View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Louisiana State University: DigitalCommons @ LSU Law Center

Louisiana Law Review
Volume 43 | Number 2
Developments in the Law, 1981-1982: A Symposium
November 1982

Workers Compensation

H. Alston Johnson

Repository Citation

H. Alston Johnson, *Workers Compensation*, 43 La. L. Rev. (1982)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol43/iss2/23

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

WORKERS COMPENSATION

*H. Alston Johnson**

LEGISLATIVE DEVELOPMENTS

There were only two amendments to the Compensation Act during the 1982 Regular Session of the Louisiana Legislature. Act 611 added Louisiana Revised Statutes 23:1274(D) to provide a procedure for settlement of death claims. This procedure requires the presentation of an affidavit attesting to the death of the employee, proof of the claimant's relationship to the deceased, and an assertion of a legal right to benefits under the Act. All of these items are to be attached to the joint petition to be submitted for court approval. Act 829 added Louisiana Revised Statutes 23:1047 to exempt from the Act real estate brokers or salesmen licensed to do business in Louisiana, while working in the "course and scope" of the real estate business. The Act further provides that all rights in tort are reserved to the employer and the employee.

The biggest controversy in the legislative session was over House Bill 256, which did not pass. The bill, sponsored by the Louisiana Association of Business and Industry, would have made a number of fundamental changes in the Act, including the introduction of a sort of commission as the tribunal of first instance. The bill was heavily amended in the Senate after its House passage, and after the House refused to concur in the Senate amendments, a conference committee report was rejected by the House.

UNUSUAL EMPLOYMENT ARRANGEMENTS

In *Maryland Casualty Co. v. Bollich*,[1] a physician leased land to a lessee who was to grow crops there. The lessor agreed to pay designated percentages of the costs and receive in return the same percentages of the profit. The lessee's son actually farmed the land. There was a cooperative arrangement among the farmers in the area to lend combines and operators to each other during harvest time. On the day in question, another farmer had sent a combine and operator to assist the lessee's son in the harvest. The operator was killed while operating the combine on the leased land. The compensa-

Copyright 1982, by LOUISIANA LAW REVIEW.

* Professor of Law, Louisiana State University.

1. 408 So. 2d 20 (La. App. 3d Cir. 1981).

tion carrier for the lending farmer paid benefits to the dependents of the operator and then sought contribution from the lessor of the land, the lessee, and the lessee's son. The appellate court properly affirmed a summary judgment as to the lessor, on the ground that there was no evidence that he had borrowed the operator under these circumstances. He paid the man nothing, did not direct the work, and had no control over the manner in which the work was done.

In a case of first impression, an individual who was injured while "trying out" for a job was limited to compensation rather than a tort claim.[2] The claimant had apparently not been formally hired, but was being given an opportunity to operate a shirt-finishing machine to see whether she would be hired. She injured herself in the process and sued both in tort and in compensation. A number of decisions from other states[3] limiting such claimants to compensation were brought to the court's attention, and an exception of no cause of action to the tort claim was sustained. Louisiana courts apparently had not faced such a problem in previous cases, but the result seems correct by analogy to those cases in which the employment arrangement had either barely begun or already terminated.[4] Such claims are manageable from an administrative standpoint, since the injured employee was on the employment premises, was using the employer's equipment, and, in fact, was doing what other employees were doing. Thus the risk is fairly predictable and does not expose the employer or the carrier to exotic risks beyond the confines of the workplace.

PHYSICAL HARM RESULTING FROM EMOTIONAL EXCITEMENT

In *McDonald v. International Paper Co.*,[5] the supreme court announced the logical extension of its rationale in *Ferguson v. HDE, Inc.*,[6] where it had recognized that an unusual mental or emotional

2. Burton v. Country Boys, Inc., No. 63,087-F (21st Dist. Ct. Aug. 9, 1982).

3. Woodell v. Brown & Root, Inc., 616 S.W.2d 781 (Ark. Ct. App. 1981); County of Los Angeles v. Workers' Compensation Appeals Board, 30 Cal. 3d 391, 637 P.2d 681, 179 Cal. Rptr. 214 (1981); Laeng v. Workmen's Compensation Appeals Board, 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (1972); Moore v. Gundelfinger, 56 Mich. App. 73, 223 N.W.2d 643 (1974); Erickson v. Holland, 295 N.W.2d 576 (Minn. 1980); Bode v. O. & W. Restaurant, 9 A.D.2d 969, 193 N.Y.S.2d 845 (N.Y.App. Div. 1959); Smith v. Venezian Lamp Co., 5 A.D.2d 12, 168 N.Y.S.2d 764 (N.Y.App. Div. 1957); Lotspeich v. Chance Vought Aircraft, 369 S.W.2d 705 (Tex. Civ. App. 1963). *Contra* Fineberg v. Public Serv. Ry. Co., 108 A. 311 (N.J. 1919); Dykes v. State Acc. Ins. Fund, 47 Or. App. 187, 613 P.2d 1106 (1980). For these authorities and for information about the case discussed in the text, the author is indebted to Frank M. RePass of the New Orleans and Slidell Bars.

4. *See* 1 W. MALONE & A. JOHNSON, WORKERS' COMPENSATION LAW & PRACTICE §§ 56 & 170 in 13 LOUISIANA CIVIL LAW TREATISE (2d ed. 1980).

5. 406 So. 2d 582 (La. 1981).

6. 264 La. 204, 270 So. 2d 867 (1972).

cause could produce a compensable accidental effect in a worker. The claimant in *Ferguson* had recently accepted new employment and was dismayed to find that his first paycheck was not as high as he thought it ought to be. Following an argument about it, he suffered a "flash of pain . . . followed by paralysis." The fact that the moving cause behind this result was "mental," rather than "physical," did not deter the court from concluding that it was an accident.

In *McDonald*, the worker suffered a fatal heart attack while on the employment premises during working hours. However, the showing of any particular physical exertion was weak at best. He had walked about 150 yards up and down two small flights of stairs before the symptoms appeared. He was working the "graveyard shift," beginning shortly before midnight, and had just arrived to fill out his time card and get special instructions for the upcoming shift. He was only 36 years old. The trial and appellate courts had granted death benefits, noting the physical strain the employee worked under (though obviously not on the day in question).[7] Both courts also noted the mental stress that he was experiencing. His employer had recently announced a mill closure. There was evidence that he was worried about that and the impending loss of his job. Moreover, the crews that he supervised were increasingly shorthanded, less than diligent, and forced to work with delapidated equipment. He often pitched in to work with the crews himself. The evidence reflected that this state of affairs had continued for the two weeks prior to the fatal attack.

The supreme court affirmed the death benefits, but ignored the physical stress aspect altogether. Citing *Ferguson*, the court noted that an unexpected result produced upon an employee by "extraordinary mental or emotional work-related stress" had been treated as a compensable accident. Also, the court observed that "the character of the case does not change in kind, but only in degree when the stimulus takes the form of sustained anxiety or pressure leading to heart attack or cerebral hemorrhage."[8] This is certainly an accurate statement. Whether the mental stress seems to be a single incident, as in *Ferguson*, or a collection of stresses over a two-week period, as in *McDonald*, is a matter of quantity, not quality. But the understandable result in *McDonald* should not be taken as an announcement of a new rule on the issue of proof of accident and causal link between employment and accident. It is at most a refinement of the long-standing principle that the causal relationship between employment and accident is essential. When we mistrusted claims of

7. McDonald v. International Paper Co., 398 So. 2d 1182 (La. App. 2d Cir. 1981). These courts had allowed penalties and attorney's fees, which award was reversed by the supreme court.

8. 406 So. 2d at 583.

"mental" stress, we defined "accident" in physical terms. As we understood mental stress better, we were willing to concede that physical effects could have mental causes. Certainly even then, we felt safer if the mental stress was, like many physical causes, a single identifiable event. And, it always made us feel more secure if the worker was squarely in the course of his employment at the time of his accident. But now, we begin to understand that chronic mental stresses, rather than acute ones, may also produce disabling effects.

But we must always remember that the longer the period over which the stress continues and the more diffuse the supposed sources of the stress become, the more tenuous is the causal relationship between the employment and the accident. Singling out employment as the moving cause in the disability, even at our fairly "liberal" level of doing so, is still crucial. The duration of the stress period and all of its sources must be carefully considered in reaching a conclusion on this issue.

OCCUPATIONAL DISEASE CASES AFTER 1975

The cases decided since the 1975 amendments[9] to the Act providing broader occupational disease coverage appear to be consistent with the spirit of those amendments. In an early case,[10] an expansive reading of the coverage was approved although the court found that the claimant could not establish that his lung condition was caused by his employment rather than by causes to which the general population might have been equally exposed.

Then, in *Schouest v. J. Ray McDermott & Co.*,[11] the supreme court took a similar view. The claimant had been employed by the defendant as a sandblaster off and on for over fifteen years. He was diagnosed as having silicosis. His physician described his impairment as "slight" and opined that it would not interfere with the performance of moderate to heavy work, so long as it was work in a silica-free environment. His employer paid him some temporary disability benefits and medical expenses and offered him a job in an allegedly silica-free environment. The claimant chose not to return to the employer's business, and his benefits were terminated. His suit for disability benefits followed.

The trial court held that the claimant was not disabled. The appellate court held that although the claimant ultimately would likely

9. LA. R.S. 23:1331.1 (Supp. 1952 & 1975).

10. Page v. Prestressed Concrete Co., 399 So. 2d 657 (La. App. 1st Cir.), *cert. not considered*, 401 So. 2d 994 (La. 1981).

11. 411 So. 2d 1042 (La. 1982).

be disabled by his condition, he was not disabled at present.[12] The supreme court concluded that he was partially disabled. The supreme court first noted that silicosis was an occupational disease even under the schedule coverage which prevailed from 1952 until 1975. Thus, one might have argued that whatever interpretation might be given to the 1975 amendments, there was no legislative intent to eliminate coverage for those occupational diseases which had previously been specifically mentioned. The court did not specifically adopt this concept, but neither did it seem to feel itself hemmed in by the notions of "characteristic of" and "peculiar to" found in the broad occupational disease coverage. Indeed, neither phrase is mentioned in the opinion. Silicosis may well be "characteristic of" employment as a sandblaster, but it probably is not "peculiar to" such employment. Properly, that fact did not keep the court from concluding that this claimant's silicosis was employment-related, as the facts appeared clearly to link the condition to his employment. Other decisions also indicate that the limiting statutory language will not be decisive when the causal link between the employment and the condition is clear.[13]

"Increased Risk" in Heart Cases

The supreme court has recently given conflicting signals in cases involving the proof of a causal link between employment and a disabling or fatal heart attack. In rapid succession, the court dealt with cases involving a number of heart-related problems. In *Guillory v. United States Fidelity & Casualty Co.*,[14] the court faced the question of whether an accident which was clearly job-related and involved the heart was the cause of the present *disability* of the worker. And in *McDonald v. International Paper Co.*,[15] the court decided the issue of whether a heart attack apparently brought on by gradual mental stress over a two-week period was a compensable accident at all.

Two other opinions stand out on the issue of causal relationship between employment and heart attack, and they represent two clearly opposed views of the problem. The facts in *Adams v. New Orleans Public Service, Inc.*[16] were not very supportive of plaintiff's claim. For

12. Schouest v. J. Ray McDermott Co., No. 11, 581 (La. App. 4th Cir. 1981) (unpublished).

13. Lofton v. Louisiana Pac. Corp., 410 So. 2d 1171 (La. App. 3d Cir.), *cert. denied*, 412 So. 2d 1094 (La. 1982) ("chronic obstructive pulmonary disease" traceable to employment in lumber mill and benefits for occupational disease awarded; no mention of such a disease being both "characteristic of and peculiar to" such employment); Dupont v. Ebasco Services, Inc., 411 So. 2d 605 (La. App. 4th Cir. 1982) (silicosis; sandblaster; no mention of statutory language).

14. ___ So. 2d ___, No. 81-C-2471 (La. July 2, 1982).

15. 406 So. 2d 582 (La. 1981).

16. 418 So. 2d 485 (La. 1982).

over 30 years, he had worked for other employers as an automotive mechanic, and he only began work with the defendant on a probationary appointment about 90 days before he experienced minor symptoms of heart problems while at work. But he made no complaints to co-employees at that time, according to the appellate court's opinion.

Shortly thereafter, he was hospitalized for tests, which revealed arteriosclerotic heart diesease of long standing. Both lower courts denied compensation on that showing, a result fairly well in line with other decisions in which no particular stress or exertion was demonstrated.[17] Moreover, his brief period of employment with the defendant would not have permitted the court to conclude that the disease itself was somehow traceable to the employment.

In its opinion on original hearing, the supreme court reversed. The court noted the claimant's testimony that he had complained to his wife of symptoms about two weeks before the more serious incident that produced his hospitalization. And on the occasion of that more serious incident, at least one co-worker testified that the claimant told him simply that he was "feeling real bad." The court held that the claimant's disability "occurred by accident" because the attacks and symptoms came "suddenly and unexpectedly," even in the absence of physical stress. On the question of causal link between that accident and employment, the court concluded that "[t]he only pertinent inquiry is whether in fact, the accident happened on the job."[18]

There were three dissents, and ultimately a rehearing was granted. Before an opinion had been rendered, the court decided *Guidry v. Sline Industrial Painters, Inc.*[19] In *Guidry*, the worker suffered a fatal heart attack, secondary to atherosclerotic heart disease, minutes after pausing for a smoke break at work. He was 53, had done manual labor for most of his life, and had worked virtually nonstop from 7:30 a.m. until 2:00 p.m. on the day of his death, except for a lunch break.

The court reviewed the familiar litany of Louisiana heart cases from *Bertrand*[20] through *Leleux*[21] and *Roussel*[22] to *Adams*. It properly

17. Adams v. New Orleans Pub. Serv., Inc., 395 So. 2d 470 (La. App. 4th Cir. 1981).

18. 418 So. 2d at 488.

19. 418 So. 2d 626 (La. 1982). The appellate court opinion is Guidry v. Sline Industrial Painters, Inc., 406 So. 2d 303 (La. App. 3d Cir. 1981), in which the writing judge expressed strong disagreement with the *Adams* opinion but felt bound to follow it and grant compensation.

20. Bertrand v. Coal Operators Cas. Co., 253 La. 1115, 221 So. 2d 816 (1969).

21. Leleux v. Lumbermen's Mut. Ins. Co., 318 So. 2d 15 (La. 1975).

22. Roussel v. Colonial Sugars Co., 318 So. 2d 37 (La. 1975).

concluded that *Adams* could not be regarded as representative of the usual position in such cases.

> Contrary to the language in *Adams* . . . the cases out of this Court, however liberal they might occasionally have been insofar as finding sufficient the *amount* of stress or exertion which has contributed to a given heart accident, have nonetheless never before taken the position [that] the absence of physical stress or exertion is of no moment, or that the occurrence of a heart attack on the job is the only relevant inquiry.[23]

Thus the court "expressly" rejected the *Adams* language that "where an injury occurs suddenly or unexpectedly it is compensable despite the absence of any physical stress or exertion" and "[t]he only pertinent inquiry is whether in fact, the accident happened on the job."[24]

The court preferred an analysis suggested by Professor Larson, which has also been used in various formulations by the Louisiana courts themselves. Where the disability or death is traceable in part (as in *Guidry*) to a pre-existing "personal" risk brought to the workplace by the worker, the "employment contribution must take the form of an exertion greater than that of nonemployment life. . . . [T]he comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person."[25] If there is no pre-existing personal causal contribution, then any exertion connected with the employment and causally related to the collapse will suffice. In both instances, the medical evidence must support a causal relationship between the exertion and the attack.

These are well-recognized principles in Louisiana, simply refined and applied in the heart cases in a clear fashion. The problem has always been to single out "employment" risks from those other risks to which the general public is equally exposed. We use various devices to accomplish this objective, and among the most important such device is the question of whether the injury "arises out of" the employment. Due to the liberal interpretation of our Act and because of the ease of application of the test, we have been inclined to compensate many injuries occurring squarely "in the course of" employment,

23. 418 So. 2d at 632.

24. 418 So. 2d at 487 & 488. Dixon, C.J., who had authored the majority opinion in *Adams*, naturally took umbrage at this rejection in his concurring opinion in *Guidry*: "Needed clarity and simplicity is not here accomplished. We only furnish fodder for claims adjusters, lawyers and expert witnesses in future cases--was there stress or no stress? It would be preferable to say, simply, that a disabling on-the-job accident is compensable." 418 So. 2d at 635 (Dixon, C.J., concurring).

25. 418 So. 2d at 633 n.15 (quoting 1 B.A. LARSON, WORKMEN'S COMPENSATION § 38.83, at 7-237 (1980) (emphasis removed).

although not so clearly "arising out of" the employment. Many of these, however, are the so-called "neutral" risks, such as acts of nature which injure the employee on the job.

When the question of "personal" risks brought to the workplace by the claimant is under discussion, however, conficting causes are clearer. If a pre-existing condition is traceable to other employment, or to factors entirely outside the employment, there is a place in society other than within the employment where such losses could be borne. The worker, nonetheless, is entitled to substantial benefit of the doubt when the symptoms actually appear in the course of employment.

But that does not mean that some employment link is unnecessary in such "personal risk" cases. Earlier cases indicated that the employment link ought to be shown by some unusual exertion or stress beyond what the employee would ordinarily have encountered in his own job. This was the clearest and easiest demonstration that, under the heading of an "increased risk" theory, the employment link was present. It no doubt will remain the most common means of establishing the link between the employment and the injury.

However, now the court also indicates that the employment link may be established by a showing that the "employment exertion," whatever form it might take, is greater than that of "nonemployment life."[26] While not particularly difficult to establish, this is nonetheless a requirement which goes beyond a simple statement that any heart attack in the workplace is presumed to be traceable to employment.

Perhaps the *Guidry* opinion is a reflection of judicial reaction to the substantially increased benefits available under the Act after the 1975 amendments. When recoveries at the maximum level permitted by the Act could be discounted to a lump sum recovery of less than $25,000, it might not have made a great amount of difference that a decision such as the original opinion in *Adams* was rendered. Now recoveries, in some instances, can be ten times that amount; hence, such a decision may be too lenient, although administratively convenient. Of course, nothing on this topic is mentioned in the opinion.

26. Even under this standard, a decision such as Barnes v. City of New Orleans, 322 So. 2d 821 (La. App. 4th Cir. 1975) (clerical employee suffered fatal heart attack at home; some minor symptoms might have occurred at work) would probably be erroneous. The supreme court indicates as much in a footnote in the *Guidry* opinion by saying that *Barnes* "did expand upon the jurisprudence" and pointedly observing that the decision was one of an intermediate appellate court and "there has not been a similar case handed down by this Court." 418 So. 2d at 631 n.10. Of course, the opinion in McDonald v. International Paper Co., 406 So. 2d 582 (La. 1981), may prove to be the salvation of office workers, since it holds that gradual mental stress producing physical effects such as a heart attack may nonetheless be a compensable accident.

Shortly before the preparation of this symposium article, the supreme court handed down its opinion in the rehearing of *Adams*. Chief Justice Dixon was still the writing justice, and the result was the same: partial disability benefits. But the two controversial statements in the original *Adams* opinion, in effect, were deleted from the opinion on rehearing:

> It is needless, now, to discuss the differences arising from these statements in this opinion. Agreement on their meaning and implications is not essential to the conclusion of the majority that Adams is entitled to compensation. After rehearing was granted in the Adams case, Guidry . . . was decided. There, a majority of the court stated, "we expressly reject" the two statements in the first Adams opinion. The rejection is discussed at length in the Guidry opinion.[27]

The opinion in *Adams* on rehearing emphasized the heat and physical stress of the claimant's employment as a moving factor in producing the accident and ultimately the disability. To that extent, at least, it appears to be more in the mode of the traditional Louisiana heart cases than had the original opinion. And as between the two, *Guidry* now becomes the more definitive present statement of the position of a majority of the supreme court.

RETAINED EMPLOYEE: SCHEDULE LOSS WHEN EARNING SAME WAGE?

Although not limited to a retained employee, a potential conflict is posed by the injured worker who promptly returns to work at the same or a higher wage. If his injury would entitle him to a specific schedule loss, but he is nonetheless not partially disabled because he is earning the same or a higher wage, is he entitled to the schedule loss?

Prior to the 1975 amendments, a worker who received an award based on total disability had no interest in pursuing a schedule loss. The schedule, as a practical matter, was applicable only to those who could not prove total disability. Partial disability was almost nonexistent. After the 1975 amendments,[28] a worker might be better off under the schedule than under partial disability if the difference between his old and new wage was minimal. But when such a worker

27. Adams v. New Orleans Public Service, Inc., 418 So. 2d 488, 492 (La. 1982). Chief Justice Dixon added in a footnote that he regretted that he found no merit in the rejection of the statements which "taken in context, were not incorrect and might have helped eliminate some specious arguments in compensation cases." *Id.*, at 492 n.1.

28. *See* LA. R.S. 23:1221 (1950 & Supp. 1975).

is not "disabled" at all (*i.e.*, apparently, he has not lost any earning capacity), should he receive the schedule benefit?

The pre-1975 answer was that he should receive the schedule benefit, on the ground that the schedule loss was a built-in minimum for injury, despite the fact that there might have been no loss of present earning capacity.[29] Predictably, the post-1975 answer apparently will be the same. In *Jacks v. Banister Pipelines America*,[30] the supreme court faced the situation of a worker who suffered the loss of an eye but returned to work for the same employer and others at the same or a higher wage, after a brief period of convalescence. He had received a few weeks of temporary total disability benefits during his convalescence, but was denied any further benefits. He sued for total and permanent disability benefits, but was limited to partial disability benefits by the trial and appellate courts.[31] He contended in the supreme court that he was entitled to the schedule benefits for loss of an eye, in addition to the benefits based upon partial disability.

The court noted the difficulty in predicting whether benefits based upon partial disability or benefits based on the schedule loss would afford the worker the greater protection. Under the circumstances, the court concluded that the prior rule should continue to apply under the post-1975 disability provisions: the worker should be awarded benefits based on the specific loss "as a minimum," with reservation of his right to recover under the partial disability provisions in the event those should prove more favorable. The employer is entitled to a credit against any ultimate partial disability award for any amounts which he might have paid for the schedule loss, on a week-for-week basis.[32]

This is a proper result, and it respects the previously established proposition that the schedule loss is not based upon loss of present earning capacity. Rather, the schedule loss may be equated to a presumption of potential loss of earning capacity following a work-related injury, for which the worker is entitled to some remedy, limited though it may be. The decision will work in harmony with the partial disability provisions, since the worker retains the right to seek benefits on that basis if his condition worsens to the point that he is no longer earning the same or a higher wage.

---

29. *See* Lacour v. Highlands Ins. Co., 247 So. 2d 611 (La. App. 3d Cir. 1971); Ventress v. Danel-Ryder, Inc., 225 So. 2d 765 (La. App. 3d Cir. 1969).

30. 418 So. 2d 524 (La. 1982).

31. Jacks v. Banister Pipelines Am., 396 So. 2d 604 (La. App. 1st Cir. 1981).

32. See the analogous cases of Lewing v. Vancouver Plywood Co., 350 So. 2d 1320 (La. App. 3d Cir. 1977); Futrell v. Hartford Accident & Indem. Co., 276 So. 2d 271 (La. 1973); Cain v. St. Paul Fire & Marine Ins. Co., 201 So. 2d 286 (La. App. 3d Cir. 1967).

OVERPAYMENT OF BENEFITS BY EMPLOYER OR INSURER

In *Carter v. Montgomery Ward & Co.*,[33] the claimant had injured his *ankle* in the course of his employment and had received weekly benefits and reimbursement of medical expenses on that basis. About four months later, the medical reports showed a full recovery and he was cleared to return to work. Shortly thereafter, he began to complain of pain in his *knee* and received treatment therefor. For about six months more, the employer paid weekly benefits and reimbursed medical expenses, presumably on the basis that the knee injury was related to the same incident. But ultimately (about ten months after the original incident), the employer terminated benefits and refused to reimburse any further expenses.

The employee's suit to establish that benefits should be resumed because the knee problem continued and was a result of the employment incident was unsuccessful. The court was of the opinion that only the ankle injury, and not the knee, was traceable to the employment. Thus it held that compensation was not due past the date on which the medical reports indicated that the ankle was healed.

The employer sought by reconventional demand to recover all those amounts which it had paid *after* the date on which the employee's ankle injury was ultimately determined to be at an end. The trial court had granted that relief, but the appellate court denied it. The employer had argued that these payments constituted payment of a thing not due under article 2301 of the Civil Code, creating a quasi-contract in its favor for their return. Citing a principle apparently adopted by the supreme court in a noncompensation case, the court held that a voluntary payment "made with full knowledge of all the facts and not under duress may not subsequently be recovered, even though the amount so paid is not actually owed."[34] The employer was aware of the medical report indicating full recovery, but continued payments for another six months, no doubt because the employee was then complaining of a knee injury which might have been employment-related.

The court's holding is not surprising. No doubt, the employee no longer had the funds which had been paid to him over the six months, and it would have been a substantial burden on him to have returned the amount to the employer. But, the holding puts employers and insurers in a difficult position. At the risk of penalties and attorney's fees, an employer or insurer must be virtually certain that no further compensation could possibly be due before it terminates benefits which

33. 413 So. 2d 309 (La. App. 3d Cir. 1982).

34. 413 So. 2d at 314. *See* Whitehall Oil Co. v. Boagni, 217 So. 2d 707 (La. App. 3d Cir. 1968) (Tate, J., dissenting), *aff'd*, 229 So. 2d 702 (La. 1969).

are being paid. If subsequent medical reports contradict the earlier optimistic ones, the employer or insurer can ignore them only at its peril.[35]

Suppose that in the present case, the employer had terminated benefits at the four-month point, at which time the medical reports showed that the ankle had healed.[36] And suppose that the same medical reports showed (as they did) that a complaint was made at that point, for the first time, about the worker's knee and, while the examining physician did not believe the complaint to be related to trauma, the worker was being referred to another physician. And suppose that on the basis of that last report, the employer terminated benefits. Penalties and attorney's fees would be a likely prospect.

So what is the employer to do? Terminate and risk penalties? Or pay for a while longer, with no prospect of regaining those payments if made in error? Almost certainly, the latter is the more advisable course. But the employer or insurer, to protect its own interest, should be very diligent in following the medical opinions during the period in which the continuing disability of the claimant is in doubt. The opinion in *Carter* does not reflect whether the employer or insurer kept close tabs on the medical situation during the six-month period that ultimately was determined to be one in which compensation benefits were not due. Such scrutiny is the only way to enable the employer to make the judgment, with legal counsel, of whether benefits can safely be terminated without risking penalties and attorney's fees, or whether they should be continued for a while longer, with no real prospect of getting them back at a future time.

APPLICABILITY OF COLLATERAL SOURCE DOCTRINE

The relationship of social security benefits and workers' compensation benefits[37] is not the only problem area involving duplication of benefits. Not infrequently, medical expenses recoverable under workers' compensation are also reimbursable from medical coverages paid for wholly by the employer, or sometimes paid for partially by the employer and partially by the employee. In the tort context, such a problem often is solved under the rubric of the collateral source doctrine, which really ought to be called the doctrine of denial of the collateral source. The usual statement of the doctrine is that a defendant may not plead an offset as to certain expenses traceable to his conduct and for which he would ordinarily be liable simply because

35. *See* 2 W. MALONE & A. JOHNSON, *supra* note 4, § 389.

36. The petition sought recovery for injury to the claimant's "leg and ankle" but never sought recovery for injury to the *knee.*

37. *See* 1 W. MALONE & A. JOHNSON, *supra* note 4, § 289.

the victim did not actually incur them.[38] If the victim's sister is a physician and renders care to him free of charge, the collateral source doctrine would not permit the defendant to deny liability for a reasonable charge for those services.[39] If the victim has medical insurance which picks up the tab for some of his expenses, the defendant is not entitled to the benefit of this "windfall" by way of a deduction of that amount from the judgment. In other words, the defendant should not benefit simply because he injured a prudent, insured victim rather than an uninsured one.

The courts have not had much occasion to deal with this problem in the compensation context. Perhaps this is due to the fact that until the last few years, private insurance plans were not prevalent, because medical expenses were not that staggering. But of course now these expenses are substantial, and there are a good number of medical plans which may overlap with compensation coverage.

This problem was presented in *Bryant v. New Orleans Public Service, Inc.*[40] At the time of injury, the compensation statute provided an initial $12,500.00 coverage for medical expenses and an additional $12,500.00 if the employee could show that he or she would be subjected to "undue and unusual hardship" without reimbursement for those expenses. The trial court determined that the claimant was subject to such a hardship due to additional expenses and ordered the employer to pay the excess amount. However, the trial judge granted the employer's request for a credit against that amount for any amounts covered by the claimant's husband's group health insurance policy.

The appellate court reversed the latter ruling on the ground that the collateral source rule prohibited such an offset in a compensation case, as it presumably would prohibit such an offset in a tort case on similar facts.[41]

The supreme court affirmed the result, but set the collateral source question to the side. It held that the credit in the employer's favor was prohibited by Louisiana Revised Statutes 23:1163, which forbids "any employer . . . to collect from any of his employees directly or indirectly . . . any amount whatever . . . either for the purpose of paying the premium in whole or in part on any liability or compensation insurance of any kind . . . or to reimburse such employer [for

38. *See* Hall v. State Dept. of Highways, 213 So. 2d 169 (La. App. 3d Cir. 1968), *cert. denied*, 252 La. 959, 215 So. 2d 128 (1968), and authorities therein cited.

39. *See* Spizer v. Dixie Brewing Co., 210 So. 2d 528 (La. App. 4th Cir. 1968).

40. 414 So. 2d 322 (La. 1982).

41. Bryant v. New Orleans Pub. Serv., Inc., 406 So. 2d 767, 768 (La. App. 4th Cir. 1981).

such premiums]." The court reasoned that the indirect effect of the contested credit would be to have the employee (in this instance through her spouse) contribute to the cost of workers' compensation. The court distinguished an earlier decision, which had permitted reduction of statutory retirement disability benefits by the amount received in workers' compensation benefits, on the ground that the worker therein had received the full *compensation* benefits and the retirement statute mandated the reduction as to the other benefits.[42]

The court's result is probably correct, although it could be argued that since the claimant's husband's *employer* apparently bore all of the cost of the group health plan, there was no direct or indirect contribution by the couple to that plan or to workers' compensation. But if the husband's employer was paying those premiums in lieu of additional wages, such "deferred compensation" otherwise would have inured to the benefit of the couple to do with as they saw fit. In this light, it might be said that granting the credit would have made them contribute to the plan or to workers' compensation, whether they wanted to or not.

In the days to come, overlap of coverage could become a problem, and to the extent of the duplication, it may be an unnecessary expenditure. Some legislative attention needs to be given to the problem of offsetting of benefit and medical expense coverages against other coverages available to employees.

THE INTENTIONAL ACT EXCLUSION: FURTHER JUDICIAL REACTION

The supreme court recently returned to the problem of the intentional act exception to the exclusivity of the compensation remedy, in the interesting case of *Citizen v. Daigle*.[43] The plaintiff was employed in a hardware store owned by the defendant. A patron had returned a rifle purchased there, complaining that it would not fire. Another clerk had tested the weapon and determined that the patron's complaint was accurate. Cormier, another employee, was assigned the task of packing the rifle for shipment to the manufacturer for repair. As a "practical joke," he aimed the weapon at the plaintiff and fired. To his surprise, it discharged, injuring the plaintiff in the upper leg.

The plaintiff recovered compensation benefits against his employer and sought tort damages against his co-employee and that employee's homeowner's insurer. Both lower courts determined that the harm

42. Patterson v. City of Baton Rouge, 309 So. 2d 306 (La. 1975).

43. 418 So. 2d 598 (La. 1982). *See* Johnson, *Developments in the Law, 1980-1981—Workers' Compensation*, 42 LA. L. REV. 620 (1982), for a discussion of other aspects of the intentional act exclusion.

was not intentional[44] and that it was not outside of the normal course and scope of employment. Thus there was no exception to take the injury out of the Act and permit a tort remedy against the co-employee.

In the supreme court, the plaintiff pressed his contention that the concept of transferred or constructive intent sufficed to authorize his recovery. He contended that since Cormier intended an assault and accomplished harmful contact (battery), classic tort theory authorized a recovery for what Cormier actually accomplished.[45] Cormier's intent to assault, the plaintiff argued, could have been transferred to the tort of battery, since Cormier should not have been absolved of blame because he actually accomplished something worse than he intended. The majority opinion did not directly address this contention. The court held that an assault was intended and that the plaintiff might have recovered for damages due to an assault, but the plaintiff "did not seek recovery of damages resulting from" the assault, but rather sought damages for the shooting. The court also noted that the plaintiff did not seek damages resulting from intentional infliction of mental distress, suggesting that perhaps some damages might have been forthcoming on that basis.

There are several minor objections to the majority opinion. The court probably should have dealt squarely with the plaintiff's contention that the proven intent to assault sufficed to establish the requisite intent for battery. The concurring opinion of Justice Dennis comes much closer to grappling with the issue by suggesting that the legislature did not intend for "constructive intent" cases to fall within the exception. He indicates that "intentional act" and "intentional tort" may not be identical after all. "Intentional tort" concepts may include transferred intent; "intentional act" may not, if the concept is limited to what a particular actor *actually* intended.

The majority opinion also shows a disturbing tendency to return to some sort of "theory" or "writ" pleading.[46] On that basis, the plain-

44. Citizen v. Daigle, 392 So. 2d 741 (La. App. 3d Cir. 1980).

45. RESTATEMENT (SECOND) OF TORTS § 13 (1965):

> An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, *or an imminent apprehension* of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.

(emphasis added).

46. This may be seen in cases in some other fields as well. *See* Kraaz v. La Quinta Motor Inns, Inc., 410 So. 2d 1048 (La. 1982) (plaintiff barred from recovery against motel owner on contract theory, but could recover in tort); DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981) (plaintiff barred from recovery against blood bank on contract theory, but could recover in tort); Meador v. Toyota of Jefferson, Inc., 332 So. 2d 433 (La. 1976) (plaintiff could not recover mental distress damages

tiff lost because his facts did not fit his "writ" of battery, although they might have fit a "writ" for assault or for intentional infliction of mental distress, which he did not possess.

However, the majority opinion is to be commended for its result, which continues a narrow view of the exception. There appeared to be no serious contention that the plaintiff was not entitled to compensation, indicating that the conduct was not intentional, at least with reference to the employer. And if the claimant had been an injured patron, no one would seriously consider proceeding against the employer as a matter of "intent" rather than "negligence."[47] Thus it is appropriate to leave the claimant with his compensation remedy.

It may be puzzling to some that the courts have proved so unreceptive to the "intentional act" tort suits. This reluctance probably is traceable in part to the courts' unconscious reaction to the disparity between the sanction and the offense. In these times, leaving compensation and regaining the tort system may mean a substantial difference in amounts of money recovered. And where the costs of that difference may ultimately be cast back upon the employer, there is reason to doubt the wisdom of such an escape. Moreover, giving an injured employee a tort remedy as a sanction for "wanton" or "reckless" employer or co-employee conduct probably is out of proportion with the evil sought to be redressed. Certainly, we do not want to encourage or even tolerate such conduct in the workplace, any more than we want to tolerate negligent conduct. But that does not mean that the sanction has to be a departure from the Compensation Act and a reentry into the tort system. It is probably better that we reserve that sanction for particularly heinous conduct, such as the unjustified physical assault upon an employee by a supervisor.[48]

Seen from this point of view, it is understandable that the courts have been reluctant to impose the "ultimate" sanction of a tort remedy on the employer or a co-employee (or their insurers) short of conduct which clearly satisfies the present exception, without the assistance of legal conclusions of the pleader, transferred intent, or similar efforts.

This suggests a middle ground which would more closely equate the sanction with the conduct. If the conduct of the employer or a

in breach of contract action, although court noted she could have done so in an action "sounding in tort"). Such decisions may be violative of article 891 of the Code of Civil Procedure, which provides for a system of fact pleading in Louisiana.

47. Of course, there may be other reasons why negligence would be preferred over intent in proof of the case. A conclusion of intentional tort might eliminate liability insurance coverage. Also no punitive damages are available for an intentional tort in Louisiana, and no particular advantage is to be gained along those lines.

48. See Rennier v. Johnson, 410 So. 2d 1149 (La. App. 3d Cir. 1981), *cert. denied*, 412 So. 2d 1115 (La. 1982) (two dissents).

co-employee is "reckless," or "wanton," or a "deliberate failure" to use a safety device,[49] as opposed to ordinary negligence or no fault at all, perhaps a percentage increase in compensation payable to the claimant could be considered as a penalty.[50] A number of states have enacted such provisions, and some states have included a percentage *decrease* in compensation to claimants for similar conduct on their part, instead of the all-or-nothing defenses which we now have.[51]

If a sanction more appropriate to the offense could be developed, perhaps the courts would not be so reluctant to apply it. And a sanction which the court would apply will go a lot further toward encouraging safety in the workplace than will a sanction which is almost never applied because it is too draconian.

And perhaps we should clarify the conduct which would lead to a tort remedy rather than a penalty. We could provide that there is no immunity from tort for any person who "commits an intentional tort against an employee" or, alternatively, who "intentionally harms an employee." In either phrase, there would be two important results. First, the vague phrase "intentional act," which could have been broadly interpreted in favor of tort actions, would become more restrictive and more in line with the purpose of the original legislative intent. And second, the potential vicarious liability of an employer would be eliminated. If the immunity is taken away from the *person* who intentionally harms the employee, there would be no way to conclude that the employer would fall in that category—unless, of course, he were actually the natural person who committed the intentional tort.

UNINSURED MOTORIST CARRIER NOT A THIRD PERSON LIABLE IN TORT

Coverage for damages caused by an uninsured, or underinsured,

---

49. *See generally* LA. R.S. 23:1081 (1950) (the description of employee conduct which may lead to a complete denial of compensation).

50. For example, if an employee could establish that the defined conduct subject to sanction had occurred, his compensation would be 15% higher than it would otherwise have been. Such a claim would remain within the Act and would not be subject to jury trial. This concept is subject to the criticism that (a) it is a fine payable to a private litigant and (b) it punishes conduct by increasing a payment for diminished worker capacity, when the capacity will not necessarily be more substantially diminished than it would have been absent the conduct.

51. *See* KY. REV. STAT. § 342.165 (1981) (15% increase, 15% decrease); MASS. ANN. LAWS ch. 152, § 28 (Michie/Law Co-op. 1976) (100% increase); MO. ANN. STAT. § 287.120(4) (Supp. 1982) (15% increase, 15% decrease for employee on more limited grounds); N.C. GEN. STAT. § 97-12 (1979) (10% increase, 10% decrease for employee on more limited grounds); UTAH CODE ANN. § 35-1-12 (1974) (10% increase). Some statutes impose a standard of clear and convincing evidence, some limit the conduct to that of supervisory employees in charge of safety, and all attempt to define the reprobated conduct in fairly specific terms.

motorist is very extensive in Louisiana, and its existence has offered new vistas for claimants seeking to receive tort damages for work-related injuries. If an employee is injured in a compensable accident but is prohibited from suing his employer or a co-employee in tort, it can be argued that such a defendant is a person from whom the employee is "legally entitled to recover damages" but who is "uninsured" in the sense that the employee cannot recover anything from him. Thus, the argument goes, the employee should be entitled to recover from an uninsured motorist carrier providing coverage either to the employer or co-employee, or to the claimant himself.

In recent decisions, the Louisiana courts have properly denied such claims.[52] The tort action preserved by the Act is intended to permit the injured employee to seek tort recovery against persons outside the employment family altogether. In other words, the Act is not intended to deny to the injured employee those rights in tort that he had before the Act and which have nothing to do with his employment. The conduct of a tortfeasor *also* may entitle the injured employee to certain rights in compensation against his employer. But the Act should not be read to grant to the injured employee any additional tort recoveries against the employer or co-employee beyond those specifically provided (such as for an intentional act). The greater the expansion of real or imagined tort rights against the employer or co-employees, the greater the damage to the delicate compromise which underlies the Act.

The present issue, though, takes the problem one further step. Here, it is argued, neither the employer nor a co-employee is being asked to contribute to tort damages. Rather, the defendant is an insurer who has contracted to provide coverage to individuals who are injured by a tortfeasor who cannot pay for what he has done. Is the delicate compromise still affected?

---

52. Fox v. Commercial Union Ins. Co., 413 So. 2d 679 (La. App. 3d Cir. 1982) (worker killed through negligence of co-employee; claim against employer's uninsured motorist carrier rejected on ground that immunity defense of co-employee was not personal and could be raised by liability carrier; and if no liability as to co-employee, then no uninsured motorist coverage); Beard v. Assumption Parish Police Jury, 413 So. 2d 923 (La. App. 1st Cir. 1982) (similar, except injury rather than death); Gray v. Margot, Inc., 408 So. 2d 436 (La. App. 1st Cir. 1981) (worker injured through negligence of co-employee; claim against his own uninsured motorist carrier rejected on ground that coverage existed only as to those persons from whom the worker was "legally entitled" to recover but from whom he could not recover due to uninsurance or underinsurance and he was not "legally entitled" to recover from co-employee); Carlisle v. State, Dept. of Transp. & Dev., 400 So. 2d 284 (La. App. 3d Cir.), *cert. denied*, 404 So. 2d 1256 (La. 1981) (three dissents) (writ request probably based on other grounds) (worker severely injured through negligence of co-employee; claim against worker's own uninsured motorist carrier rejected).

Clearly it is. The Act represents a societal judgment that workplace accidents, generally speaking, are to be dealt with in the compensation system and not in the tort system. The more limited recovery which compensation brings (theoretically in a more prompt fashion) will ultimately be borne by the public, in its capacity as consumers of the product or service provided by the injured employee's enterprise. The same persons will bear the cost of tort damages funneled through the uninsured motorist premiums paid by that same enterprise, but they will do so at a significantly higher level. Consumers of the product of the enterprise will thus be paying costs for workplace accidents based upon tort damages rather than compensation benefits, and that is directly counter to the societal judgment made in the Act.

Somewhat different arguments might be made for the case in which the injured employee is seeking to recover from his own uninsured motorist carrier sums that he cannot recover from a co-employee for a workplace accident. Here, it may be said that the injured employee paid for this "extra" coverage out of his own pocket and should be entitled to the benefit of what he paid for. But the entire scheme of uninsured motorist coverage is designed to give to the injured motorist an immediate source of recovery, with the ultimate responsibility to be cast upon the actual tortfeasor, if at all possible. The scheme does not deny tort damages; it simply gives the motorist another source from which to receive those damages. The scheme does not reveal a societal decision that motorists are not entitled to a tort recovery when injured by an impecunious driver; rather, it demonstrates that a tort recovery is so important that we will devise a special scheme to help insure that it will occur.

The difference between uninsured motorist coverage and the Compensation Act becomes apparent. The Act expresses the societal intent that tort damages for workplace injuries are no longer the expected or desired remedy. Indeed, it has been held that no tort is committed when an employer or a co-employee plays a role in injuring the worker.[53] To the extent that a "real" tortfeasor also plays a role, we are willing to preserve that remedy.[54] But if there is no

53. *See* LeJeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 3d Cir.), *cert. denied*, 290 So. 2d 903 (La. 1974); Hebert v. Blankenship, 187 So. 2d 798 (La. App. 3d Cir. 1966); 2 W. MALONE & A. JOHNSON, *supra* note 4, § 374.

54. Thus there may be a cause of action against an injured employee's own uninsured motorist carrier, or his employer's carrier, if injury is caused wholly by the conduct of an uninsured motorist outside the employment "Family." And presumably, there could be a similar recovery when the injury is caused partially by an employee and partially by an uninsured motorist who is not an employee, but reduced by the percentage of fault of the employee—who has committed "no tort."

"real" tortfeasor, then there is no "real" tort and no reason to devise or use a scheme to assure a "real" tort recovery.

To the extent that we would permit an injured employee to recover against his own uninsured motorist carrier under these circumstances, we would require that all purchasers of uninsured motorist coverage assist in paying tort damages for injuries caused wholly by workplace conditions. To do so would run counter to the concept accepted so long ago that injuries caused wholly by workplace conditions are better dealt with outside of the tort system altogether.

Certainly, the purchase of uninsured motorist coverage is voluntary, and that introduces a factor to be considered. Perhaps one should be entitled, in effect, to purchase "tort" coverage for workplace injuries caused by automobile use, if he wants to do that. But so long as we make no distinctions between *employees* who purchase such coverage and those who have no expectation of ever experiencing a loss which would permit collection under such coverage, we have spread tort damages for workplace injuries over too broad a group. If we are committed to the concept that such injuries are best left in compensation, then most of society has a right to expect this concept to be respected until such time as the legislature makes it clear that it intends an exception to be made.

Understandably (and perhaps happily), the recent decisions do not go into such detail on the question. The courts were content to observe that an injured employee has a right under section 1101 to sue in tort against a person in whom there has been created "a legal liability to pay damages" and that since no tort is committed by a co-employee who helps injure the claimant, there is no such legal liability. Absent such legal liability, there is no person from whom the claimant is "legally entitled to recover damages" under the uninsured motorist statute. Thus there is no basis for any recovery against the uninsured motorist carrier.