Louisiana Law Review

Volume 12 | Number 1
November 1951

Workmen's Compensation Claimants' Latent or Unknown Injuries-Prescription

Albert Tate Jr.

Comments

Workmen's Compensation Claimants' Latent or Unknown Injuries—Prescription

*Albert Tate, Jr.**

The Louisiana Workmen's Compensation Act provides a one year limitation against filing suit from the date of the (1) accident, (2) death, (3) last compensation payment, or (4) development of the injury "where the injury does not result at the time of, or develop immediately after the accident."[1] Under the last denoted limitation to claims arising from latent or unknown injuries, a problem arises as to when an injury "develops," especially when due to mistaken surgical diagnosis an injured employee may not realize the seriousness of his disability or its relation to the accident until more than one year has elapsed from the date of the accident or the last compensation payment. Three recent cases concerning these latent or unknown injuries have clarified various aspects of the problem and the previous jurisprudence, namely, *Morgan v. Rust Engineering Company*,[2] *Mottet v. Libby-Owens-Ford Glass Company*,[3] and *Manuel v. Travelers Insurance Company*.[4]

---

* B.A., George Washington University (1941); LL.B., Yale Law School (1947). Member, Louisiana Bar.

1. La. R.S. (1950) 23:1209 (Section 31 of La. Act 20 of 1914, as amended by La. Act 85 of 1926, and La. Act 29 of 1934): "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 proceedings have been begun as provided in Parts III and IV of this Chapter. 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. *Also, where the injury does not result at the time of, or develop immediately after the accident, the limitation shall not take effect until the 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 two years from the date of the accident.*"

(The portion in italics, being the amendment of La. Act 29 of 1934, is the statutory provision relating to latent or unknown injuries; it will be noted that in any event suit for these latent or unknown injuries is perempted or prescribed after two years from the date of the accident.)

2. 52 So. 2d 86 (La. App. 1951).

3. 49 So. 2d 38 (La. App. 1950).

4. 46 So. 2d 319 (La. App. 1950).

In the *Mottet* case,[5] the accident in which the claimant was injured occurred on January 27, 1946, but (his condition being incorrectly diagnosed as non-disabling neuritis) he continued his work at heavy duties despite increasing pain until September, 1946, when an orthopedic surgeon correctly diagnosed the injury as a herniated disc, a disabling injury. Plaintiff informed his employers of this and was transferred to lighter duties until March 11, 1947, when his condition became so painful that plaintiff was forced to quit his employment. Suit was filed August 4, 1947. The Second Circuit Court of Appeal reversed the trial court's judgment for the plaintiff on the merits and sustained the defendant's plea of prescription or peremption.[6]

The court stated that the prescriptive period does not begin "from the time of an accurate *diagnosis* of an injury, but from the *development* of the injury" and further stated that the test was " 'When did plaintiff's right and cause of action for compensation accrue?' "[7] The court held that this was not March 11, 1947, when plaintiff alleged "repeated traumatic strains . . . eventually resulted in complete total and permanent disability";[8] nor was it September, 1946, when for the first time the disabling nature of plaintiff's injury was correctly diagnosed.[9] It held that this date was January 27, 1946, when plaintiff alleged and proved an accident occurred, following which he suffered "severe and continuous pain."

Manuel v. Travelers Insurance Company[10] dealt with the reverse facet of the problem. On April 30, 1948, the plaintiff sustained a knee injury in the course of his employment, was operated upon and given medical treatment, and was paid compensation through October 1, 1948, when he was discharged as completely recovered. On October 27 or 28, 1949, the plaintiff suffered a recurrence of the injury when he bent to pick up his

5. 49 So. 2d 38 (La. App. 1950).

6. Although technically the delay in which rights may be exercised under the Louisiana Compensation Act is a peremption rather than a prescription period, Brister v. Wray, Dickinson Co., Inc., 183 La. 562, 164 So. 415 (1935), in deference to the almost universal usage of the bar it will be referred to herein as "prescription."

7. 49 So. 2d 38, 40 (La. App. 1950).

8. Ibid.

9. Plaintiff also unsuccessfully sought to avoid prescription by the argument that the wages received when transferred to lighter work were in lieu of compensation, Carpenter v. E. I. Dupont de Nemours & Co., 194 So. 99 (La. App. 1940); which plea, since plaintiff was paid the regular scale wage for the lighter work, was disallowed. 49 So. 2d 38, 41 (La. App., 1950).

10. 46 So. 2d 319 (La. App. 1950).

razor while shaving before reporting to work with a subsequent employer. The First Circuit Court of Appeal reversed the trial court's sustaining of the defendant's plea of prescription against the compensation insurer of the April 30, 1948, employer. It held that the one year limitation did not apply following October 1, 1948 (date of last compensation payment), when plaintiff was discharged as completely cured. "He did not suffer any disability for a period of more than a year thereafter," since on October 27 or 28, 1949 plaintiff suffered a *second* injury arising from the same accident of April 30, 1948, which did not manifest itself until it "suddenly developed on October 27 or 28, 1949, as a direct and proximate result of the accident on April 30, 1948."[11]

Both of these decisions are in accordance with the previous jurisprudence to the effect that an injury "manifests" itself within the meaning of the act when its physical symptoms appear, and not when its relationship to the accident in the course of employment is made manifest by correct surgical diagnosis, even though plaintiff is inhibited from enforcing his rights under the compensation act by mistaken diagnosis by physicians.[12]

---

11. Id. at 325. Otherwise stated, prescription was tolled between the date when the injury was cured and the date when it reoccurred.

The court also resisted the defendant's efforts to restrict the saving effect of the amendment of La. Act 29 of 1934, note 1 supra, to those cases where no injury at all resulted at the time of the accident, thus applying the clause, "where the injury does not result at the time of, or develop immediately after the accident" as restricting the two-year saving period to latent or unknown injuries *only* where no injury at all develops at the time of the accident, but one becomes manifest at a later date, as in Guderien v. Sterling Sugar & Ry. Co. Ltd., 151 La. 59, 91 So. 546 (1922).

12. Hannafin v. Pelican Cracker Factory, Inc., 185 So. 479 (La. App. 1939); Jaume v. Maison Blanche Co., 193 So. 905 (La. App. 1940); Richard v. Blair, 20 So. 2d 577 (La. App. 1945); Esthey v. Avondale Marineways, Inc., 25 So. 2d 631 (La. App. 1946); Stephenson v. McCook Brothers Funeral Home, Inc., 27 So. 2d 644 (La. App. 1946). See also Perkins v. American Employers Ins. Co., 53 So. 2d 462 (La. App. 1951).

An earlier line of jurisprudence holding that under the original Section 31 of the Employers' Liability Act, La. Act 20 of 1914, the one year's prescription ran not from the date of the physical accident but from the date the employee became aware of the injury, White v. Louisiana Western Ry. Co., 174 La. 308, 140 So. 486 (1932), and (lower appellate decision) 135 So. 255 (La. App. 1931); Guderien v. Sterling Sugar & Ry. Co. Ltd., 151 La. 59, 91 So. 546 (1922); West v. Industrial Lumber Co., Inc., 128 So. 678 (La. App. 1930); and Jones v. General Accident Fire and Life Assurance Corp., 1 La. App. 88 (1924), was ended by the holdings that the amendment of La. Act 85 of 1926 to Section 31 by substituting "within one year after the *accident*" for the former "within one year after the *injury*" had overruled these holdings and commenced prescription from the date of the physical accident rather than the employee's awareness of the injurious results thereof, Carroll v. International Paper Co., 175 La. 315, 143 So. 275 (1932); White v. Louisiana Western Ry., 174 La. 308, 140 So. 486 (1932), and see Trichell v. Stovall Drilling Co., 150 So. 869 (La. App. 1933). Act 29 of 1934 amended the section to preserve for two

However, in *Morgan v. Rust Engineering Company*,[13] the trial court's sustaining of the defendant's plea of prescription was reversed, and the case was remanded for trial on the merits under the following allegations of fact: On July 15, 1946, while working, plaintiff suffered sharp pains in his back. He reported to the employer's physician, who advised him that his pains were due to prostatitis, a condition not associated with the accident, which condition would be cured by minor treatment and rest. After this treatment and after a stay at home without working for six months (during which time his back "bothered him only occasionally and at intervals when he exerted himself"),[14] plaintiff attempted to return to work for another employer but was forced due to the increasing intensity of the pain to abandon this employment and report to Charity Hospital for treatment approximately in August of 1947. It was only at this later date that the injury "manifested itself to petitioner and to the doctors at the Charity Hospital,"[15] when it was correctly diagnosed as a disabling ruptured intervertebral disc resulting from the accident occurring in the course of employment.

Although the plaintiff experienced sudden pains while working, the Orleans Court of Appeal held that "he did not become aware that the pains resulted from an injury until several months afterward, when the doctors at the Charity Hospital in New Orleans discovered that the pains resulted from a ruptured intervertebral disc."[16]

The court distinguished the *Morgan* case from *Hannafin v. Pelican Cracker Factory, Incorporated*,[17] and other prior cases on the ground that in the *Morgan* case the plaintiff was informed of and relied upon the mistaken diagnosis of the defendant-employer's doctor that the pains were due to the nonaccidental condition of prostatitis and that therefore no accidental injury was sustained.[18] The crux of the decision seems to be the diag-

---

years from date of accident the rights of employees suffering from latent or unknown injuries and thus to somewhat soften these harsh interpretations of the 1926 amendment of the section.

13. 52 So. 2d 86 (La. App. 1951).

14. Id. at 87.

15. Id. at 88.

16. Id. at 89.

17. See note 13, supra.

18. "We are unwilling to conclude that the plaintiff should be penalized to the extent of having his suit for compensation dismissed because he was oblivious that he had suffered accidental injury, and believed and relied upon the representations made and the treatment given him by the doctor for the Rust Engineering Company [defendant]." Id. at 89.

nosis that no accidental injury had occurred, therefore misleading plaintiff into thinking no accident had occurred and no cause of action under the act existed.

In the *Hannafin*[19] case and in *Richard v. Blair*,[20] where defendants' pleas of prescription were sustained, suit was brought more than one year after defendants' physicians had mistakenly discharged the plaintiffs as cured of the effects of accidental injury, but within one year of the correct diagnosis of disability by plaintiffs' physicians. These cases are technically distinguishable, since the plaintiffs knew an accidental injury had occurred and knew they were continuing to suffer pain even though defendants' physicians diagnosed the pains' continuance as not related to the injury, while in the *Morgan* case due to mistaken diagnosis of defendant's physician the plaintiff did not even know an accidental injury had occurred.

In *Stephenson v. McCook*,[21] the plaintiff sustained a strain or injury in the course of his employment in July, 1944, but the resulting discomfort and passage of blood were mistakenly diagnosed by a physician as (non-accidental) "chronic non-specific prostatitis." It was not until April 18, 1945, that the condition was correctly diagnosed as a serious disabling spinal injury resulting from the July, 1944, strain in the course of employment. Suit was filed nearly twenty-one months after the accident, but defendant's plea of prescription was sustained since plaintiff alleged "he knew he had sustained an injury" and "suffered pain and discomfort almost continuously from the time of the accident"[22] though "he did not know the exact nature of the injury."[23] Perhaps the only distinguishing feature from the *Morgan* case is that in the *Stephenson* case plaintiff was misled by the mistaken diagnosis of *his own* physician rather than the *defendant's*, although this seems unduly narrow a ground on which to have denied recovery in the *Stephenson* case.

It is submitted that the result in *Morgan v. Rust Engineering Company* is not only sound, but is also desirable. Furthermore, taking into consideration the humanitarian aim of the compensation statute and its liberal construction in favor of protecting

19. Hannafin v. Pelican Cracker Factory, Inc., 185 So. 479 (La. App. 1939).
20. 20 So. 2d 577 (La. App. 1945).
21. 27 So. 2d 644 (La. App. 1946).
22. Id. at 645.
23. Id. at 646.

injured workmen, it seems to this writer that as a practical matter the injured employee does not have a remedy until his complaint is correctly diagnosed as being both disabling and related to the accident.

It should be borne in mind that in the early stages some disabling injuries are difficult, if not impossible, to diagnose from the point of view of objectively discernable symptoms.[24] It may well be that although the claimant has actually sustained a permanently disabling injury, his alleged "backache" or other complaint may be ascribed to imagination, temporary disuse, or non-accidental causes by all examining physicians, in the absence of any objective phenomena. From their point of view, the *Hannafin* and *Richard* plaintiffs were not in a position to prosecute successfully their claim at the time of their discharge as cured after the treatment of the initial injury, any more than was the *Morgan* plaintiff who did not even know he had sustained an accidental injury within the meaning of the act; although as

24. This seems to be particularly true of the proverbial "back injuries," lumbrosacral strains and herniated discs and other genuine back complaints often being difficult to detect in their early stages and to distinguish from the imaginary "back injuries" with which compensation attorneys have to contend. It will be noted that the cases of Hannafin v. Pelican Cracker Factory, Inc., 185 So. 479 (La. App. 1939) (sacro-iliac strain); Stephenson v. McCook Brothers Funeral Home, Inc., 27 So. 2d 644 (La. App. 1946) (ephysitis of the dorsal vertebrae); and Mottet v. Libby-Owens-Ford Glass Co., 49 So. 2d 38 (La. App. 1950) (herniated disc) dealt with "back injuries" which on trial upon the merits were proved to be serious and disabling injuries which had been incorrectly and sincerely diagnosed as minor or non-accidental injuries at their inception, in all of which cases recovery was denied by application of prescription. In Perkins v. American Employers Insurance Company, 53 So. 2d 462 (La. App. 1951), a sacro-iliac strain was sustained on October 4, 1948, six weeks following which upon advice of defendant's physician plaintiff returned to work where he remained despite (he testified) increasing pain until May 15, 1949, when (he testified) his back "gave way." Prescription was sustained on the ground that if any injury had occurred in October, 1948, it was of a continuing nature. In Morgan v. Rust Engineering Co., 52 So. 2d 86 (La. App. 1951), where a ruptured intervertebral disc was misdiagnosed as a non-accidental injury, probably at the time of mistaken diagnosis the symptoms had not objectively manifested themselves, as was true in the *Hannafin*, *Stephenson*, and *Mottet* cases also, to the point where the physician could correctly diagnose them as seriously disabling accidental injuries. Although the plaintiffs suffered subjective pain and discomfort, possibly no objective symptoms were manifest sufficient to support correct surgical diagnosis, and therefore manifest sufficient from the point of view of evidence or proof to support a cause of action by plaintiffs under the compensation statute. It will be remembered that the plaintiff in the *Mottet* case (49 So. 2d 38, 40), in an effort to avoid prescription, unsuccessfully contended that the "accident and resulting injury" were not effected by a single definite incident, but, on the contrary, that the "accident consisted of repeated traumatic strains which eventually resulted in complete total and permanent disability," a theory which the court conceded to be medically correct.

proved or alleged, in all cases actually the plaintiffs were totally and permanently disabled. Nor did the fact that the mistaken surgeon in the *Stephenson* case was of the plaintiff's choosing, rather than of the defendant's as in the *Morgan* case,[25] alter the fact that an injured employee had suffered a latent or unknown injury which from a practical point of view had not "manifested" itself to the point where he could successfully prosecute a lawsuit. Evaluated as of the time of mistaken diagnosis, it is apparent that the practicing attorney would have had to advise the plaintiffs in the above cases that they had no cause of action for compensation.

Since in no event may suit for disability resulting from latent or unknown injuries be sustained more than two years from the date of the accident,[26] and since when suit is brought more than one year after the injury or the last compensation payment, the plaintiff will have the burden of proving the injury was not "manifest" within the normal year;[27] it is felt that the defendant will not be unduly prejudiced if the test of the *Mottet* case, "When did the plaintiff's right and cause of action accrue,"[28] should be interpreted to mean that the action had accrued when as a practical matter the injury was made "manifest" by at least one medical diagnosis that it was disabling and caused by the accident.

Natural Obligations

Policy Underlying Articles on Natural Obligations

If the reason for enacting a law is known, it is usually of some assistance in determining the meaning of the written pro-

25. In the great majority of cases, the impecunious injured workman is forced to rely on specialists furnished by defendant. But adopting this narrow test of "whose" physician incorrectly diagnosed the injury appears to lead to technicalistic inquiry regarding selection and perhaps qualification of physicians not actually related to the primary question—when did the injury actually "manifest" itself. Nor does this line of inquiry take into account the slow-developing latent injury discussed in note 24, supra.

26. See La. R.S. (1950) 23:1209, and particularly the amendment of La. Act 29 of 1934; Arnold v. Solvay Process Co., 207 La. 8, 20 So. 2d 407 (1944); Anderson v. Champagne, 8 So. 2d 373 (La. App. 1942); Kinder v. Lake Charles Harbor and Terminal Dist., 31 So. 2d 498 (La. App. 1947); Cook v. International Paper Co., 42 So. 2d 558 (La. App. 1949).

27. Since the delay period under the compensation statute is considered a peremption rather than a prescription, "the workman's cause of action is absolutely and irrevocably destroyed if not seasonably exercised, Brister v. Wray, 183 La. 562, 164 So. 415; Heard v. Receivers of Parker Gravel Co., 194 So. 142," Morgan v. Rust Engineering, 52 So. 2d 86, 89 (La. App. 1951).

28. 49 So. 2d 38, 40 (La. App. 1950).