8200 Hampson Street, Suite 302
New Orleans, LA 70118

(504) 266-2024

frank@whiteley-law.com

Louisiana Workers Compensation

Chapter 7

Affirmative Defenses

As a matter of public policy, some injuries that occur in the course and scope of employment are not compensable under most workers' compensation acts. The affirmative defenses recognized in Louisiana, which are similar to those recognized in other jurisdictions, are (1) willful intention to injure self or others, (2) intoxication, and (3) initial aggressor in an unprovoked physical altercation. Louisiana also limits benefits that may be received while an employee is incarcerated. Of the affirmative defenses, intoxication is the most often invoked by employers and most often litigated. *La. R.S. 23:1081.*

INTOXICATION

An accident caused by an employee's intoxication generally is not compensable. The accident will be compensable, despite the employee's intoxication, however, if the employee's intoxication resulted from activities that were in pursuit of the employer's interests or if the employer provided the intoxicating beverage or substance and encouraged its use during the employee's work hours. *La. R.S. 23:1081(1)(b)*.

The employer has the burden of proving that intoxication caused the accident, but the statute establishes the presumptions based on the employee's blood alcohol level, evidence of drug use by the employee and the employee's refusal to take a post-accident drug test. Once the employer proves that an employee was intoxicated, the employee's accident is presumed to have been caused by the accident. La. R.S. 23:1081(12); however, the employee can rebut the presumoption that the accident/injury was caused by their intoxication. An employee

may recover workers' compensation benefits, despite being intoxicated at the time of the accident, if the employee can prove that the intoxication was not a contributing cause of the accident. *Id*.

La. R.S. 23:1081(3)(c) sets forth the following presumptions regarding intoxication related to alcohol consumption:

> **(a)** If there was, at the time of the accident, 0.05 percent or less by weight of alcohol in the employee's blood, it shall be presumed that the employee was not intoxicated.
>
> **(b)** If there was, at the time of the accident, in excess of 0.05 percent but less than 0.08 percent by weight of alcohol in the employee's blood, such fact shall not give rise to any presumption that the employee was or was not intoxicated, but such fact may be considered with other competent evidence in determining whether the employee was intoxicated.
>
> **(c)** If there was, at the time of the accident, 0.08 percent or more by weight of alcohol in the employee's blood, it shall be presumed that the employee was intoxicated.

Regarding drug use, an employee is presumed to have been intoxicated if, at the time of the accident, there is evidence of on or off the job use of any non-prescribed controlled substance.1 *La. R.S. 23:1081((5).* Furthermore, an Employer has the right to administer drug and alcohol testing immediately after a job accident, and, if the employee refuses to submit to the drug and alcohol testing, it is presumed that the employee was intoxicated at the time of the accident. *La. R.S. 23:1081(7)(a) and 9(b).*

The employer can establish the use of illegal drugs by introducing the results of an employer-administered urine test pursuant to a written and promulgated substance abuse rule of the employer. La. R.S. 23:1081(8). Drug programs and testing procedures must comply with the Office of Workers' Compensation's drug testing rules. *La. R.S. 23:1081(9)*.

1 The statute adopts by reference the definition of controlled substance found in 21 U.S.C. 812, Schedules I, II, III, IV, and V.

If an employee's accident is caused by intoxication, the employer is still responsible for reasonable medical care following the accident until the employee is stabilized and ready for discharge from the acute care facility. After the employee's condition is stabilized and the employee is ready for discharge from the acute care facility, the employer's responsibility for medical payments ends. *La. R.S. 23:1081(13)*.

Case Law Interpreting La. R.S. 23:1081(b)

Thompson v. Capital Steel Co., 613 So.2d 178 (La. App. 1st Cir. 1992), cert. denied, 617 So.2d 936 (La. 1992).

The employee, Johnny Thompson, was injured in an accident on March 15, 1990 while cutting steel at his employer's facility. Following the accident, he was taken to the La. Med Clinic where a urine sample was taken. Urinalysis testing was positive for marijuana. Apparently, urinalysis testing was not done pursuant to a request by the employer. The employer had no written drug or alcohol policy.

The trial court denied the intoxication defense on the grounds that the testing results were inadmissible under Section 1081(8) because the collection of the sample and testing for drug usage was not done by the employer pursuant to a written and promulgated policy. The appellate court affirmed. The court of appeal did so despite its conclusion that the test results were highly reliable considering the detailed testimony establishing proper testing and handling of the specimen.

Austin v. Fibrebond Corp., 25,565 (La. App. 2d Cir. 2/23/94) 638 So.2d 1110, *writ denied*, 94-1326 (La. 9/2/94) 643 So.2d 149.

Austin's accident occurred when a wheeled tool box he was pulling on this employer's premises became lodged in a groove in the floor. To dislodge it, Austin jerked it causing it to lurch out of the groove and roll over his right heel. Austin refused to undergo drug testing, requested pursuant to a written policy by the employer. Austin had knowledge of the drug policy prior to the accident.

The trial court found, consistent with the statute, that Austin refused to submit to a drug test after legitimate requests by his employer pursuant to the written policy as authorized by 23:1081(7)(a). The refusal triggered a presumption of intoxication and the presumption that the accident was caused by the intoxication. The appellate court, however, reversed.

At trial, Austin had offered testimony from his co-workers who had observed him before, after and during the alleged accident. None of these employees observed anything unusual or which would lead them to conclude Austin was intoxicated. Based on this testimony, the appellate court found that Austin had rebutted the presumption of intoxication and, therefore, was entitled to compensation despite his refusal to take a drug test.

Johnson v. Riverplex International, 609 So.2d 1005 (La. App. 5th Cir.), writ den'd., 613 So.2d 627 (La. 1993).

The employee, Darren Johnson, either became entangled or grabbed the hooks at the end of a crane line used to offload rice sacks. He fell 60 to 80 feet. He subsequently dies of injuries that he sustained in the fall. Urinalysis testing performed at the hospital was positive for marijuana and cocaine.

The court held that the employer had established the employee's intoxication based on the positive urine testing. In this regard, Johnson is inconsistent with Thompson, which refused to consider the results of a hospital administered drug test that was not taken at the employer's direction pursuant to a written and promulgated drug policy. As in Austin, however, the court found that the employee's parents rebutted the presumption of causation based on testimony of co-workers that Johnson did not appear to be intoxicated on the day of his accident.

Meliet v. Brown & Root Industrial Services, Inc., 94-789 (La. App. 5 Cir. 3/1/95), 652 So.2d 105, cert. den'd., 654 So.2d 328 (La. 1995).

On January 28, 1992, Robert Meliet and two co-workers were engaged in dismantling a scaffold at the Shell Norco plant. During a break, one of plaintiff's co-workers descended the scaffold. A while later, plaintiff decided to climb down, but, instead of descending the scaffold, he attempted to use a ladder that was not fastened to the scaffold. When he stepped on to the ladder, the ladder came away from the scaffold, and Meliet fell 25 to 30 feet to the ground. Meliet had been alone and unobserved for 15 to 20 minutes before he fell.

Urine testing at a local hospital, pursuant to a drug policy written and promulgated by the employer, was positive for cocaine. A medical expert testified that the level of cocaine could have indicated claimant had ingested cocaine a short time before the specimen was taken. Both the trial court and court of appeal found accident was caused by Meliet's intoxication. The appellate court distinguished Johnson because, unlike the employee in Johnson, Meliet did not have evidence to rebut the presumption that intoxication caused his job accident. Meliet was alone for 15 to 20 minutes before he fell. Therefore, no co-worker was in a position to testify that he did not appear to be intoxicated immediately prior to his fall.

Williams v. Louisiana Coca-Cola Co., 94-810 (La. App. 5 Cir. 3/1/95), 652 So.2d 108, cert. den'd., 654 So.2d 349 (La. 1995).

Williams injured himself in a single vehicle accident while driving a semi-trailer truck for defendant. His accident occurred on February 8, 1990, and the employer discovered in 1993 that the original hospital admission contained positive urinalysis test results indicating the presence of cocaine at the time of the accident. Benefits were terminated based on William's intoxication. At trial, the employer presented the certified hospital records and no other evidence. Plaintiff denied cocaine use and blamed the accident on improper loading of the trailer. The hearing officer found that defendant met his burden of proving intoxication but denied the defense finding that plaintiff rebutted the causation presumption having proved that the intoxication was not a contributing cause of the accident.

On appeal, the Fifth Circuit, declining to follow Thompson v. Capital Steel, and held that only drug tests administered by the employer must be performed pursuant to a written and promulgated drug policy. Tests performed in the ordinary course of medical treatment by a hospital pursuant to internal hospital policy are admissible to prove intoxication even if the employer did not have a written and promulgated drug policy.

Plaintiff denied that he had ever taken cocaine, but the Court found that, in view of the objective medical evidence, his denial placed claimant's credibility into doubt. That lack of credibility cast suspicion on the reliability of plaintiff's other testimony as to why the accident occurred (alleged improper loading of the van). After a careful analysis of presumptions and the burden of proof in compensation cases, the court required plaintiff, not the employer, to come forward with something more than his own self-serving testimony to prove by a preponderance that the one-sided overloading of the truck caused the accident rather than his intoxication.

Fisher v. Westbank Roofing, 95-964 (La. App. 5 Cir. 2/27/96), 670 So.2d 1328, writ den'd., 96-0809 (La. 5/10/96), 672 So.2d 926.

Plaintiff fell from a roof on December 23, 1993. The employer had a written drug policy and requested drug testing immediately after the accident. The test, however, was not administered until six days after the accident. Screening testing was positive for marijuana. Defendant's expert testified that the amount of by-product in the urine could not have come from passive inhalation. Plaintiff denied smoking marijuana on the day of the accident but admitted he had done so four days earlier at a Saints football game.

Because the employer had a written and promulgated drug abuse policy, the results of the drug screening were admissible into evidence. Because testing had not been performed immediately after the accident, however, the employer was not entitled to the presumption of intoxication. Absent the presumption, and considering the other evidence presented by

plaintiff (by co-employees and family members that he did not take marijuana on the day of the accident, that he performed his work in a normal manner, etc.), the court denied the intoxication defense.

Barker v. Allen Canning Co., 95-252 (La. App. 3 Cir. 10/4/95), 663 So.2d 320, writ denied, 95-2688, (La. 1/12/96); 666 So.2d 323.

Barker slipped on a damp concrete floor of a canning room while working. After complaining of back and neck pain he was transported to a nearby emergency room. Pursuant to the company's written and promulgated substance abuse policy, urinalysis was administered. Barker tested positive for marijuana, which triggered the presumption of intoxication. Therefore, the burden was on the employee to rebut the presumptions of intoxication and causation.

Plaintiff's wife testified that her husband had not smoked marijuana for five days before the accident. A co-worker testified that plaintiff did not appear to be intoxicated at the time of the accident. In this case, physicians testified that "there is no real way to tell that a person would be disoriented or what his general condition would be because the effects of drugs differ from use to use and person to person." On this evidence, the found that plaintiff failed to rebut the presumption of intoxication as the cause of his fall.

Deal v. Bankcroft Bag, Inc., 28,188 (La. App. 2d Cir. 4/3/96), 671 So.2d 1264.

After five years of employment with defendant, Deal injured his knee in an accident on May 29, 1994. The accident was reported immediately and pursuant to the employer's written drug and alcohol policy, urinalysis was administered. The urinalysis was positive for marijuana, showing a concentration of marijuana by-product of 45 nanograms. The employee also argued that his test was positive due to passive inhalation. His own expert, however, testified that the concentration level at 45 ng/ml was too high to be explained by passive inhalation. The court concluded that defendant had shown by a preponderance of evidence that the employee had evidence of marijuana use at the time of the accident, thereby triggering the presumptions of intoxication and causation. Finding that the employee had not satisfactorily rebutted the presumptions, the claim was dismissed.

Jerry W. LeCroy v. Brand Scaffold Building, Inc., Joseph V. Bennett v. Brand Scaffold Building, Inc., 95-1522 and 95-1523 (La. App. 1 Cir. 2/23/96), 672 So.2d 181.

Jerry LeCroy and Joseph Bennett were employees of Brand Scaffold Builders, Inc. Both were killed in an automobile accident which occurred on May 7, 1993 while travelling on Interstate 592. The accident was caused when a vehicle travelling the opposite way crossed

2 The employees were in the course of employment because they were on the way

the grass median striking the decedents' vehicle head on. The men were on their way to the job site. Marijuana was found in the wrecked vehicle and blood tests revealed the presence of the drug in the systems of both men. Additionally, LeCroy's blood alcohol content was .09.

The trial court denied the intoxication defense because there was no evidence that the conduct of decedents or the operation of the vehicle was improper or illegal in any manner. The employees were just in the wrong place at the wrong time. Their intoxication did not contribute to the accident.

On appeal, employer's counsel argued that the evidence of marijuana and alcohol use was not being offered to establish the intoxication defense under Section 1081, but rather to defeat coverage under the course and scope of employment issue. In other words, defense counsel argued that the existence of criminal conduct defeats coverage because the injury associated with that conduct does not "arise out of" and is "not in the course of" employment. The court, however, found that the employee's criminal conduct occurred while they were attempting to perform legitimate employment duties, and, therefore, it did not remove them from the course of employment.

Zeno v. Truck-N-Trailer Equipment Co., Inc., 96-630 (La. App. 3 Cir. 12/11/96) 685 So.2d 560.

Jessie Zeno was injured while in the course and scope of his employment on August 27, 1995, when he fell to the ground from the top of a ladder. While standing on the ladder's top step, Zeno attempted to lift a 5 lb. can of roof sealant over his head, lost his balance and fell. Blood alcohol testing revealed a .23% ethanol level in the blood stream approximately two hours after the accident. At trial, the hearing officer determined that the employer met its burden of proving plaintiff was intoxicated at the time of the accident and that the accident was caused by the intoxication and therefore, denied the claim.

On appeal, the employee did not dispute the hearing officer's finding that he was intoxicated, nor did he attack procedures used for collecting or testing his blood on arrival of the hospital. Employee raised an estoppel argument, claiming that his employer knew that he was an alcoholic and, therefore, should not be able to assert the intoxication defense. The court noted, however, that plaintiff had been disciplined on several occasions in the past for appearing intoxicated at work. He was aware of the company policy against arriving at work under the influence of alcohol. The record was devoid of any evidence suggesting that Zeno could have justifiably believed that arriving at work intoxicated with acceptable behavior. The court rejected his estoppel argument.

Savoy v. Cecil Perry Improvement, Co., 96-889 (La. App 3 Cir. 2/5/97) 691 So.2d 692.

Plaintiff received serious injuries when the truck he was operating overturned on June 7, 1993, while in the course and scope of his employment. The plaintiff lost control in a curve. He claimed that a car in the opposing lane of travel crossed the center line and, to avoid a head on collision, he veered his truck to the shoulder at which point it left the roadway and overturned in a roadside ditch. Urinalysis testing at the hospital was positive for marijuana, cocaine and benzodiazepine. Spinal surgery was performed the next day, consisting of a fusion procedure as well as the insertion of a plating fixation device. Prior to surgery, Gardner Wells tongs were placed upon plaintiff to stabilize his neck prior to transfer to the surgical unit. The plaintiff requested a second drug screen two days after the accident which done. It was positive for marijuana. Plaintiff had told an admitting nurse that he took Valium a few days before the accident and smoked marijuana the weekend before. With respect to cocaine, he blamed that on a friend who rolled his marijuana joint. (That friend tended to put cocaine in with the marijuana).

At trial, plaintiff introduced expert testimony that the presence of THC (marijuana by-product) in the urine specimen confirms that the individual was exposed to marijuana sometime in the past but does not confirm that the individual was under the influence of marijuana at the time of the test. The employer's expert testified that the marijuana, cocaine and benzodiazepine had combined effects on plaintiff, including, but not limited to, alertness, sensory perception, mental confusion, sedation, as well as excitement, impaired reaction time, fatigue, mood changes and impaired vision, all of which compromised the ability to safely operate a motor vehicle. The employer's expert also testified that the admitted use of Valium and to smoking marijuana confirm that the employee was an active drug user. The expert testified that the employee was under the influence of drugs at the time of the accident and that impairment was a significant cause of the motor vehicle accident.

The trial court awarded benefits, finding that the employer failed to prove that the employee was intoxicated at the time of the accident or that intoxication caused the accident. The appellate court reversed, noting that the hearing officer had erred as a matter of law by placing the burden of proof on the employer. The drug records were admitted through a certified copy of the hospital records and the court noted that the laying of a proper foundation for their admission was not necessary citing Gore v. City of Pineville, 598 So.2d 1122 (La. App. 3 Cir.), writ denied, 600 So.2d 681 (La. 1992). The court also noted that the employee had denied intentional cocaine use despite having been incarcerated on two separate convictions for possession of crack cocaine. The court recognized that the presence of marijuana or cocaine metabolites in a urine screen test does not scientifically demonstrate that an individual was under the influence of those drugs. The legislature, however, specifically created a presumption in favor of the employer if the employee tests positive for certain drugs. Considering the presumption of intoxication, presumption of causation and the fact that plaintiff has the burden of proof to show that intoxication was not a cause of the accident, the appellate court upheld the intoxication defense and denied the employee's claim.

The court also addressed another aspect of the intoxication defense, the issue of when the employee's condition has "stabilized and (employee is) ready for discharge from the acute care facility". All of the doctors testified that plaintiff's condition had stabilized prior to surgery because a neurosurgeon had placed Gardner Wells tongs on plaintiff and transferred to him to the surgical intensive care unit. The court held that under the circumstances of this case, a patient who has suffered a severe spinal injury and is immobilized by the insertion of tongs into his head is not stable and ready for discharge from the acute care facility although he is stabilized with respect to risk of "loss of life." Therefore,, the court required the employer to pay the medical expenses incurred prior to discharge from the hospital.

Israel v. Gray Insurance Company, 98-525 (La App 3d Cir 10/28/98) 720 So2d 803.

The employee was injured at work, but a drug test revealed that he had high levels of cocaine in his system at the time of the accident. The employer's drug policy was a written statement that drugs were not permitted in the work place and that any violation of the statement would result in termination and forfeiture of unemployment or workers' compensation benefits. The employer had employees sign the document acknowledging that they had read and understood it. The trial court found that the statement did not meet the requirements of a drug "policy" under La. R.S. 23:1081(8), and, therefore, that the results of the employer administered drug screen were not admissible.

The issue before the appellate court concerned what constitutes a " drug policy" under LSA-R.S. 23:1081(8). Specifically, does a general statement of intolerance towards drug use qualify as a "policy," or, instead, does a "policy" require specific information regarding implementation and the possibility of testing? The court held that a "policy" is "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." The employer's statement was not a "policy" because it did not set forth any method for drug testing, did not select from various testing methods and did not specify under what circumstances an employee may be required to submit to a test. Therefore, the drug test administered at the request of the employer was not admissible.

Spires v. Raymond Westbrook Logging, 43,690 (La. App. 2 Cir. 10/22/08); 997 So. 2d 175.

The employer claimed that the employee was not entitled to recover benefits after he sustained an injury while at work because he was intoxicated at the time of the accident. The employee's medical records indicated that the employee tested positive for marijuana, amphetamines, and opiates. On appeal, the court noted that results for drugs tests performed at both medical centers were not verified or confirmed as required under *La. Rev. Stat. Ann. § 23:1081(9)(E)*. Accordingly, there was no presumption of intoxication.

OTHER AFFIRMATIVE DEFENSES

Two other defenses are available under La. R.S. 23:1081. La. R.S. 23:1081(1)(a) provides that no compensation is allowed for an injury caused "by the injured employee's willful intention to injure himself or to injure another." La. R.S. 23:1081(1(c) allows no compensation "to the initial aggressor in an unprovoked physical altercation." In additional to these defenses, La. R.S. 23:1201.4 provides that benefits may be forfeited during any period of incarceration.

Willful Intent to Injure – suitable after a job accident.

The willful intent to injure defense is rarely raised by employers and even more rarely applied by courts. The failure to follow safety precautions, in itself, does not qualify as a willful intention to injure oneself. Phillips v. Sanderson Farms, Inc., 2013 0285 (La. App. 1 Cir. 11/1/13), 136 So.3d 27. To prevail on a defense under La. R.S. 23:1081(1), the employer must show that the employee had a "willful and wanton intention to hurt himself." Ashworth v. Big Easy Foods of La., LLC, 13-650 (La. App. 3 Cir. 12/11/13), 128 So.3d 672, *citing*, *King v.* Grand Cove Nursing Home, 93-779 (La. App. 3 Cir. 3/9/94), 640 So.2d 348

La. 23:1081(1) has been raised as a defense when an employee's decedents seek workers' compensation death benefits following an employee's suicide. An early case held that:

> "where death is caused by suicide, death benefits may not be recovered under the Louisiana Workmen's Compensation Act unless it is established that the suicidal act was the product of some form of insanity, mental disease, mental derangement or psychosis, which resulted from the injury. Otherwise, a suicide is attributable to the decedent's own volitional act which constitutes an "independent intervening cause." It is not sufficient for recovery to show that the suicide resulted merely from the fact that the decedent had become discouraged, depressed, despondent or melancholy as the result of the accident or injury."

Soileau v. Travelers Ins. Co., 198 So.2d 543, 546 (La. App. 3 Cir. 4/26/67).

Soileau was the leading case on the issue, and it was followed as recently as 1993.[3] At least two cases refused to follow Soileau, however, and, instead, adopted a less restrictive standard. Broussard v. Hollier Floor Covering, Inc., 602 So. 2d 1023 (La. App. 3 Cir. 5/20/92), held that an employee's suicide was compensable because

3 Perniciaro v. Martin Marietta Corp., 613 So. 2d 775 (La. App. 4 Cir. 1/28/93).

"while the decedent made a conscious decision to take his own life, he was without the ability to perceive that he had any other choice but to commit suicide." Id. at 1029. In the court's view, the decedent's dependents were entitled to workers' compensation death benefits because the decedent's lack of free will to prevent his suicide was the direct result of his depression over his inability to fully recover from his work related back injury. Id.4

Aggressor Doctrine

La. R.S. 23:1081(1)(c) denies benefits to the initial aggressor in an unprovoked physical altercation. The statute makes an exception, however, when excessive force is used in retaliation against the initial aggressor. The employer has the burden of proving that an employee was the initial aggressor and, therefore, not entitled to compensation. Wilson v. General Motors Corp., 45,232 (La. App. 2 Cir. 5/26/10), 37 So.3d 602.

A verbal provocation may defeat an initial aggressor defense. In Demeritt v. Trahan, 99-983 (La. App. 3 Cir. 12/2/99), a subordinate became agitated when his supervisor ordered him to perform a task. The subordinate approached within inches of the supervisor, shook his finger in the supervisor's face and said, "What the f--- you think you're doing to me?" The supervisor hit the subordinate, and the subordinate hit him back. The supervisor got the worse of the altercation and sought workers' compensation benefits. The trial court held that the subordinate's words were "provocation" and, therefore, that the initial aggressor defense did not apply. The appellate court affirmed, finding that "verbal provocation may defeat the initial aggressor doctrine in workers' compensation cases under certain circumstances." Id. at 957.

Interestingly, the supervisor in Demeritt had filed a tort claim against his employer alleging that it was vicariously liable for the injuries inflicted by the subordinate. In the tort claim, the trial court found, and the same appellate court affirmed, that the supervisor was not entitled to tort damages because he was the initial aggressor in the altercation. Apparently, the supervisor was sufficiently provoked to be entitled to workers' compensation benefits, despite his role as initial aggressor, but not sufficiently provoked to be entitled to tort damages.5

4 Broussard was cited with approval and followed by Burlin v. C.D. Montz & Co., 97-855 (La. App. 5 Cir. 01/14/98) 708 So. 2d 1054.

5 Although the appellate court opinion in the tort case was not published, there apparently was no question that the subordinate intended to injure the supervisor when he hit him. According to the reported decision in the workers' compensation case, tort damages were denied solely because the supervisor was the initial physical aggressor in the altercation.

Incarceration

La. R.S. 23:1201.4 provides that an employee's workers' compensation benefits, including medical benefits, are forfeited during any period of incarceration. If the employee has dependents that rely on the employee's compensation for support, however, the employee's benefits are not forfeited but are paid directly to the dependents or their legal guardian. The employee's right to benefits resumes after release from incarceration.

Unless the incarcerated employee is later found not guilty of the charges that led to incarceration, or those charges are dismissed, prescription is not interrupted or suspended during the period of incarceration. When the employee is later found not guilty or charges are dismissed, however, prescription is extended by the number of days that the employee was incarcerated. In other words, in those limited circumstances, when an employee is found not guilty or charges are dismissed, the remaining prescriptive period on the employee's claim is the same on the day of release as it was on the day of incarceration. When the employee is incarcerated due to a guilty verdict or plea and the case is not dismissed, however, prescription is not interrupted. In those cases, the prescriptive period runs while the employee is incarcerated, even though the employee is not entitled to benefits during the incarceration.