injury to her neck. As Ms. McCullough's employer, Tiger Offshore, through LMIC, asserted that it had paid workers' compensation medical and disability benefits to Ms. McCullough. LMIC claimed that prior to Ms. McCullough's work-related accident on September 22, 2008, she suffered from a preexisting injury or condition in her neck and that Tiger Offshore, with full knowledge of that permanent partial disability, had retained Ms. McCullough in its employ. LMIC further claimed that as a result of the combination or merger of Ms. McCullough's preexisting injury or condition with her injuries from the September 22, 2008 accident, Ms. McCullough's resulting disability was substantially greater than that which would have resulted had the preexisting injury or condition not been present.

LMIC alleged that it had requested reimbursement from the Second Injury

Fund for compensation benefits paid to or on behalf of Ms. McCullough from the Board. However, in a report dated August 6, 2010, the Board denied LMIC's reimbursement claim. LMIC contended that it was aggrieved by the decision of the Board and was entitled to an appeal of the Board's decision and trial *de novo* of the issue of reimbursement.

In response, the Board filed a preemptory exception raising the objection of prescription, claiming that the Board denied LMIC's claim for reimbursement at its meeting on August 5, 2010, that it mailed a copy of its decision on August 6, 2010, that a copy of its decision was delivered to LMIC on August 10, 2010 (as evidenced by a certified mail receipt), and that LMIC's appeal of the decision of the Board was untimely under the provisions of La. R.S. 23:1378(E) because it was not taken within thirty days after the date of the decision of the Board. A hearing on the preemptory exception raising the objection of prescription was held on January 31, 2011. Thereafter, by judgment signed on February 23, 2011, the district court sustained the Board's preemptory exception raising the objection of prescription and dismissed LMIC's petition for judicial review. From this judgment, LMIC appeals.

On appeal, LMIC essentially argues that the district court erred in sustaining the preemptory exception raising the objection of prescription because its petition was timely. LMIC claims that while La. R.S. 23:1378(E) provides that an appeal must be taken within thirty days after the date of the decision of the Board, this delay does not commence to run until the decision of the Board is mailed, citing **Lafayette Parish School Board v. Louisiana Workers' Compensation Second Injury Board**, 2004-1632 (La. App. 3rd Cir. 4/6/05), 900 So.2d 294, writ denied, 2005-1183 (La. 11/28/05), 916 So.2d 145, and that the Board failed to prove the date its decision was mailed; therefore, the exact date that the thirty-day time delay commenced to run cannot be determined. Additionally, LMIC contends that

although the Board submitted a copy of a certified mail return receipt purportedly establishing that LMIC received a copy of the Board's decision on August 10, 2010, that evidence was not properly authenticated and should not have been considered by the trial court. Lastly, LMIC claims that its appeal of the decision of the Board was prepared and mailed by LMIC on August 26, 2010, but for reasons unknown was not processed or filed by the Clerk of Court's office until September 16, 2010.

The failure to timely file an appeal of a decision of the Board under La. R.S. 23:1378(E) is a jurisdictional defect rather than a matter of prescription *per se*. See **Travelers Indemnity Company v. State of Louisiana Workers' Compensation Second Injury Board**, 2009-1332 (La. App. 1st Cir. 2/12/10), 35 So.3d 311, 315. In this case, the district court found that LMIC received the notice of the decision of the Board on August 10, 2010 and that the appeal filed on September 16, 2010, was beyond the thirty days allowed by law; therefore, the district court dismissed LMIC's petition. After reviewing the record in its entirety, we find no error in the judgment of the district court.

As previously noted, the decision of the Board is final; however, an appeal may be taken *within thirty days after the date of the decision of the Board*. La. R.S. 23:1378(E). In this case, LMIC's petition was filed on September 16, 2010, and the Board rendered its decision on August 5, 2010. Thus, the petition was untimely. Although LMIC argues that there is no evidence establishing when the Board mailed its decision, La. R.S. 23:1378(E) provides that the thirty-day time period commences the day after the date of the decision of the Board, which in this case would be August 6, 2010. Furthermore, the Board offered and the trial court accepted into evidence a copy of the certified mail return receipt evidencing that LMIC received the notice of the Board on August 10, 2010. Assuming that the notice of the decision was mailed, at the very latest, by the Board on the same date

that it was received by LMIC (August 10, 2010), LMIC's petition was still filed beyond the thirty day time period and was untimely. In accord **Lafayette Parish School Board**, 900 So.2d at 296. To the extent that LMIC claims that the copy of the certified mail receipt was not competent evidence because it was not authenticated, we note that LMIC does not claim or allege that it never received the notice on that date. Therefore, we cannot say that the district court abused its discretion in admitting and relying on a copy of the certified mail return receipt in reaching its conclusion that LMIC's petition was untimely.

Lastly, insofar as LMIC claims that the appeal was prepared and mailed prior to the date that the Nineteenth Judicial District Clerk of Court's office stamped the petition as filed, the record fails to support this allegation. Although the record contains a letter dated August 26, 2010, from counsel for LMIC to the Clerk of Court and a check dated September 7, 2010, payable to the Clerk of Court, these documents do not establish that LMIC's petition was actually filed earlier than September 16, 2010, the date that the Clerk of Court stamped the petition as filed. See La. C.C.P. arts. 251, 253.

Because the record before us establishes that LMIC's petition for judicial review seeking review of the Board's final decision was not timely under the provisions set forth in La. R.S. 23:1378(E), the district court properly dismissed LMIC's petition. The February 23, 2011 judgment of the district court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Liberty Mutual Insurance Company.

AFFIRMED.