8200 Hampson Street, Suite 302
New Orleans, LA 70118

(504) 266-2024

fwhiteley@whiteley-law.com

Louisiana Workers Compensation

Chapter 18

Contribution Between Successive Employers and Insurers

When an employee's job injury is the result of a combination of successive accidents with separate employers, the separate employers are solidarily liable for all workers' compensation benefits due to the employee.[1] Similarly, when an employee's injury is due to a combination of successive accidents with the same employer, but the employer has separate workers' compensation insurers for each of accidents, the separate insurers are solidarily liable for all workers' compensation benefits due to the employee.[2] In such cases, the employee may obtain an award for the entire amount of compensation due against any or all of the solidary obligors.[3] When one solidary obligor pays workers' compensation benefits to an injured employee, that obligor is entitled to contribution from any other solidary obligor.[4] Between the solitarily obligors, each is responsible for its pro rata share of the benefits due to the injured employee.[5]

[1] Gales v. Gold Bond Bldg. Products, 493 So.2d 611, 614 (La. 1986).
[2] Daigle v. Lajet, Inc., 504 So.2d 1126 (La. App. 5th Cir. 1987); Scott v. Hartford Accident and Indemnity Co., 302 So.2d 641 (La. App. 3rd Cir. 10/16/74).
[3] Gales, *supra*.
[4] Carter v. Tri-State, Ins. Co., 259 So.2d 433 (La. App. 2 Cir. 2/29/72).
[5] Id. (when two employers were solidarily liable for an employee's benefits, the payor was entitled to contribution from the other obligor for its "pro rata portion, that is, one-half of the compensation paid").

Basis for Solidary Obligation

If one accident is the sole cause of the employee's disability, only the employer and insurer at the time of that accident is liable for workers' compensation benefits. If the employee's disability is due to a combination of accidents, or an aggravation of a prior injury by a subsequent accident, the employer or insurer at the time of the prior accident and the employer or insurer at the time of the subsequent accident are solidarily liable for benefits.[6] Disputes in contribution claims often concern whether the employee's disability is due to a combination of accidents or one accident alone.

Most cases in which employers or insurers have been found to be solidary obligors involve an aggravation of a prior injury by a subsequent accident. For example, in Daigle v. Lajet, Inc.,[7] the employee was injured twice while working for the same employer. At the time of the first accident, the employer was insured by Travelers Insurance Company; at the time of the second accident, the employer was insured by Home Insurance Company. In the first accident, the employee injured his low back and required back surgery. Although he initially was released to return to work without restriction following his surgery, his physician later restricted him to light duty work because he experienced low back and right leg pain performing full duty work. Nine months after being restricted to light duty work, the employee reinjured his back at work and required a second surgery. The issue at trial was whether Travelers, the insurer at the time of the first accident, or Home, the insurer at the time of the second accident, was responsible for the employee's workers' compensation benefits. The trial court found that the second accident was merely an aggravation of the first injury and, for that reason, concluded that only Travelers, the insurer at the time of the first accident, was responsible for the employee's workers' compensation benefits. The appellate court reversed. The appellate court agreed that the second accident aggravated the injury from the first accident, but held that, because both accidents contributed to employee's disability, Travelers and Home were solidarily liable for the employee's benefits due to his back injury.

Although most solidary obligations arise from an aggravation of a prior injury by a subsequent accident, a solidary obligation also may arise when separate injuries from separate accidents combine to create a greater disability. In Fuentes v. Cellxion, Inc.,[8] the employee injured her left shoulder in June of 2000, when her employer was insured by American Interstate Ins. Co. She had two shoulder surgeries following that accident. After she returned to work, at light duty, with the same employer, she injured her left wrist in a second job accident. Her left wrist injury was diagnosed as carpal tunnel syndrome. Her employer was insured by The Gray Insurance Company at the time of the second accident. Based on the medical evidence, the court concluded that the shoulder injury and the wrist injury were separate and unrelated injuries. Therefore, American Interstate was responsible for all benefits related solely to the shoulder, the Gray was responsible for all benefits related to the solely wrist. The employee subsequently

[6] Daigle, *supra*.
[7] Id.
[8] 44,914 (La. App. 2 Cir. 12/16/09), 27 So.3d 1045

developed reflex sympathetic dystrophy (RSD), however, and, the court found that the RSD was caused by a combination of the shoulder and wrist injuries. Therefore, both insurers were solidarily liable and entitled to contribution from each other for the benefits paid for the RSD.

In Joyner v. Houston General Ins. Co.,[9] no solidary obligation existed because the court found that the employee's disability was related to only one of his two job accidents. The employee in Joyner suffered a compensable heart attack on December 27, 1975. Houston General Insurance Company was the workers' compensation insurer at that time, and it paid workers' compensation benefits for that employee's injury. The employee returned to work in the fall of 1976. On March 28, 1977, the employee had a second compensable heart attack. Rockwood Insurance Company was the workers' compensation insurer at the time of the second heart attack. Neither insurer paid benefits after the second heart attack because they each claimed that the other was the responsible insurer. When suit was filed, Rockwood argued alternatively that it and Houston General were solidarily liable for the employee's benefits. The medical testimony, however, established that the two heart attacks involved different areas of the heart and different vessels to the heart. Based on this testimony, the court found that the employee's two heart attacks were separate events that produced separate injuries. Therefore, the insurers were not solidarily liable for the employee's benefits. Only Rockwood, the insurer at the time of the second heart attack, was liable for employee's benefits.

Existence and Extinguishment of Solidary Obligation

For a prior employer or insurer to be solidarily liable with a subsequent employer or insurer for an employee's injury, the solidary obligation must exist at the time of the subsequent accident and at the time for which benefits are sought from the prior employer or insurer. If, at the time of the second accident, claims against the prior employer or insurer are prescribed or have been settled, no solidary obligation exists between the prior and subsequent employers or insurers. If, at any time, the employee's rights against the prior employer or insurer are extinguished for any reason, no solidary obligation exists from that point forward between the prior and subsequent employers or insurers. If no solidary obligation exists, no right to contribution exists.

Schouest v. Franke[10] confirmed that, when a claim arising out of a prior accident has settled before a subsequent accident, the subsequent employer or insurer is not entitled to contribution from the prior employer or insurer. In Schouest, the plaintiff was injured while working for Jefferson Parish on April 14, 1982. In September of 1984, Jefferson Parish and its insurer, Travelers, settled the plaintiff's claim arising out of his April 14, 1982, job accident. On May 15, 1985, the plaintiff was injured in a subsequent accident while working for another employer, Fred Franke d/b/a Stripe and Patch. Stripe and Patch and its insurer, State Farm, claimed that the plaintiff's disability was due, in whole or part, to the plaintiff's April 14, 1982,

[9] 368 So.2d 1149 (La. App. 3 Cir. 3/7/79)
[10] 526 So.2d 1342 (La. App. 5th Cir. 1988)

job accident, and they filed a claim against Jefferson Parish and Travelers seeking indemnity or contribution for the benefits that they were required to pay to the plaintiff as a result of his May 15, 1985, job accident. The court denied the claim for contribution. The court found that, because of the settlement between the plaintiff, Jefferson Parish and Travelers, no solidary obligation existed at the time of the plaintiff's second accident. Therefore, Stripe and Patch and State Farm, the employer and insurer at the time of the second accident were not entitled to contribution from Jefferson Parish and Travelers.

Bledsoe v. Willowdale Country Club,[11] reached the same result when the prior claim was prescribed, instead of settled. Bledsoe involved a claim by an employee arising out of two accidents with the same employer but with separate insurers. The employee filed a claim against both insurers. The trial court found both insurers solidarily liable for the medical and disability benefits due to the employee. The appellate court, however, found that the employee's claim for disability benefits against the first insurer had prescribed at the time of the accident. Therefore, it reversed the trial court's judgment to the extent that it found the first insurer solidarily liable for disability benefits due to the employee.

Prevost v. Jobbers Oil Transportation Co., 95 0224 (La. App. 1 Cir. 10/6/95), 665 So.2d 400, concerned whether a second insurer was entitled to contribution from a first insurer when the employee had forfeited the right to compensation benefits against the first insurer. The employee's first accident occurred on December 14, 1985, when Aetna was the workers' compensation insurer; the employee aggravated his job injury in a second accident on March 27. 1992, when Guarantee Mutual was the workers' compensation insurer. The employee forfeited his right to benefits against Aetna on March 30, 1993, when he settled a third-party claim arising out of the December 14, 1985, accident without Aetna's approval. Guarantee argued that it was entitled to contribution from Aetna for the benefits it was required to pay as a result of the combined injuries from the two accidents, or, alternatively, that it was not liable to plaintiff for Aetna's share of the benefits that became due after the employee forfeited his rights against Aetna. The court, however, held that the extinguishment of Aetna's liability due to the forfeiture destroyed any solidary liability between Aetna and Guarantee for those benefits. Because Aetna and Guarantee were no longer solidary obligors, Guarantee was not entitled to contribution from Aetna for any benefits due after the forfeiture and was not entitled to reduce the employee's benefits by Aetna's share of benefits due after the forfeiture.

[11] 94-234 (La. App. 5 Cir. 9/27/94), 643 So.2d 1302

Prescription on Contribution Claims

Prescription on contribution claims between workers' compensation employers or insurers is governed by La. R.S. 23:1209.[12] In Larkin v. Regis Hairstyles and TIG Ins. Co. v. LWCC,[13] second insurers had argued that, because the Louisiana Workers' Compensation Act does not specifically address prescription on contribution claims, those claims are subject to the ten year prescriptive period for personal actions.[14] The courts in both cases, however, ruled that prescription on contribution claims is governed by La. R.S. 23:1209.

In Big 4 Trucking, Inc. v. N.H. Ins. Co,[15] the first insurer acknowledged that prescription is governed by La. R.S. 23:1209 but argued that, because La. R.S. 23:1209 does not specifically address prescription on contribution claims, the one-year prescriptive period set forth in La. R.S. 23:1209(A)(1) applies to all claims for contribution, regardless of the nature of the benefits paid by the second insurer. The court, however, held that, to the extent that the second insurer sought contribution for medical benefits or supplemental earnings benefits paid, its claim was governed by the three-year prescriptive periods set forth in La. R.S. 23:1209(C) and La. R.S. 23:1209(A)(2). As Big 4 Trucking illustrates, because prescription on contribution claims is governed by La. R.S. 23:1209, the applicable prescriptive period on a contribution claim may vary depending on whether any benefits were paid by the party from whom contribution is sought and the type of benefits that were paid by the party seeking contribution.

La. R.S. 23:1209 governs not only the applicable prescriptive periods; it also governs when prescription begins to run. In Larkin, *supr*a, and Gilmore v. Reising Sunrise Bakery,[16] the parties seeking contribution argued that prescription on their contribution claims did not begin to run until they were cast in judgment to pay benefits to the injured employee. Both courts rejected that argument. Because prescription is governed by La. R.S. 23:1209, it begins to run from the date of the accident, or, if benefits have been paid, from the date of the last payment of benefits. When two employers or insurers are solidarily liable for benefits, payments by one will interrupt prescription against the other.[17]

The interruption of prescription because of a payment by a solidary obligor can extend prescription significantly, even for an employer or insurer that is not aware of the solidary obligation. In Rave v. Wampold Cos.,[18] based on a solidary obligation among three insurers, a claim for benefits filed against a prior insurer was not prescribed even though it was filed more than five years after that insurer had last paid any benefits on the claim. The employee in Rave

[12] Big 4 Trucking, Inc. v. N. H. Ins. Co., 2017 0420 (La. App. 1 Cir. 11/1/17); TIG Ins. Co. v. LWCC, 2009 0330 (La. App. 1st Cir. 9/11/09), 22 So.3d. 981; Larkin v. Regis Hair Styles, 2002-127 (La. App. 3rd Cir. 5/15/02), 817 So.2d 1266

[13] See fn. 10

[14] La. C.C. art. 3499

[15] 2017 0420 (La. App. 1 Cir. 11/1/17)

[16] 531 So.2d 1172

[17] Rave v. Wampold Cos., 06-978 (La. App. 3 Cir. 12/6/06), 944 So.2d 847; Rouly v Perero Cos., 16-385 (La. App. 3 Cir. 11/2/16), 206 So.3d 1159.

[18] 06-978 (La. App. 3 Cir. 12/6/06), 944 So.2d 847

had three accidents working for the same employer. The employer had a different insurer for each of the three accidents. The pertinent dates were:

Hartford Ins. Co.:

Date of Accident – 9/8/98

Last Disability Payment – 11/25/98

Last Medical Payment – 1/26/99

Suit Filed – 9/2/05

Liberty Mutual Ins. Co.:

Date of Accident – 8/2/99

First Disability Payment – 8/3/99

Last Disability Payment – 5/1/00

First Medical Payment – August or September of 1999

Last Medical Payment – ongoing when suit filed

Suit Filed – 2/7/05

LWCC:

Date of Accident – 5/26/00

First Disability Payment – 1/31/01

Last Disability Payment – ongoing when suit filed

Last Medical Payment – ongoing when suit filed

Suit Filed – 12/5/03

Both Hartford and Liberty Mutual argued that the claims against them for TTD were prescribed because suit was filed more than one year after they last paid disability benefits. Hartford also argued that the claim against it for medical benefits was prescribed because suit was filed more than three years after Hartford last paid medical benefits. The court noted, however, that Liberty Mutual began paying disability benefits less than a year after Hartford stopped paying disability benefits; LWCC began paying benefits less than a year after Liberty Mutual had stopped paying benefits; and Liberty Mutual began paying medical less than three years after Hartford had last paid medical. If the three insurers were solidarily liable for the employee's injuries, which was an issue in the case, the payments by each subsequent insurer interrupted prescription on the employee's claims against all of the insurers. Therefore, none of the employee's claims were prescribed.

Rave involved an employee's claim against solidarily liable insurers. The rationale, and the result, would be the same if, instead of a claim by the employee, one employer or insurer were seeking contribution from another employer or insurer. The basis of the contribution claim is solidary liability, and interruption of prescription against any solidary obligor interrupts prescription as to all other solidary obligors.[19]

Solidary Liability in Occupational Disease Cases

An employee's rights against solidarily liable employers or insurers in an occupational disease claim are the same as in an accident claim. Any employer whose employment contributed to an employee's occupational disease is solidarily liable with all other causative employers for the workers' compensation benefits due as a result of the employee's occupational disease.[20] The employee may demand the whole performance of the workers' compensation obligation from any causative employer. Contribution among solidarily liable employers or insurers, however, is handled differently in an occupational disease claims.

Unlike accident claims, in which all solidary obligors are responsible for their virile share of the benefits paid to the employee, occupational disease claims are subject to the "last injurious employer rule."[21] Between the solidary obligors in an occupational disease claim, "the last obligor during whose employment the employee was injuriously exposed to the cause of the disease is liable for the whole compensation obligation."[22] The last injurious employer rule" is also applied to insurers. An employer's insurer at the time of the last injurious exposure with the employer is responsible for all benefits due as a result of the employee's occupational disease.[23] Therefore, any employer or insurer that pays workers' compensation benefits as a result of an occupational disease may recover the full amount paid from the employer or insurer at the time that the employee was last exposed to the condition that caused the occupational disease. The last injurious employer or insurer, on the other hand, is not entitled to contribution from any prior employer or insurer.

[19] La. C.C. 1799
[20] Gales v. Gold Bond Bldg. Products, 493 So.2d 611, 614 (La. 1986).
[21] Id., confirming as a rule its prior suggestion in Carter v. Tri-State, Ins. Co., 259 So.2d 433 (La. App. 2 Cir. 2/29/72).
[22] 493 So.2d at 616.
[23] Beason v. Red Ball Oxygen Co., 29,894 (La. App. 2 Cir. 110/29/97), 702 So.2d 26