

earning benefits to which claimant is entitled.

Accordingly, for the reasons set forth above, the February 11, 1999 judgment is affirmed insofar it granted Boh Brothers' exception of prescription to temporary total disability benefits and reversed insofar as it granted the exception of prescription to SEBs. The October 31, 1997 judgment is affirmed insofar as it held that claimant's arm disability is causally related to the April 6, 1993 work accident and that claimant is entitled to worker's compensation benefits and reversed insofar as it held claimant was entitled to TTD benefits. It is adjudged herein that claimant is entitled to an award for SEBs in an amount due under La.R.S. 23:1221(3) to be determined on remand. The case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; RENDERED AND REMANDED.



99-475 (La.App. 5 Cir. 10/13/99)

Aletha FISHER

v.

WALGREENS LOUISIANA CORPORATION, INC., Pharmacist John Doe, and ABC Insurance Company.

No. 99-CA-475.

Court of Appeal of Louisiana,
Fifth Circuit.

Oct. 13, 1999.

Customer filed suit against pharmacy, alleging that she sustained damages as result of employee negligently filling her prescription. The Parish Court, Parish of Jefferson, No. 72-493, Christine Remy, J.,

granted pharmacy's exception of prescription, and customer appealed. The Court of Appeal, Daley, J., held that customer had constructive knowledge of her cause of action against pharmacy, and therefore prescription period commenced, on date she purchased and used cream.

Affirmed.

1. Limitation of Actions ⇐195(3)

Plaintiff bears the burden of showing why prescription has not run when the face of the petition reveals that the action has prescribed.

2. Limitation of Actions ⇐95(5)

Customer had constructive knowledge of her cause of action against pharmacy for damages she allegedly sustained as result of employee negligently filling her prescription, and therefore prescription period commenced, on date she purchased and used cream; customer testified during deposition that she questioned employee about cream as soon as prescription was filled, and that she used cream later that day and knew it wasn't correct prescription.

3. Limitation of Actions ⇐95(4.1)

Injured party need not have actual knowledge of his condition for purposes of starting the statute of limitations for delictual actions, as long as there is constructive notice, that is information sufficient to incite curiosity, excite attention, or put a reasonable person on guard to call for inquiry.

Harry E. Cantrell, Jr., New Orleans, Louisiana, for plaintiff/appellant.

Jack E. Truitt, Lionel J. Favret, III, Metairie, Louisiana, for defendant/appellee.

Panel composed of Judges EDWARD A. DUFRESNE, Jr., THOMAS F. DALEY and SUSAN M. CHEHARDY.

1²DALEY, J.

On January 12, 1998, the plaintiff, Althea Fisher, filed suit against Walgreens Louisiana Corporation, Inc., (Walgreens), alleging that she sustained damages as a result of the defendant's employee negligently filling her prescription on January 9, 1997. She further alleged that she did not realize that the hand cream prescription had been improperly filled until January 11, 1997. Walgreens answered with a general denial, then filed an Exception of Prescription, arguing plaintiff's action had prescribed. The plaintiff has appealed the trial court's granting of Walgreens' Exception of Prescription.

[1] Pursuant to Article 3492 of the Louisiana Civil Code, a delictual action must be filed within one year "from the day injury or damage is sustained." The plaintiff bears the burden of showing why prescription has not run when the face of the petition reveals that the action has prescribed. *Anderson v. Beauregard Memorial Hospital*, 97-1222 (La.App. 3rd Cir.3/6/98), 709 So.2d 283.

[2] 1³The plaintiff argues that although the cream was prescribed, purchased, and used on January 9, 1997, she did not discover she was given the incorrect cream until January 11, 1997. She further argues that since January 11, 1998 was a Sunday, her suit was timely filed on January 12, 1998.

[3] The long-standing rule of law is "an injured party need not have actual knowledge of his condition for purposes of starting the statute of limitations for delictual actions, as long as there is 'constructive notice,' that is information sufficient to incite curiosity, excite attention, or put a reasonable person on guard to call for inquiry." *Boyd v. B.B.C. Brown Boveri, Inc.*, 26,889 (La.App. 2nd Cir.5/10/95), 656 So.2d 683, 688, writ not considered, 95-2387 (La.12/8/95), 664 So.2d 417.

In her deposition, plaintiff testified that she had used Topicort cream for a couple of years. It was prescribed by her physi-

cian to treat the dry skin on her hands caused by diabetes mellitus. She explained that she received a new prescription for Topicort on January 9, 1997, and went to Walgreens to have the prescription filled. Plaintiff further testified that in the past the Topicort cream she was given was in a blue and white tube. When she opened the bag to look at the cream on January 9, 1997, she immediately noticed this tube was red and white. She testified that she questioned Walgreens personnel as to the different color of the tube and further testified:

... she told me it was the same cream, and I knew it wasn't because you could feel—When you put it on, it was like more of a greasier one than the first cream I had.

Deposition of Althea Fisher, page 29, lines 4-8.

During her deposition, the plaintiff was questioned as to the first time she noticed a problem with the cream, and she answered:

1⁴That night [January 9, 1997] when I applied it, I told my son, I said—I screamed, 'I don't feel good.' I said, 'It make my hand feel like it itching.' Like red spots started breaking out on it. I said, 'I don't know if it's the same cream or not.' And I said, 'I should get up and go and check this cream out.' So I waited until the next morning and my hand was swollen up and it was red and infected. That's when I went to the doctor.

Deposition of Althea Fisher page 36, lines 15-24.

Later during the deposition, the following exchange took place:

Before you went to the doctor, did it occur to you that maybe there was something wrong with the cream that you had put on your hand?

It had to be, because like I say, I had used Topicort cream before and it had never done that.

Deposition of Althea Fisher page 53, lines 23-25.

Applying the case law to this testimony, we find that the plaintiff had knowledge that she may have been given the incorrect cream on January 9th, 1997. She also had knowledge that she sustained damage from the use of the cream. Thus, the trial court correctly granted the defendant's Exception of Prescription.

Appellant also asserts as error the trial court dismissal of her petition for failure to serve timely. This assignment of error is not addressed since the prescription issue is dispositive.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.



99-518 (La.App. 5 Cir. 10/26/99)

Kevin McKENZIE

v.

EVANS QUALITY TEMPORARIES.

No. 99-CA-518.

Court of Appeal of Louisiana,
Fifth Circuit.

Oct. 26, 1999.

Employer appealed from order of the Office of Workers' Compensation holding it liable for supplemental earnings benefits (SEB), medical bills and medication expenses, and penalties and attorney fees. The Court of Appeal, Chehardy, J., held that: (1) claimant was not entitled to SEB, and (2) employer was not liable for penalties or attorney fees.

Affirmed in part; reversed in part.

1. Workers' Compensation ⇌1377, 1914

Workers' compensation judge (WCJ) made error of law when WCJ placed initial burden on employer to prove that claimant seeking supplemental earnings benefits (SEB) was unable to earn ninety percent of his pre-injury wages, and thus, appellate court was entitled to review record and evidence de novo. LSA-R.S. 23:1221(3).

2. Workers' Compensation ⇌52, 803

The determination of whether a workers' compensation claimant seeking supplemental earnings benefits (SEB) is unable to earn wages equal to 90% or more of the wages he earned before the accident is necessarily a facts and circumstances inquiry in which courts must be mindful of the jurisprudential tenet that workers' compensation law is to be liberally construed in favor of coverage. LSA-R.S. 23:1221(3).

3. Workers' Compensation ⇌1939.3

In a worker's compensation case, an appellate court's review is governed by the manifest error or clearly wrong standard.

4. Workers' Compensation ⇌1939.5, 1939.7

Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact-finder's in a workers' compensation proceeding, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony.

5. Appeal and Error ⇌893(3)

When one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable and, if the record is otherwise complete, the appellate court should make its own independent de novo review of the record and determine a preponderance of the evidence.

6. Workers' Compensation ⇌1421, 1624

Workers' compensation claimant failed to establish by preponderance of evidence