SUPREME COURT OF LOUISIANA

NO. 98-CC-1602

MICHELLE O'REGAN AND RYAN O'REGAN

VERSUS

PREFERRED ENTERPRISES, INC.
D/B/A NUMBER ONE CLEANERS, ET AL.

Knoll, Justice, dissenting.

The Achilles' heel in the majority's opinion is its failure to address the non-occupational presumption as the threshold issue in its analysis of La.R.S. 23:1031.1(D). Instead of focusing on this legislatively included presumption, the opinion improperly shifts attention to the burden of proof outlined in the statute. Through such mode of analysis, the majority creates a fiction to say that O'Regan's claim falls within the Workers' Compensation Act. Ultimately, this methodology leaves O'Regan without a remedy in law. When there is no remedy, there is no immunity. *Boyer v. Crescent City Box Factory*, 143 La. 368, 78 So. 596 (1918).

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law is applied as written. La.Civ. Code art. 9; La.R.S. 1:4. Moreover, this Court has cautioned before that in the interpretation of the Workers' Compensation Act, the basic history and policy of the compensation movement must be considered. *Roberts v. Sewerage & Water Board of New Orleans*, 92-2048 (La. 3/21/94), 634 So.2d 341, 345.

Against this backdrop, I note that the jurisprudence and those who comment on the theory of workers' compensation repeatedly emphasize that compromise is the quintessential characteristic of the workers' compensation movement. *Roberts*, 634 So.2d at 344; *Gagnard v. Baldridge*, 612 So.2d 732, 735 (La. 1993); *Atchinson v. May*, 201 La. 1003, 1013, 10 So.2d 785, 788 (1942); *Puchner v. Employers' Liab.*

Assur. Corp., 198 La. 921, 931, 5 So.2d 288, 291 (1941); 13 H. ALSTON JOHNSTON, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION § 32, at 40 (3d ed. 1994). Succinctly stated, a *quid pro quo* nexus forms the foundation for the relationship between the employer and employee in the workers' compensation construct. When the presumption created in La.R.S. 23:1031.1(D) is applied to the facts in the present case, it is evident that no *quid pro quo* relationship between O'Regan and Preferred comes into fruition.

A brief examination of the framework of workers' compensation highlights and clarifies why I find it inescapable that O'Regan may sue Preferred in tort. Under the broad concept of workers' compensation as formulated since its inception in Acts 1914, No. 20, the employer is responsible for compensation benefits to "an employee not otherwise eliminated from the benefits of this Chapter [who] receives personal injury by *accident arising out of [the employment] and in the course of his employment*." La.R.S. 23:1031(A); (emphasis added). The emphasized phrases were carefully chosen by the Legislature and have been utilized by the courts to decide the threshold issue of whether the particular risk involved falls within the protection of the compensation act. 13 H. ALSTON JOHNSTON, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION § 141 (3d ed. 1994); *see also Mundy v. Dept. of Health & Human Resources*, 593 So.2d 346, 349 (La. 1992).

In 1952, when the Legislature broadened the concept of "accident" to provide for occupational diseases in the workers' compensation system, it engrafted the same phrases in its treatment of occupational diseases in La.R.S. 23:1031.1(A) and (B). Generally, an employee who becomes disabled because of an occupational disease will be entitled to workers' compensation benefits "as if said employee received personal injury by accident *arising out of and in the course of . . . employment*," La.R.S.

23:1031.1(A) (emphasis added), if the employee has performed work for a particular employer in which he has been engaged for more than twelve months, La.R.S. 23:1031.1(D), and he can show by a preponderance of the evidence that the "disease or illness . . . is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease," La.R.S. 23:1031.1(B).

However, the Legislature delineated more tightly drawn criteria for an employee who was disabled because of an occupational disease contracted within the first twelve months of employment. In such instances, the occupational disease "shall be *presumed to be non-occupational* and *not to have been contracted in the course of and arising out of such employment*." La.R.S. 23:1031.1(D) (emphasis added). It is only if an employee can show by an overwhelming preponderance of the evidence that the occupational disease was contracted within the twelve months' limitation and that it meets the definition of occupational disease as provided in La.R.S. 23:1031.1(B) that the occupational disease "shall *become* compensable." La.R.S. 23:1031.1(D) (emphasis added); *see Dibler v. Highland Clinic*, 27-274 (La.App. 2 Cir. 9/27/95), 661 So.2d 588.

This analysis of the legislation makes two points very clear. First, although the Workers' Compensation Act provides coverage for occupational diseases pursuant to La.R.S. 23:1031.1(A), the Legislature created a category of employees in La.R.S. 23:1031.1(D) who are "otherwise eliminated from the benefits of this Chapter," by virtue of their employment for less than a year. This elimination is created as a result of the legislatively crafted presumption that in such instance the disease is non-occupational and presumed "not to have been contracted in the course of and arising out of employment." As provided by the Legislature, the statute further provides that

it only "*becomes* compensable" (emphasis added) if a heightened burden of proof is reached. La.R.S. 23:1031.1(D).[1] Simply stated, by virtue of the presumption that is operative because of the Legislature's creation of the temporal requirement, such disease has been identified as a risk that falls outside the protection of the compensation act. In this regard, it is clear that the Legislature has not only imposed a higher burden of proof, it has created a category which presumptively eliminates certain employees from workers' compensation benefits.[2] Second, if an employee attempts to be brought under the Act and fails to meet the heightened burden of proof, the disease remains "non-occupational and not to have been contracted in the course of and arising out of such employment." La.R.S. 23:1031.1(D). Such conclusions are inescapable by virtue of the presumption and the specific words which the Legislature chose to use in this statute.

"[I]f the employee fails to demonstrate that the injury arose out of and occurred in the course of employment the Act has no applicability and he may proceed in tort." 14 H. ALSTON JOHNSTON, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION § 366, at 226 (3d ed. 1994). Therefore, if an employee has been eliminated from the benefits of the Workers' Compensation Act by virtue of the presumption which the Legislature expressed in La.R.S. 23:1031.1(D), it is clear that his rights and remedies on account of his occupational disease against his employer are not restricted to compensation benefits because he is not entitled to the protection of

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[1] It is arguable that since it was presumed that O'Regan was presumptively not covered under the Workers' Compensation Act that she could have proceeded immediately in tort. In such instance, it would have been incumbent upon Preferred to dispute such by showing that O'Regan's occupational disease was work-related and thus not compensable in tort.

[2] This fact clearly distinguishes n 17 in our earlier decision in *Charles v. Travelers Ins. Co.*, 627 So.2d 1366 (La. 1993). In that footnote this Court questioned whether an employee would have a remedy in tort if the Legislature had increased the burden of proof in a workers' compensation case to the point where the employee cannot prove the claim; ultimately, that question was not reached because it simply was not squarely presented. Although there is a heightened burden of proof in the present case, more importantly, the statute in question contains a legislatively created *presumption* that the disease is non-occupational.

the compensation act as a direct result of the operation of La.R.S. 23:1031.1(D). Simply stated, in the absence of a *quid pro quo*, the compensation act does not disturb any existing remedy, *i.e.*, one's right to sue for damages in tort. LARSON'S WORKERS' COMPENSATION LAW, § 65.40, at 12-55 ("rights of action for damages should not be deemed taken away [from the employee] except when something of value has been put in their place.")

This concept is not new to workers' compensation. In *Boyer v. Crescent City Box Factory*, 143 La. 368, 78 So. 596 (1918), it was conceded that even though the employee suffered an employment-related injury which was compensable, her tort action for the serious disfigurement she suffered as a result of that work injury was not barred by the exclusivity provisions of the Workers' Compensation Act, since the statute did not provide for disfigurement as it does now in La.R.S. 23:1221(4)(p). Under those facts this Court held that in the absence of compensation, there was no exclusivity. *Boyer* at 600. This principle has never been repudiated. 14 H. ALSTON JOHNSTON, LOUISIANA CIVIL LAW TREATISE, WORKERS' COMPENSATION § 366, at 227 (3d ed. 1994).

Not only has the *Boyer* principle not been repudiated, it has served as the underpinning for decisions in the area of occupational diseases prior to their coverage under the Workers' Compensation Act in 1952. In *Clark v. Southern Kraft Corp.*, 200 So.2d 849 (La.App. 2 Cir. 1949) and *Faulkner v. Milner-Fuller, Inc.*, 154 So.2d 507 (La.App. 2 Cir. 1934), the Act was held not exclusive since no compensation was then available for occupational diseases. *See also Spillman v. South Central Bell Tel. Co.*, 518 So.2d 994 (La. 1988); *Connor v. Naylor Indus. Services*, 579 So.2d 1226 (La.App. 3 Cir.), *writ denied*, 585 So.2d 568 (La. 1991). The same reasoning is applicable in the present case because the statute presumptively provides that O'Regan

is not covered under the Act and she was unable to bring herself within the provisions of the Act.

Contrary to the majority's assertion, O'Regan's failure before the hearing officer and the Louisiana Fifth Circuit Court of Appeal was premised on her inability to prove that the Workers' Compensation Act was applicable. Her failure before these adjudicatory bodies was not that the Act covered her injuries and she was unable to prove some element of her claim. Rather, by virtue of La.R.S. 23:1031.1(D) her claim was presumed non-occupational and not contracted during her employment. She simply was unable to carry the burden of proving that the Act provided coverage for her occupational disease. Accordingly, if O'Regan's claim is not covered under the Act, then the exclusivity provision is not applicable. Therefore, there being no *quid pro quo*, O'Regan has not lost her right to sue in tort. Accordingly, I would affirm the decisions of the lower courts.

For these reasons I respectfully dissent.