

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 1381

DAVID GARRETT

VERSUS

K&B MACHINE WORKS, INC. AND  
ALASKA NATIONAL INSURANCE

Judgment Rendered: FEB 26 2016

Appealed from the Office of Workers' Compensation, District 9  
In and for the Parish of Terrebonne  
State of Louisiana  
Docket Number 13-03837

Elizabeth Lanier, Workers' Compensation Judge Presiding  
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\*\*\*\*\*

BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

*Welch, J. (K&B) concurs and assigns reasons*

## **WHIPPLE, C.J.**

In this workers' compensation matter, the employee challenges a judgment of the Office of Workers' Compensation, which dismissed his claim against his former employer and its workers' compensation insurer for penalties and attorney's fees for their failure to timely pay a judgment. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

On July 22, 2000, David Garrett was injured while in the course and scope of his employment with K&B Machine Works, Inc. ("K&B"). As a result of his injuries, Garrett underwent a series of medical treatments and then surgery. Garrett filed a claim for workers' compensation benefits, and K&B's insurer, Alaska National Insurance Company ("Alaska National") paid Garrett indemnity benefits until a settlement took place.

In February of 2012, Garrett was in an automobile accident. An x-ray taken after the automobile accident showed that one of the rods placed in Garrett's back from his prior surgery related to his work injury in 2000 was fractured. Additionally, after the automobile accident, Garrett began to experience a "flare-up" of his prior symptoms and sought treatment from Dr. Gervais. Alaska National questioned the effectiveness of the medication prescribed by Dr. Gervais and notified Garrett that it would not pay for the services provided by Dr. Gervais or the prescribed medications. Garrett then filed a disputed claim for compensation.

Following a trial, the workers' compensation judge rendered a judgment on January 6, 2015 in favor of Garrett. In pertinent part, the judgment set forth that Garrett was entitled to all medical treatment and prescription medications requested by Dr. Gervais. The judgment further stated that K&B and Alaska

National were to pay Garrett a total of \$23,209.34 for unpaid prescriptions costs, penalties and attorney's fees, plus judicial interest.

On March 12, 2015, Garrett filed a motion to enforce the judgment, alleging that the amounts awarded in the January 6, 2015 judgment were not paid or were paid untimely. Accordingly, Garrett sought additional penalties and attorney's fees from K&B and Alaska National for their failure to timely pay the judgment, pursuant to LSA-R.S. 23:1201(G).

On April 2, 2015, approximately **eighty-six days** after the judgment was rendered, K&B and Alaska National paid Garrett the remaining amount owed under the January 6, 2015 judgment. Although the full amount owed under the judgment was eventually paid, Garrett's claim for additional penalties and attorney's fees for failure to timely pay the judgment remained unresolved.

Following a hearing, the workers' compensation judge issued a judgment on June 11, 2015, denying Garrett's claim for additional penalties and attorney's fees. In pertinent part, the judgment stated that the phrase "non-appealable" in LSA-R.S. 23:1201(G) means that the delays for taking a devolutive appeal have elapsed, and thus, the thirty days to pay a judgment pursuant to LSA-R.S. 23:1201(G) begins after the sixty days to take a devolutive appeal have run, not after the thirty days to take a suspensive appeal have run. (497) Thus, penalties and attorney's fees were not owed to Garrett because the judgment was paid within thirty days after it became non-appealable, i.e., the judgment was paid on the eighty-sixth day and thus, it was paid within thirty days after the sixty-day delay for taking a devolutive appeal had run.

From this judgment, Garrett appeals, contending that the workers' compensation judge erred in finding that K&B and Alaska National timely paid the January 6, 2015 judgment. Specifically, Garrett avers that the workers'

compensation judge's finding was based on a flawed interpretation of LSA-R.S. 23:1201(G) that allows employers/insurers approximately ninety days to pay judgments without penalties, as opposed to sixty days.

### DISCUSSION

Louisiana Revised Statute 23:1201(G), governing penalties for failure to timely pay judgments rendered in a workers' compensation proceeding, provides as follows:

G. If any award payable under the terms of **a final, nonappealable judgment is not paid within thirty days after it becomes due**, there shall be added to such award an amount equal to twenty-four percent thereof or one hundred dollars per day together with reasonable attorney fees, for each calendar day after thirty days it remains unpaid, whichever is greater, which shall be paid at the same time as, and in addition to, such award, unless such nonpayment results from conditions over which the employer had no control. No amount paid as a penalty under this Subsection shall be included in any formula utilized to establish premium rates for workers' compensation insurance. The total one hundred dollar per calendar day penalty provided for in this Subsection shall not exceed three thousand dollars in the aggregate. (Emphasis added.)

At issue herein is whether the term "final, nonappealable judgment," as stated in LSA-R.S. 23:1201(G), means a judgment where the thirty days to take a suspensive appeal have run, or a judgment where the sixty days to take a devolutive appeal have run.

In Noveh v. Broadway, 94-2306 (La. App. 1st Cir. 6/23/95), 657 So. 2d 687, 688, writ denied, 95-1995, 662 So. 2d 468, this court addressed this specific issue of statutory interpretation and concluded that "a final non-appealable judgment" for purposes of LSA-R.S. 23:1201 means one where the delays for taking a devolutive appeal have run. As stated therein:

We find that the term "nonappealable", as used in LSA-R.S. 23:1201F, means that the judgment can no longer be appealed, i.e. all of the delays for the taking of an appeal, suspensive or devolutive, have run. Because [the employer] paid the compensation benefits owed within thirty days after the delays for the taking of a devolutive

appeal had run, the hearing officer correctly determined that [the employer] did not owe any statutory penalties.

Noveh, 657 So. 2d at 689.

Since Noveh has not been overturned by our supreme court or reconsidered by this court *en banc*, we are constrained to follow this court's prior holding therein. Inasmuch as we are bound by this prior jurisprudence, we are unable to find that the workers' compensation judge erred in dismissing Garrett's claim for penalties and attorney's fees under LSA-R.S. 23:1201(G), as the judgment was paid eighty-six days after the judgment was rendered, and thus, it was paid within thirty days after the sixty-day delay for taking a devolutive appeal had run.

For the above and foregoing reasons, we hereby affirm the June 11, 2015 judgment of the Office of Workers' Compensation through this summary opinion in accordance with Rules 2-16.2(A)(4), (5), and (6) of the Uniform Rules of the Louisiana Courts of Appeal. All costs of this appeal are assessed to the plaintiff/appellant, David Garrett.

**AFFIRMED.**

DAVID GARRETT

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STATE OF LOUISIANA

Welch, J., concurring.



I agree that under the current state of the law, the majority has correctly noted that the language of La. R.S. 23:1201(G) and this Court's decision in **Noveh v. Broadway**, 657 So.2d 687 (La. App. 1<sup>st</sup> Cir. 6/23/95) allows penalties and attorney fees only after the judgment becomes final and non-appealable (*i.e.* after all suspensive and devolutive appeal delays have run.) Notably, nothing in La. R.S. 23:1201(G) prohibits a plaintiff from executing on any sums awarded in a judgment after suspensive appeal delays have run. I believe the legislature intended to strike a balance between awarding penalties and attorney fees when a final, non-appealable judgment has not been paid within thirty days of it becoming due versus the plaintiff's ability to collect on the judgment following the expiration of the thirty-day suspensive appeal delay. Had the legislature intended differently, they could have clearly stated that the penalties and attorney fees would be awarded if the judgment was not paid following the running of the suspensive appeal delays. Therefore, the trial court correctly denied the plaintiff's motion and the judgment of the trial court is properly affirmed.

Thus, I respectfully concur.