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BOUND IN SHALLOWS AND MISERIES: THE 1983 AMENDMENTS TO THE WORKERS' COMPENSATION STATUTE*

H. Alston Johnson**

The philosopher Thomas Hobbes is credited with the gloomy observation that life could be described as "poore, nasty, brutish and short."¹ One is tempted to make the same observation with respect to the life expectancy of the celebrated Act 1 of the First Extraordinary Session of 1983, and the very substantial changes wrought in the workers' compensation statutes by its provisions. The Act's extreme stance may have shortened its lifespan drastically. The delicate balance or compromise inherent in the Act between the interests of the employer and the employee is the very foundation of the compensation system, and one may confidently expect trouble if the balance is upset too greatly in one direction or the other. For a long period of time, employees felt that the balance was tipped too far in the employers' direction; more recently, employers have argued that the balance was tilted toward the employees' interest at tremendous economic cost.

Thus, those representing the employers' interests undertook legislative redress of the balance. A 1981 proposal and a 1982 proposal did not meet with legislative approval, the latter scuttled by those who had launched it because they were dissatisfied with the product of the legislative process. In the interim between the 1982 regular session and the 1983 extraordinary session, those representing the various sides in the controversy tried to mediate their differences at the strong encouragement of the governor. They were ultimately unable to do so, and the bill introduced and finally passed in the special session was not the product of a compromise. Rather, it was the proposal of the employer community, and it was a good deal more pro-employer than either of the recent proposals. The legislative struggle in the special session was intense but ultimately was very lopsided. The employer community had the necessary legislative votes

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* The author acknowledges the assistance of W. Shakespeare, *Julius Caesar*, act IV, sc. III, L. 217 in formulating this title. The complete pertinent quotation is:

There is a tide in the affairs of men
Which, taken at the flood, leads on to fortune;
Omitted, all the voyage of their life
Is bound in shallows and miseries.

The use of the phrase from the last line reflects the author's belief that an excellent opportunity to strike a new balance in the Act was missed in the legislative sessions of 1981 and 1982 and the special session of 1983.

** Professor of Law, Louisiana State University.

1. T. Hobbes, *Leviathan* pt. 1, ch. 13, at 62. In fairness, it should be noted that he was speaking of life in a state of "war" as he defined it, as opposed to a state of "peace." Still, the analogy seems apt.

and proceeded to pass a bill which was more pro-employer than anything in recent or past memory.

Some will say that the employees and their supporters are receiving only their just desserts for years of favoritism under judicial interpretations of the Act. But it is unseemly for a serious social problem of this nature to be resolved simply by responses of "it's our turn" or "been down so long it looks like up to me." The people of Louisiana deserve more reasoned treatment of this problem than can be gained by treating the issue as a political football, to be kicked about and ultimately to be carried over the goal by those who simply have the votes at the moment.

The purpose of this analysis, however, is not to point the finger of blame at any group or special interest. Its purpose is first to discuss what the changes are and what they seem to mean. And secondly, its purpose is to suggest ways in which the Act's extreme positions might be modified with an interest toward restoring the delicate balance underlying the Act which simply must be preserved to avoid constant legislative wrangling over this serious problem.

OVERVIEW OF THE BALANCE

It is appropriate to begin with an overview of the changes in the prominent features of this compensation system and any compensation system. The point at which the balance is struck on these prominent features has a great deal to do with the interpretation which courts will give to the amended provisions, as it has had a great deal to do with their past interpretations.

Four factors have figured prominently into the Louisiana courts' interpretation of the disability provisions of the Act in the past: level of benefits, judicial speculation in the worker's favor, court administration of the Act, and prevalence of compromise.² The 1975 amendments altered only the level of benefits, and it was predicted that the Louisiana courts probably would not change their interpretation of the disability provisions significantly because the other factors were still prevalent.³ That prediction was largely validated by the adoption of the odd lot doctrine.⁴

Somewhat the same prediction might be made about the 1983 amendments, but for the fact that the language is intentionally drawn so narrowly that the judiciary simply may not have the option to do much interpreting.⁵ The level of benefits arguably has been increased, although in some signifi-

2. See W. MALONE & A. JOHNSON, *LOUISIANA WORKERS' COMPENSATION LAW AND PRACTICE* § 274 in 13 *LOUISIANA CIVIL LAW TREATISE* 607-15 (2d ed. 1980).

3. *Id.*

4. *Id.* at § 276 (Supp. 1984).

5. See *infra* text accompanying note 41.

cant aspects the level is decreased. There is no change in the specific award for total and permanent disability: two thirds of the worker's pre-injury wage during the period of disability without a limitation on the number of weeks. Of course, the tightened definition of total and permanent disability will mean that only a miniscule number of awards will be made under this heading.⁶ The maximum amount of weekly compensation has also been increased from two thirds of the average weekly wage to seventy-five percent of the average weekly wage in all employment. This increase is less significant than may initially appear, as may be demonstrated by a series of examples. For ease of calculation, assume that the applicable average weekly wage in all employment is \$300.00 (the actual figure for the year September 1, 1982 to September 1, 1983 was \$306.10). In this hypothetical example, the maximum weekly compensation under Louisiana Revised Statute 23:1202 prior to its amendment was \$200.00. By definition, *roughly* one half (this is an average, not a median, wage) of Louisiana workers made less than the average weekly wage. The precise percentage would of course depend upon the actual levels of wages above and below that average figure.

The increase in the maximum provided by the amendments to section 1202 would fix that amount at \$225.00 per week instead of \$200.00 per week in our hypothetical example. Any worker who actually made less than the average weekly wage would not benefit from the increase in the maximum at all, for the simple reason that at his level of wages the prior maximum had never been reached. The worker who made \$270.00 per week would have received \$180.00 per week in total disability payments (two thirds of his wage, subject to the maximum of \$200.00 per week) prior to the amendments. The same worker will still receive \$180.00 per week after the amendments (two thirds of his wage, subject to the maximum of \$225.00 per week). For this group of workers, there is no change at all in the level of total and permanent disability benefits.⁷

Next assume a worker was making \$480.00 per week. Prior to the amendments he would have been entitled to \$200.00 per week, since two thirds of his wage would have exceeded that ceiling. After the amendments, he is still entitled to two thirds of his wage, but subject to a higher maximum of \$225.00.

And finally assume a worker was making slightly more than the average weekly wage—say, \$330.00 per week. Prior to the amendments, he was entitled to \$200.00, since two thirds of his wage would have exceeded that maximum. After the amendments, he is entitled to \$220.00

6. See *infra* text accompanying note 36.

7. And the new formula for supplemental earnings benefits will produce benefits for the worker who earns a lesser wage after his injury which will *never* be more than those under the pre-1983 Act. See *infra* text accompanying notes 16-18.

per week, since two thirds of his wage would not exceed the statutory maximum.

In summary, this hypothetical increase in level of benefits from \$200.00 to \$225.00 per week as a maximum will yield its greatest benefit to those workers whose actual wage is at least 12.5% greater than the average weekly wage in all employment. As to them, the increase will be uniform. A steadily decreasing benefit is afforded to the group of workers who earn between 12.5% above the average weekly wage and the actual average weekly wage. And for those who earn below the average weekly wage, there is no change in the level of benefits for total and permanent disability. This reflects a movement toward a wage-protection concept rather than impairment of earning capacity. It also gives no increase in benefits to those who arguably might need that increase most: those who earn less than the average weekly wage in all employment. A far more significant benefit for such workers would have been an increase to seventy-five percent of their actual wage rather than an increase to seventy-five percent of the average weekly wage as a maximum. Thus, the changes in the factor of level of benefits result in mixed signals to the judiciary.

As for judicial speculation in the worker's favor and court administration, superficial progress has been made. There is now an administrator who may theoretically serve as an arbitrator and continuing supervisor of a compensation award. But the change in these factors will have to await judgment as to the efficiency of the director's operation. If he is well staffed and well funded, he might be able to do that. On the other hand, he could be overwhelmed and perform little other than a perfunctory review in order to issue the parties a ticket to district court. One disturbing aspect of that process is that the administrator's investigation and recommendation are not admissible in the ultimate litigation.⁸ Once again, the court may simply have to speculate in the worker's favor because there is no indication of what alternatives have been made available to him.

The prevalence of compromise may have been reduced slightly by the commendable statement in Louisiana Revised Statute 23:1271 that periodic payments are in the best interest of the worker, and that no compromise may be entered into until six months have elapsed from termination of temporary total disability. Moreover, no lump sum payment may be made unless it is demonstrated that such a payment is clearly in the best interests of the parties.⁹ These amendments may limit to some extent the pervasive nature of the compromise and lump sum payment devices, but that remains to be seen.

In fine, the underlying problems which have led in the past to a liberal

8. See LA. R.S. 23:1310.1 (Supp. 1984).

9. See *infra* text accompanying note 87.

judicial interpretation of the disability standard have not been eliminated; they have been attacked in limited ways. Interestingly, the factor which most pointed to a narrower reading of the post-1975 disability standard (level of benefits) has been altered in a restrictive fashion which will not give relief to those most in need of it.

REVISED DISABILITY PROVISIONS

Attention may now be turned to the most important changes wrought by Act 1 of the 1983 Extraordinary Session and to the central feature of any compensation system: the standard for determining disability.

Former Partial Disability: Supplemental Earnings Benefits

The best feature of the major amendments to Act 583 of 1975 was the emphasis upon partial disability payments as the primary remedy. Total and permanent disability benefits were supposed to be restricted by the 1975 amendments, and probably were to some extent (though not to the extent that the employer community wanted). Persons who had been entitled to total and permanent disability benefits because they could not return to precisely the same job and perform all the same tasks would, after 1975, have to be content with partial disability benefits.

Thus, the 1983 amendments commendably retain this emphasis. It is not, however, especially encouraging to note the severe restrictions placed on total and permanent disability and to discover upon close examination that the new formula for those who can find other work after their injury never produces greater benefits than the post-1975 formula.

There had been a glaring deficiency in the 1975 amendments relative to partial disability. A worker was entitled to two thirds of the difference between his pre-injury wage and any post-injury wages that he "actually earns." Understandably, this phrase was interpreted (though reluctantly in some instances) as meaning precisely what it said: measurement of actual earnings.¹⁰ If a worker capable of earning wages nonetheless did not for whatever reason, there was no change in his level of benefits. Thus, for all practical purposes, a worker who chose to do so could draw the maximum benefits for 450 weeks by simply not working. He would thus receive identical benefits during those weeks to those received by a totally and permanently disabled worker.¹¹

In order to remedy this evil, the employer community decided to pur-

10. See *Schouest v. J. Ray McDermott & Co.*, 411 So. 2d 1042 (La. 1982); *Scott v. Sears, Roebuck & Co.*, 406 So. 2d 701 (La. App. 2d Cir. 1981); *Mayes v. Louisiana-Pacific Corp.*, 379 So. 2d 46 (La. App. 3d Cir. 1979), *cert. denied*, 381 So. 2d 1232 (La. 1980).

11. This satisfies no one's sense of propriety and was an unwise, though not inadvertent, legislative choice. See W. MALONE & A. JOHNSON, *supra* note 2, § 275, at 619.

sue the pure wage-loss concept adopted by Florida in 1979. Although the concept was bruited about in the legislative halls as a novel approach, it is in fact the original approach to workers' compensation problems. Compensation was intended as a scheme to replace lost earning capacity, and one of the simplest measures of earning capacity is the ability to earn wages in the competitive marketplace of workers. This test is not infallible, since a number of factors other than the worker's earning capacity might affect the matter (general economic conditions, helpful employers or co-employees, geographical location, and the like). But the test is simple and direct, and has a good deal to recommend it.

Thus, in the 1981 proposal¹² and the 1982 proposal,¹³ a wage-loss treatment of the partially disabled worker was advanced, by name, for legislative consideration. Even in those proposals, the Louisiana employer community had gone the Florida statute one better. The Florida statute provides for compensation in such instances at the level of ninety-five percent of the difference between eighty-five percent of the employee's average monthly wage and the amount of post-injury wages he is able to earn on a monthly basis after reaching maximum medical improvement.¹⁴ The first two Louisiana proposals fixed the level of compensation at eighty percent of the difference between ninety percent of the pre-injury wages he was able to earn.

The difference in the two schemes may be seen by taking a Florida worker and a Louisiana worker, each earning \$200.00 per week prior to injury and able to earn nothing for a certain number of weeks. Using a conversion factor of 4.3 from weekly to monthly income (as Florida apparently would),¹⁵ the Florida worker was making \$860.00 in average pre-injury monthly wages. During those weeks in which the workers are able to earn nothing, the Florida worker would be entitled to \$161.50 per week (85% of \$860.00 is \$731.00; 95% of the difference between \$731.00 and nothing is \$694.45; \$694.45 divided by 4.3 is \$161.50). The Louisiana worker would have been entitled to \$144.00 under the same circumstances (90% of \$860.00 is \$774.00; 80% of the difference between \$774.00 and nothing is \$619.20 divided by 4.3 is \$144.00).¹⁶

The 1982 proposal did not pass, and in the successful 1983 proposal,

12. La. H.R. 986, 7th Reg. Sess. (1981).

13. La. H.R. 256, 8th Reg. Sess. (1982).

14. FLA. STAT. ANN. § 440.15(3)(b) (West 1981).

15. Though the Florida provision is written in terms of monthly benefits, it does not contain this specific conversion factor. The 4.3 figure is found in FLA. STAT. ANN. § 440.12(3), which specifies that a monthly wage loss amount may not be more than 4.3 times the weekly maximum amount fixed by section 440.02.

16. These proposals did not contain a 4.3 conversion factor, however. Benefits were described as being payable on a weekly basis. But, for ease of comparison in this example, the conversion factor has been used.

even the more limited wage-loss formula of the prior proposals was further restricted. Apparently, to satisfy some objection to the phrase "wage-loss," the term given to such benefits was changed to "supplemental earnings benefits" (SEB). The substance was precisely the same as the earlier proposals, except at an even further reduced level of benefits. As enacted, Louisiana Revised Statutes 23:1221(3) now specifies that the Louisiana worker who is able to earn wages is entitled to seventy-four percent of the difference between ninety percent of his former monthly wage and the amount of monthly wages he is able to earn after the injury.¹⁷ The conversion factor of 4.3 weeks per month is specifically included in the statute. So the Louisiana worker who was earning \$200.00 per week (\$860.00 per month) prior to the injury, and nothing in certain weeks thereafter will be entitled under the new provisions to \$133.20 per week (90% of \$860.00 is \$774.00; 74% of the difference between \$774.00 and nothing is \$572.76; \$572.76 divided by 4.3 is \$133.20). This same worker would have received \$133.00 per week under the 1975 Louisiana amendments, \$161.50 under the Florida law, and \$144.00 under the 1981 and 1982 Louisiana proposals.

The reduction in such benefits under Act 1 of the 1983 Extraordinary Session becomes more pronounced as the worker earns more in post-injury wages. Suppose now a worker was making \$300.00 per week prior to injury (\$1290.00 per month) and can make \$160.00 per week (\$688.00 per month) after his injury. Under Florida law, he would be entitled to \$90.24 per week; under former Louisiana law, \$93.33 per week; under the 1981 and 1982 Louisiana proposals, \$88.00;¹⁸ under the 1983 amendments, \$81.40. Even the increase in maximum number of weeks for such payments from 450 to 520 weeks will not make up the difference in most cases. The worker who draws all 520 weekly checks of \$81.40 receives a total of \$42,328.00, and the one who draws 450 weekly checks of \$93.33 receives a total of \$41,998.50. The worker who for some reason does not draw the last five weekly checks under the extended 520-week provision comes out worse in the overall amount as well as the weekly amounts.

And of course, the worker who is able to earn ninety percent or more of his former wage is entitled to no SEB at all, and prior to the amendments he would have been entitled to a small amount per week (ten percent of the difference between his old wage and his new wage).

The use of a monthly wage figure for these calculations is puzzling in light of the fact that the Louisiana act has always been keyed to weekly wage figures. Indeed, many of the workers primarily affected by the Act

17. The figure of 74% is clearly a compromise between the prior law's two thirds and the prior proposals' 80%.

18. This figure is arrived at by using a 4.3 conversion factor. Without the conversion factor the amount per week would be greater.

are paid on a weekly basis. The simple reason for its use is that Florida appears to use such a factor. Additionally, and probably not coincidentally, the conversion factor will diminish payable benefits in certain instances.¹⁹ Consider our worker who was making \$300.00 per week prior to his injury (\$7.50 per hour). He returns to work and makes in four successive weeks \$150.00, \$300.00, \$300.00, and \$360.00, the last by working overtime. Under Louisiana Revised Statutes 23:1021(10), his average weekly wage would work out to be more than 90% of his pre-injury wage, and with the conversion factor he would not be entitled to any SEB. Under the prior law with weekly calculations, he would have been entitled to \$100.00 during the first week.²⁰

The drafters of the 1983 amendments were careful to close the "actually earns" loophole, and understandably so. The Florida statute had always contained the phrase "is able to earn," and that phrase replaces "actually earns" in the basic SEB provisions in Louisiana Revised Statutes 23:1221(3)(a). The previous language relative to earnings in any employment—whether the same or not, whether that for which he was trained or not—is supplemented by the addition of the phrase "or self-employment." And then subsection 1221(3)(b) provides: "[T]he amount determined to be the wages the employee is able to earn in any month shall in no case be less than the sums actually received by the employee, including, but not limited to, earnings from odd-lot employment, sheltered employment, and employment while working in any pain." This is similar to the Florida provision with a few Louisiana embellishments (the specific references to odd lot employment and working in pain).

And subsection 1221(3)(c)(i) further provides that the post-injury earnings figure might sometimes actually be more than actual earnings:

[I]f the employee is not engaged in any employment or self-employment . . . or is earning wages less than the employee is able to earn, the amount determined to be the wages the employee is able to earn in any month shall in no case be less than the sum the employee would have earned in any employment or self-employment . . . which he was physically able to perform, and (1) which he was offered or tendered by the employer or any other employer, or (2) which is proven available to the employee in the employee's or employer's community or reasonable geographic region.

19. Even the use of 4.3 instead of the more accurate conversion factor of 4.33 will decrease a worker's benefit. The worker who draws \$300.00 per week for an entire year draws \$15,600.00 in total dollars. Under the conversion factor of 4.3, he will be deemed to have drawn \$15,480.00 (\$300.00 times 4.3 equals \$1,290.00 times 12 equals \$15,480.00). This slight difference will ultimately yield a smaller benefit once all of the calculations are complete.

20. Two thirds of the difference between \$300.00 and \$150.00.

The Florida provision on the same point speaks of an employee who "voluntarily limits his income or fails to accept employment commensurate with his abilities."²¹

The only way for a worker to avoid being deemed to have earned the wages in the proffered or available employment which he does not accept is to prove under Louisiana Revised Statutes 23:1221(3)(c)(ii) "by clear and convincing evidence, unaided by any presumption of disability, that solely as a consequence of substantial pain, the employee can not perform" such employment.

The general thrust of this amendment is clear and understandable. There is room for abuse, however. Suppose the worker's employer proves that there is a job which the worker can physically perform *available* in the "employer's" community, though he does not actually offer it to the worker. And suppose that the employer is a statewide corporation and interprets this section to mean that its "community" is the entire state. If the worker is unable or unwilling to move to another portion of the state to take this "available" job, a literal reading of the statute would require that the earnings he would have received be counted against his compensation benefit. Such a reading would be patently unfair but not entirely inconsistent with the language of the statute.²²

Termination of the right to supplemental earnings benefits also underwent change in the 1983 amendments. Although the same basic scheme was retained, the specific limit to the maximum number of weeks of such benefits increased from 450 to 520 under the amendments. The employer continues to receive credit against the maximum for a week in which he pays any amount in SEB, but he gets no credit against the maximum for weeks in which he pays nothing.²³ Thus, though there is a limit to 520 weeks of actual payments, there is no limit to 520 calendar weeks.

But there are two additional termination points not present prior to the amendments. One of these blends SEB into retirement or social security benefits. Supplemental earnings benefits terminate "[w]hen the employee retires or begins to receive old age insurance benefits under Title II of the Social Security Act, whichever comes first."²⁴ In this event, however, a minimum of 104 weeks of SEB are payable.

The second provision terminates SEB "[a]s of the end of any two-year period commencing after termination of temporary total disability, unless during such two-year period supplemental earnings benefits have

21. FLA. STAT. ANN. § 440.15(3)(b)(2) (West 1981).

22. Some may find this reading implausible. But if the employee's and the employer's community is meant to be one and the same, why put in the statute "in the employee's or employer's community"?

23. LA. R.S. 23:1221(3)(d)(ii) (Supp. 1984).

24. LA. R.S. 23:1221(3)(d)(iii) (Supp. 1984).

been payable during at least thirteen consecutive weeks."²⁵ This provision is borrowed from the Florida statute²⁶ and was found in both the 1981 and 1982 proposals.²⁷ The surface intent of the provision is to terminate such benefits when they seem not to be needed. If a worker has, over a two-year period, been able to earn ninety percent or more of his former wage in all but three months (recall that the 4.3 conversion factor means he may earn less than ninety percent in some weeks but still not receive benefits for that month), then arguably he no longer needs this subsidy.

A two-year period of surveillance may be sufficient in some cases, but not in others. What if the worker suffers the termination of benefits under this provision, but then is unable to do as well in the next two or three years? There is no specific authority for beginning SEB payments again, and there could be some doubt about the worker's right to review under Louisiana Revised Statute 23:1331 in light of the specific statement in that section that it "shall not apply to the calculation of the monthly benefit amount" under SEB.²⁸ It is the worker's responsibility under subsection 1221(3)(f) to report any right to SEB to the employer or insurer within thirty days after the week in question.²⁹ What major harm could there be in requiring the employer or insurer to simply put the file on hold, even though two years might have passed, until the employer or insurer hears from the employee?

It also seems that an unscrupulous employer could offer the injured employee two jobs so that he could make ninety percent of his prior wage,³⁰ and maintain him in that status until twelve weeks short of two years from termination of temporary total disability. If the worker is then cut back to one job at below ninety percent of his prior wage, what remedy does he have?

At the very least, it should be held that although SEB payments "terminate" upon the occurrence of the conditions described, they can be reinstated by the employee if he pursues the ordinary processes and proves that he is again entitled to them. In other words, the stoppage of payments would be more in the nature of a suspension than a termination. Otherwise, tremendous unfairness could be introduced into the Act. And worse, the concept of continuing subsidy for those who need it would be violated.

25. LA. R.S. 23:1221(3)(d)(i) (Supp. 1984).

26. FLA. STAT. ANN. § 440.15(3)(b)(3)(a) (West 1981).

27. See bills cited respectively *supra* notes 12-13.

28. LA. R.S. 23:1331(D) (Supp. 1984).

29. Supplemental earnings benefit payments must be based on actual reports. As amended, LA. R.S. 23:1222 will not permit the award of SEB based upon "probable duration of loss of wages." Prior to amendment, the section had permitted temporary disability awards based on "probable duration" of the disability.

30. Alternatively, an industrious worker could hold two jobs with different employers and achieve a total of 90% or more of his former wage.

Revised Standards for Total Disability

As a part of the major 1975 amendments, the employer community gave up the specific limitation (then 500) on the number of weeks of payments awardable for total and permanent disability along with other concessions. In turn, the definition of total and permanent disability was significantly tightened. At the very least, awards such as those under the prior law for total and permanent disability for those who could work anywhere else but their former job would no longer be available. Understandably, the employer community thought the number of total and permanent disability awards would significantly decrease.

Predictably, the employer community was dismayed by a few early and rather lenient decisions by the appellate courts.³¹ Rather than waiting for a few years of judicial refinement or opting for a rejuvenated partial disability provision calling for a return to the wage-loss principle only, the employer community began building momentum for another definition of the disability standards.

In the interim between 1975 and 1983, the Louisiana Supreme Court had adopted the odd lot doctrine. After earlier liberal interpretations, the appellate courts had begun to settle down to a realistic use of the doctrine, incorporating the substantial-pain cases into it.³² In time, the doctrine would likely have proved to be a reasonable approach to total and permanent disability cases, though the balance would probably not have been struck where the employer community would have wanted it.

Despite the fact that the odd lot doctrine in some form is in use in most jurisdictions, the 1983 amendments specifically prohibit its use as well as any working-in-pain doctrines which might lead to total and permanent disability awards. This is accomplished by amendments to Louisiana Revised Statutes 23:1221(2) which replace the phrase inability "to engage in any gainful occupation for wages" with the phrase "to engage in any self-employment or occupation for wages";³³ provide that compensation for total and permanent disability benefits "shall not be awarded if the employee is engaged in any employment or self-employment . . . including but not limited to any and all odd-lot employment, sheltered employment, or employment while working in any pain";³⁴ and specify

31. They were especially dismayed with *Phillips v. Dresser Eng'g Co.*, 351 So. 2d 304 (La. App. 3d Cir. 1977), *cert. denied*, 353 So. 2d 1048 (La. 1978), an opinion giving an extremely lenient reading of the revised standards without consideration of the alteration of benefits suggested by Professor Malone and this writer. W. MALONE & A. JOHNSON, *supra* note 2, § 277, at 269.

32. W. MALONE & A. JOHNSON, *supra* note 2, § 277 (Supp. 1984). In the most recent year, for example, the number of cases in which the odd lot doctrine was unsuccessfully argued approximately equalled those in which it was successfully argued.

33. LA. R.S. 23:1221(2)(a) (Supp. 1984).

34. LA. R.S. 23:1221(2)(b) (Supp. 1984).

that whenever the employee is not working, such benefits may be awarded

only if the employee proves by clear and convincing evidence, unaided by any presumption of disability, that the employee is physically unable to engage in any employment or self-employment, regardless of the nature or character of the employment or self-employment, including, but not limited to, any and all odd-lot employment, sheltered employment, or employment while working in any pain,

notwithstanding its "location or availability."³⁵

By any interpretation, this provision will make awards for total and permanent disability almost nonexistent. Any injured worker who returns to work in any capacity and in whatever degree of pain will not be totally and permanently disabled. And any worker who does not return to work is entitled to compensation for permanent total disability only if he proves by clear and convincing evidence that there is no work anywhere that he can do, even that which he would have to perform in substantial pain. One can conceive of the case of an injured pulpwood worker in Mound who cannot return to that work or any other work available in the reasonable geographic region. He probably could handle completely sedentary jobs, such as the sorting and wrapping of plastic tableware for a catering service. Such jobs exist only in Lafayette and New Orleans,³⁶ though none are available at the moment. Even then, he would suffer substantial pain if required to work an eight-hour day. If he cannot prove by clear and convincing evidence that such jobs do not exist, he is not entitled to total and permanent disability benefits. Even the Florida source provision is not so stringent,³⁷ and Larson terms its burden on the question "a stiff one."³⁸ He will probably have to come up with a new adjective to describe Louisiana's new standard.³⁹

Certainly one cannot contend that the pre-1975 Louisiana standard

35. LA. R.S. 23:1221(2)(c) (Supp. 1984).

36. Or for that matter, they may exist in Seattle, Washington since the statute does not specify location within Louisiana.

37. See FLA. STAT. ANN. § 440.15(1)(b) (West 1981). It reads:

Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof or paraplegia or quadriplegia shall, in the absence of conclusive proof of a substantial earning capacity, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts. In such other cases, no compensation shall be payable . . . if the employee is engaged in, or is physically capable of engaging in, gainful employment; and the burden shall be upon the employee to establish that he is not able uninterruptedly to do even light work due to physical limitation.

38. 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.15 (1982).

39. No exhaustive search has been made, but it is difficult to believe that any state would have a standard more restrictive than the new Louisiana statute.

was a good one, though there were reasons for its existence.⁴⁰ Nor can one call a standard which would exclude from total and permanent benefits those who are reasonably capable of earning wages at another job unfair. But the pity of the present standard is that it is so one-sided and inflexible that it risks causing serious injustice in some cases. It may cause the judiciary to find other, more flexible points at which to adjust the balance.⁴¹ The odd lot doctrine, properly interpreted in light of increased benefits and no limitation on number of weeks, coupled with an amended partial-disability section similar to the new SEB provisions, would probably have accomplished the same result without going to the extreme.

If an employee should happen to get a judgment of total and permanent disability even under these restrictive standards, Louisiana Revised Statutes 23:1211(2)(d) provides that if he subsequently receives "any earnings," he "shall not" receive the total and permanent disability benefits, but rather shall receive SEB payments. It is unclear whether this is meant to authorize an employer or insurer to ignore a judgment awarding total and permanent disability benefits and begin SEB payments without seeking modification under Louisiana Revised Statutes 23:1331. Indubitably, in light of the tenor of the remainder of the section, it is intended that this will occur without supervision of the director or the district court and without scrutiny of the process by which it is established that the worker has "any earnings."⁴²

In addition, no judgment of total and permanent disability may be entered prior to an evaluation of rehabilitation possibilities⁴³ or during a rehabilitation program.⁴⁴ In the latter instance, the worker is entitled to temporary total disability benefits for the duration of the program.⁴⁵

Revised Schedule Awards: Permanent Partial Disability

There were only four changes to the so-called schedule awards in the

40. See W. MALONE & A. JOHNSON, *supra* note 2, § 274.

41. Perhaps the court would hold that loss of consortium by the spouse and children of an injured worker is not barred by the exclusivity provision. Or perhaps it would hold the immunity of the principal unconstitutional when the principal has not actually paid compensation. Or perhaps it would hold an employer liable vicariously through its interpretation of the intentional-act exclusion. Or perhaps it might hold that since a back injury which does not prevent a worker from earning 90% of his former wage is no longer compensable under the former schedule loss provisions, it might serve as the basis for a tort action. One of these options has already occurred. See *Jones v. Thomas*, 426 So. 2d 609 (La. 1983) (employer vicariously liable for intentional act of employee).

42. See S. NILES, 1983 AMENDMENTS—LOUISIANA WORKER'S COMPENSATION ACT—COMMENTARY AND REVIEW 59 (1983) (prepared for Independent Insurance Agents of Louisiana) ("Termination of total disability benefits will be applied automatically.").

43. LA. R.S. 23:1226(D) (Supp. 1984).

44. LA. R.S. 23:1223(2)(e), :1226(G) (Supp. 1984).

45. LA. R.S. 23:1226(F) (Supp. 1984).

1983 amendments. First, these benefits are now called "permanent partial disability" benefits and are "solely for anatomical loss of use or amputation"⁴⁶ to the specified members. The use of the word "anatomical" probably is intended to make certain that no award will be made for "loss of function" when no "anatomical" loss has occurred. But the word "anatomical" could be interpreted broadly enough to include such loss of function, since that is an effect on the anatomy.

Second, and most important, a new subsection, Louisiana Revised Statute 23:1221(4)(q), now provides that no benefits shall be "awarded or payable" under any portion of the permanent partial disability provisions unless the anatomical loss of use or amputation, or loss of physical function under 23:1221(4)(p), is greater than fifty percent as established in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. A review of that volume demonstrates that such ratings are very rare, and the net effect of this limitation will certainly be to limit any schedule awards to a very few cases.

This limitation is entirely consistent with the adherence to the wage-loss principle expressed in the 1983 amendments. A schedule of benefits for losses which do not impair earning capacity, or do so in a very limited fashion, is the antithesis of the wage-loss concept. Florida, for example, usually cited as the progenitor of the modern return to the wage-loss concept, has no schedule losses in the ordinary sense of the word.⁴⁷ The 1981 proposal and the 1982 proposal contained no schedule whatsoever.⁴⁸ The theme of wage-loss is very clear: if the injury does not produce loss of wages, it should not be compensable. The schedule provisions had been interpreted in Louisiana as being a "minimum" award for the worker even when he could not prove any economic disability from the injury.⁴⁹ These interpretations continued after the major amendments in 1975.⁵⁰ The over-fifty percent limitation will severely curtail such awards, and in theory will push more claimants over into the supplemental earnings benefits category. There is nothing inherently wrong with that approach, but the over-fifty percent limitation may be too severe.

Third, the provisions governing partial loss of use were also amended to decrease the potential benefits in certain cases. Prior to the amendments of 1983, Louisiana Revised Statutes 23:1221(4)(o) provided for compensation in cases of partial loss of use in "such proportion to the amounts named herein for the total loss of such members as the disability to such members bears to the total loss of the member." For example, a worker

46. LA. R.S. 23:1221(4) (Supp. 1984).

47. See FLA. STAT. ANN. § 440.15(3)(a) (West Supp. 1983).

48. See bills cited respectively *supra* notes 12-13.

49. See *Lacour v. Highlands Ins. Co.*, 247 So. 2d 611 (La. App. 3d Cir. 1971).

50. See *Jacks v. Banister Pipelines America*, 418 So. 2d 524 (La. 1982).

who suffered total loss of his hand would be entitled to two thirds of his wages during 150 weeks. A worker who suffered a fifty-five percent loss to his hand would be entitled to fifty-five percent of two thirds of his wage during 150 weeks.⁵¹ Thus, if the two workers earned \$150.00 per week apiece, the first would be entitled to \$100.00 per week for 150 weeks, and the second \$55.00 per week during 150 weeks—except the second worker would be entitled to the statutory minimum, which in 1982-1983 was \$61.00 per week.

The amended provision states that compensation in such cases shall bear "such proportion to the number of weeks provided for herein for the total loss of such members as the percentage loss or impairment to such members bears to the total loss of the member." This provision might have made a bigger impact on benefits payable had the over-fifty percent limitation not been enacted. Under the prior law, with a small percentage disability, a worker might nonetheless be entitled to the minimum award for the full number of weeks.⁵² After the over-fifty percent limitations, it will be rare that a worker's calculated benefit will fall below the statutory minimum of twenty percent of the average weekly wage in all employment.

The second worker in the hypothetical, for example, works for just about the minimum wage in a forty-hour week, earning \$150.00 per week. With a fifty-five percent disability to the hand, he will now be entitled to \$100.00 per week for 82.5 weeks (55% of 150 weeks), whereas under the former provision he was entitled to \$61.00 (the current statutory minimum) for 150 weeks. Still, there is a slight decrease in total benefits for the injury (from \$9,150.00 to \$8,250.00) at the lowest level of the wage scale. And, of course, should his disability be rated at fifty percent or less, he will get nothing at all under the amended schedule provisions.

The fourth change expands the presumption of total and permanent disability resulting from specific losses to include loss of both arms or both legs and to include paraplegia or quadraplegia. Absent "conclusive proof of a substantial earning capacity,"⁵³ a judgment of total and permanent disability is appropriate. However, one may presume that such

51. For an application of this formula, see *Stracener v. United States Fidelity & Guar. Co.*, 410 So. 2d 1220 (La. App. 3d Cir. 1982). The same case at the supreme court level resulted in a finding of partial disability, more beneficial to the employee than the schedule benefit. *Stracener v. United States Fidelity & Guar. Co.*, 420 So. 2d 1101 (La. 1982).

52. The same worker who earned \$150.00 per week but suffered only a 20% disability to the hand would be entitled to 20% of two thirds of wages for 150 weeks, or \$20.00 per week. But he would have received the statutory minimum of \$61.00 per week for 150 weeks—a substantial difference. Now, since the schedule losses must be greater than 50%, the incidence of such awards will be greatly reduced, as will the disparity between the calculated benefit and the statutory minimum. But the combination of the over-50% limitation and the new formula for partial loss will work a hardship on all those who suffer a 50% disability or less, and on certain over-50% disability workers at the lower end of the wage scale.

53. LA. R.S. 23:1221(4)(j) (Supp. 1984).

a person who thereafter earned anything at all, even in sheltered employment, would be subject to loss of those benefits under Louisiana Revised Statute 23:1221(2)(d).

Role of Pain Arguments After 1983 Amendments

Arguments that the employee is working in pain or would have to work in pain after his injury will have reduced importance after the 1983 amendments. This was clearly the intent of the amended provisions.

In a total and permanent disability argument, pain will now have no role to play at all. The fact that an employee can work but only in substantial pain will not make him totally disabled, since he must prove that there is no job he can do, even in "any" pain.⁵⁴

In a case involving a claim for supplemental earnings benefits, pain arguments might play a limited role. An employee who is not working and is able to prove by clear and convincing evidence that the reason is "solely . . . substantial pain"⁵⁵ would be entitled to prevent an employer from counting as post-injury wages the amounts which he could earn in that pain. Still this is a difficult burden, beyond the ordinary standard in civil cases. It will not be surprising to find employees unable to satisfy that burden, and thus to have counted as post-injury earnings monies which they could earn in pain though they actually do not or cannot.

Arguments of pain, substantial or less so, have been disputed issues in every jurisdiction. Often subjective, very difficult to prove, and sometimes downright suspicious, such claims have bedeviled the courts for decades. It is thus quite understandable that the 1983 amendments would take out after such arguments. But the extreme position adopted may prove to be short-sighted. The Louisiana Act is left in the very inhumane posture of (a) caring not a whit about pain with regard to a total and permanent disability claim and (b) caring only a little more in an SEB case, and only if an employee can discharge the increased standard of proof that he cannot work "solely" because of "substantial pain." Again, the inflexibility of such an approach may one day prove its undoing.

Effect of 1983 Amendments on Disabling Effects from Mental Causes

There is an almost imperceptible language change in the disability provisions after the 1983 amendments which may have been intended to

54. LA. R.S. 23:1221(2)(a)-(c) (Supp. 1984).

55. LA. R.S. 23:1221(3)(c)(ii) (Supp. 1984). This appears to have been one of the very few employer concessions in the discussions after the 1982 regular session. It was not found in either the 1981 or the 1982 proposal, and is not found in the Florida statute.

eliminate awards for disability traceable to mental causes.⁵⁶ Under Louisiana Revised Statutes 23:1221(2)(c), when an injured employee is not engaged in any type of employment after recovering from the injury, an award of total and permanent disability may be made "only if the employee proves by clear and convincing evidence . . . that the employee is *physically* unable to engage in any employment."⁵⁷ Thus it would be open to an employer to argue that an employee who proved by this difficult standard of proof that he was *mentally* unable to engage in any employment had not established a case for total and permanent disability.

If this is in fact the intent of the provision, it represents a giant step backwards. Only recently have the workings of the mind in response to trauma or other stimuli become somewhat clearer, and concomitantly only recently has there been sufficient sophistication to recognize that workplace injuries might produce either physically or mentally disabling consequences, or both. An individual is just as disabled in the economic sense, whether the source of his disability be in physical or mental causes. There is no reason to revert to the turn of the century with such an amendment and uniformly exclude all such claims regardless of the quality of proof.⁵⁸

Proof of Disability After 1983 Amendments

Proof of disability presumably will take on a different appearance after the 1983 amendments. Louisiana Revised Statutes 23:1221 was substantially amended to impose a higher standard of proof on an employee seeking to establish disability. Moreover, use of "any presumption of disability" is not permitted, though the precise meaning of this phrase in this context is unclear.

Louisiana Revised Statutes 23:1221(2)(c) provides that if an employee is not engaged in any type of employment and claims total and permanent disability, he must prove "by clear and convincing evidence, unaided

56. Indeed, it is contended in one writer's interpretation of the Act that this was precisely the intent. "The test for disability is a physical inability and not a mental disability. Reasonable interpretation suggests that mental disability is not considered. Clearly, the intent was to exclude disability from mental incapacity. The subjectivity of claims premised upon mental disability cannot be avoided; hence, such claims are excluded." S. NILES, *supra* note 42, at 57.

57. Emphasis added. Similarly, in order to avoid the conclusion that wages he "could have earned" will be counted against supplemental earnings benefits, an employee must prove that he cannot perform offered or available employment "solely as a consequence of substantial pain." LA. R.S. 23:1221(3)(c)(ii) (Supp. 1984). Does this mean that an employee who shows he is mentally disabled to perform the proffered employment (though not in pain) will fail to discharge that burden?

58. Perhaps the court can simply hold that "physically" is broad enough to cover the entire body and all disability which affects it, just as it interpreted the definitions of "accident" and "injury" to include mental consequences though "violence to the physical structure of the body" was specified in the statute.

by any presumption of disability," that he is "physically unable to engage in any employment . . . , including, but not limited to, any and all odd-lot employment, sheltered employment, or employment while working in any pain, notwithstanding the location or availability of any such employment." The Florida source provision is not as restrictive. It requires simply that in the case of a non-working employee, "the burden shall be upon the employee to establish that he is not able uninterruptedly to do even light work due to physical limitation."⁵⁹ The Louisiana provisions actually became progressively more restrictive as the legislative wars went on. The 1981 proposal⁶⁰ tracked the Florida language precisely on this point. The 1982 proposal⁶¹ which died in the waning hours of the session simply deleted the word "uninterruptedly." But after the governor's ad hoc task force had met and the 1983 proposal was introduced, this stronger language was included in the bill and never left it.

Even proof of disability sufficient to be entitled to SEB has become more burdensome for the employee. If an employee is not engaged in any employment, or is earning lower wages than he was prior to injury, the amount of post-injury wages which will go into the calculation for SEB is the amount that he "would have earned in any employment . . . which he was physically able to perform"⁶² and which was offered to him or proven available to him. In order to prevent the inclusion of wages which he "could have earned" in the calculation, the employee must under Louisiana Revised Statutes 23:1221(3)(c)(ii) establish "by clear and convincing evidence, unaided by any presumption of disability, that solely as a consequence of substantial pain," he cannot perform the tendered or available employment. There is no similar Florida provision. That statute confines itself to the statement that whenever a wage-loss (SEB) benefit is payable, "the burden shall be on the employee to establish that any wage loss claimed is the result of the compensable injury."⁶³

These are difficult burdens for the worker, and the changes clearly reflect the intent that awards for total and permanent disability should be very unusual and that maximum awards for SEB for those "able to work" should also be rare. Even so, it is difficult to justify the "clear and convincing evidence" standard. Not only is compensation litigation an ordinary civil proceeding in which a reasonable preponderance of the evidence is sufficient in almost every instance, it has always been treated as social legislation in which the worker is entitled to somewhat lenient

59. FLA. STAT. ANN. § 440.15(1)(b) (West 1981). Even this lesser standard (than Louisiana's) is termed by Larson "a stiff one." A. LARSON, *supra* note 38, § 57.15.

60. La. H.R. 986, 7th Reg. Sess. (1981).

61. La. H.R. 256, 8th Reg. Sess. (1982).

62. LA. R.S. 23:1221(3)(c)(i) (Supp. 1984).

63. FLA. STAT. ANN. § 440.15(3)(b)(2) (West 1981).

treatment. Such a standard of proof is inconsistent with seventy years of interpretation of the Act, without any demonstrable reason appearing for the change. Simply placing the burden on the employee would have been a sufficient alteration of the balance on the question of proof.

What may have been meant by "unaided by any presumption of disability" is uncertain. Some believe that this language was aimed at the presumption found in numerous cases that a claimant's disability is presumed to have resulted from an accident if prior to the accident the claimant was in good health but afterwards the symptoms of disability appear, so long as the medical evidence supports a causal link between the accident and the disability.⁶⁴ But this is not a "presumption of disability." Rather, it is a presumption of causal relationship between an accident and disability once the disability is established by other means. Thus the new phrase in the statute cannot properly be interpreted as affecting this presumption of causation.

The phrase perhaps was intended to attack the odd lot doctrine from another angle. The doctrine was specifically overruled elsewhere in Louisiana Revised Statutes 23:1221. Since it established a sort of presumption of total and permanent disability, after a prima facie showing, which the employer had to overcome, perhaps this phrase is meant simply as another way of overruling that doctrine.

But perhaps the most likely explanation is that the phrase is simply an additional statement of the difficulty of the employee's burden, and is largely superfluous in light of the "clear and convincing evidence" standard found elsewhere in section 1221.⁶⁵

Disfigurement and Impairment of Physical Function After 1983

Louisiana Revised Statutes 23:1221(4)(p), as amended in 1983, expands potential awards for disfigurement but restricts awards for loss or impairment of physical function.⁶⁶ The explanation of awards for disfigurement is accomplished by deletion of the qualifying phrase "about the face or head," which probably entered the Act in the first place only to express

64. See W. MALONE & A. JOHNSON, *supra* note 2, § 252.

65. See S. NILES, *supra* note 42, at 57 ("The employee may not rely upon presumption or fiction, but he must provide real evidence.").

66. Except in a very limited sense, the Florida statute which served as the source of most of the 1983 amendments has no schedule losses. Such losses, not being based on actual wage loss, would be inconsistent with Florida's firm commitment to the wage-loss principle. In fact, it is somewhat surprising that the schedule was retained in the 1983 amendments. Neither the 1981 proposal nor the 1982 proposal contained schedule losses, and thus were more faithful to the Florida source provisions. While the 1983 amendments did contain the schedule, the new provision in subsection 1221(4)(q) limiting *any* schedule award to percentage ratings of loss of use of 50% or more makes its reach very narrow indeed. See *supra* text accompanying notes 46-48.

the facts of *Boyer v. Crescent Paper Box Factory*.⁶⁷ The amended subsection thus would permit an award for serious and permanent disfigurement regardless of its location on the body. The award continues to be available without reference to any disability.

The loss of physical function portion of the provision has been narrowed, however. Formerly, serious and permanent impairment of the "usefulness of a physical function" was cognizable under the Act. Now only such impairment of the "respiratory system, gastro-intestinal system, or genito-urinary system, as contained within the thoracic or abdominal cavities" is compensable. The very clear intention of this amendment was to exclude claims for impairment of the function of the back or neck. Awards in pre-1983 cases for impairment of function of the lungs would probably still be cognizable, but awards relating to teeth, the mouth, the ankle, the shoulder, the sense of hearing or smell, or to reproductive capacity would be in serious doubt.⁶⁸ A broad reading of the provision might reach some of these, but certainly not all.

The maximum award of two thirds of wages during one hundred weeks is retained, but some language is added to guide the court in its determination of how much of the award should be made in a given case. When the loss of function is susceptible of a percentage determination, the compensation is to be determined according to the formula in Louisiana Revised Statutes 1221(4)(o): compensation to bear such proportion to the number of weeks (presumably one hundred) for total loss as the percentage impairment bears to total loss.⁶⁹ And if the impairment is not susceptible of percentage determination, the subsection retains the present standard of compensation in "reasonable" proportion to that provided for cases of "specific disability."

The net result of these amendments seems to be that impairment of the function of the back, neck, or other portions of the body not contained within the new language, if the impairment does not cause sufficient wage loss to permit an award of SEB, will go without any remedy whatsoever. A worker who suffers a back injury but with minimal residual disability such that he can return to another job at ninety percent or more of his former wage will have no remedy under the Act.

PROCEEDINGS BEFORE THE DIRECTOR AND RELATED PROCEDURAL CHANGES

The introduction of a new level of dispute resolution under the Act

67. 143 La. 368, 78 So. 596 (1918).

68. See W. MALONE & A. JOHNSON, *supra* note 2, § 286.

69. This formula is reached by paraphrasing LA. R.S. 23:1221(4)(p), which is written in terms of total and partial loss of use of specified "members" of the body such as hands, fingers, toes, and the like—none of which would be covered under LA. R.S. 23:1221(4)(p) as written.

is probably the next significant change worked by the 1983 amendments worthy of discussion. One should note at the outset that the legislative choice is not for an industrial commission patterned after the state Civil Service Commission or the Public Service Commission, with an appeal on the record to a court of appeal. Rather, the legislature chose simply to add an additional level of dispute resolution at the beginning of the process, and it provided that this level was non-binding, with either party free to reject the recommendation of this informal arbitrator. And, what is even more curious, the recommendation which the arbitrator makes is inadmissible in the later judicial proceedings.

Proceedings Before the Director

Act 1 of the 1983 Extraordinary Session created the office of state worker's compensation administration, headed by a director. It established that office as the initial point in the process of dispute resolution, and the director as the arbiter of those disputes.

The director has a panoply of administrative powers and duties not particularly pertinent here, including direction of the office, appointment of personnel, requirement of filing of safety plans, promulgation of rules and forms, and the like.⁷⁰ The actual process of dispute resolution begins when the employer is required to report to its insurer (if any) and to the director an injury resulting in death or in the lost time in excess of one week after the injury. This report must be made within ten days of actual knowledge of the injury and is to be made on a form provided by the director. All the information required to be provided is confidential and is not subject to subpoena.⁷¹ Upon receipt of that information from the employer, the director is required to send "immediately" to the injured employee a brochure explaining the employee's potential rights under the Act and the functions of his office.⁷²

Thereafter, if "at any time" a "bona fide dispute" occurs concerning a death or injury resulting in excess of seven days lost time, either the employee, his dependent, the employer, or the insurer may file a claim with the director.⁷³ The director is then required to "evaluate" the claim and, within thirty days, to issue a recommendation. The recommendation is said to be "advisory only" and is not admissible in any subsequent proceeding.⁷⁴

Filing with the director tolls the prescriptive periods contained in Loui-

70. LA. R.S. 23:1291-:1293 (Supp. 1984).

71. LA. R.S. 23:1306(B) (Supp. 1984).

72. The more cynical may see this as an effort to keep the worker from contacting an attorney concerning his rights under the Act.

73. LA. R.S. 23:1310 (Supp. 1984).

74. LA. R.S. 23:1310.1 (Supp. 1984).

siana Revised Statutes 23:1209, now tolled by filing with the district court. Presumably, this is applicable to all of the various time periods in section 1209, and no other substantive change is intended.

Within thirty days after receipt of the recommendation, each party must notify the director of acceptance or rejection of the recommendation. As a practical matter, only notice of rejection has any significance. A party is presumed to have accepted the recommendation if notice of rejection is not received within the allotted thirty days.⁷⁵ If the recommendation is timely rejected, the director issues a certificate showing that fact, though the certificate does not reveal what the recommendation was nor who the rejecting party or parties were. At that point, the employee or his dependent is free to proceed in the proper district court.

One hesitates to criticize any genuine effort at resolution of disputes without formal litigation. But as drafted, the foregoing procedure contains a number of troubling aspects. The requirement that the director evaluate each claim and issue a recommendation within thirty days is totally unrealistic. It is impossible to have a staff large enough to make any kind of meaningful recommendation within thirty days after receipt of very basic information such as that required by the amended Act. It may have been envisioned that the director evaluate the claims without hearings, but if he does hold hearings, the thirty-day period for issuance of a recommendation will almost certainly be violated.

The conclusive presumption of acceptance of the recommendation if a party does not respond could work an injustice in the case of a worker without counsel. If the worker is provided with the necessary forms to make a claim by his employer and does so (in part because he will be told that he has to file a claim with the director if he wants to file one at all), he will be the one who receives the recommendation. At his peril, he must digest the recommendation and decide whether he will accept or reject it, all within a thirty-day period. Such deciphering of paperwork and prompt response to deadlines may be commonplace for experienced employers and insurers with computer-aided retrieval systems, but for the uninitiated injured worker the same is not necessarily the case.

The requirement that the director's recommendation be "kept secret" is puzzling. The trial court's ruling is not kept secret in an ordinary appeal. Indeed, one is justifiably interested in what the trial court thought of the case. Perhaps the legislature believed that a district court would treat the matter as if it were an appeal and refuse to overturn the director's recommendation absent manifest error. If so, that could clearly have been prohibited in the amendments. The remedy of keeping the director's recommendation a secret is much too broad for that evil.

75. LA. R.S. 23:1310.1 (Supp. 1984).

And if the director's investigation and potential hearings are never to be revealed, there will be a considerable duplication of effort at the district court level. The procedure at the level of the director and the subsequent treatment of his recommendation reduce him to little more than an involuntary, but non-binding, arbitrator.

Amended Provisions for Filing in District Court

To reflect the establishment of the office of the director of worker's compensation, Act 1 amended the provisions for the initial filing of a petition in the district court. If the director's recommendation is rejected by any party, the employee or his dependent must file a petition with the appropriate civil district court within sixty days of receipt of the recommendation or within the period established by Louisiana Revised Statutes 23:1209, whichever occurs last. Thus, the claimant has the full benefit of the time periods established by that section as judicially interpreted, and he may have an even longer time if the sixty-day period after receipt of the recommendation would expire after that period. Under the prior provisions of Louisiana Revised Statutes 23:1311, either the employee or the employer had the right to file a petition with the district court. Under the amended provisions, only the employee has that specific right. Theoretically, an employer could have rejected the director's recommendation but be powerless to file a petition for a declaratory judgment. Presumably, the employer would decline to pay the employee and thus provoke that employee's lawsuit under this provision.

But if the dispute is over the employee's failure to undergo a medical examination, and the employee rejects the director's recommendation that he do so, what remedy does the employer have? The amended section does not appear to envision that situation.

The venue provisions found in section 1311 as amended in 1980 are retained, and they include the parish of the domicile of the employee or his dependent.

The requirement that the petition be verified is continued,⁷⁶ and some additional specific requirements are made with respect to the contents of the petition. It must set forth: (1) the names and addresses of the parties; (2) a statement of the time, place, nature and cause of the injury, or equivalent information to put the employer on notice; (3) the specific benefits claimed to be due but not being paid or provided; and (4) a statement that the claim has been submitted to the director, but that the attempt at resolution failed.⁷⁷ The petition must also contain a certificate from the director showing that his recommendation has been rejected, although

76. But the answer need no longer be verified. LA. R.S. 23:1315 (Supp. 1984).

77. LA. R.S. 23:1311(B) (Supp. 1984).

the certificate is not to contain either the content of the recommendation or the identity of the party or parties which rejected it.⁷⁸

The requirement that the petition contain a certificate from the director showing that his recommendation has been rejected thus becomes part of the consideration of whether the petition is premature. Absent that certificate, the petition "shall be dismissed."⁷⁹

The language of the dismissal section may be firm enough to prevent the parties from circumventing the office of the director. In theory, if the claimant and the employer or insurer did not want to pursue the "informal resolution" procedure offered by the director, they could agree that the claimant would file his lawsuit in the appropriate district court and the defendant would answer, thus waiving the plea of prematurity under article 928 of the Code of Civil Procedure. A court not willing to tolerate such a procedure could either note on its own motion that it did not have subject matter jurisdiction,⁸⁰ or that the clear mandate of section 1314 required it to dismiss the petition because it lacked the certificate of rejection of the director's recommendation. How a court might be inclined to rule on such maneuvers may depend heavily upon the court's impression of how efficient the director's office seems to be. If there are great delays, it may be in the best interest of the claimant to permit him to bypass the procedure if he and the defendant agree to do so.

Modification of Awards by Director

The 1983 amendments made some minor changes in Louisiana Revised Statutes 23:1331 concerning modification of a judgment by consent of the parties, essentially to reflect the role of the office of the director as the tribunal of first instance. A judgment rendered by the district court may now be modified by agreement of all parties "with the approval of the director or, in the event the director refuses to so approve, by a judge of the district court which rendered the same."⁸¹ All such modifications are subject to the provisions of Louisiana Revised Statutes 23:1271-:1274 relative to compromises and lump sum settlements.⁸²

If the director approves a modification, the approved agreement must

78. LA. R.S. 23:1310.1 (Supp. 1984).

79. LA. R.S. 23:1314 (Supp. 1984).

80. LA. CODE CIV. P. arts. 2, 3, 925.

81. LA. R.S. 23:1331 (Supp. 1984).

82. LA. R.S. 23:1271 now contains the provision that a compromise or lump sum settlement may not be confected until six months after termination of temporary total disability. Reference to that section in LA. R.S. 23:1331 could place a limitation on the right to review and modification in a few instances.

be forwarded to the clerk of court for the parish in which the judgment was originally rendered for filing. Upon filing, the agreement "shall become" the judgment of the district court.⁸³

If the parties do not agree that a modification is in order, a procedure for review similar to that prior to the 1983 amendments exists. Six months after rendition of judgment, or six months after the date the parties have accepted the director's recommendation, the director "shall review" the judgment or recommendation upon the application of either party.⁸⁴ He may then issue a new recommendation under Louisiana Revised Statutes 23:1310.1.⁸⁵ Though the amended provision does not so provide specifically, this new recommendation presumably is subject to the ordinary review process in the judicial system.

The amendments delete from Louisiana Revised Statutes 23:1331 the requirement that a party seeking review allege that the "incapacity of the employee has been subsequently diminished or increased, or that the judgment was obtained through error, fraud, or misrepresentation." Presumably, this omission makes the precise reason for the modification request irrelevant.

Louisiana Revised Statutes 23:1331(D) provides that the modification procedure "shall not apply to the calculation of" SEB. The precise import of this statement is unclear. Surely it cannot mean that when a worker's post-injury wages decrease from what they were at the time of a recommendation or judgment, he has no right to seek an increase in SEB against a recalcitrant employer. The same should be said of the right of the employer to seek a decrease in SEB if the worker's post-injury wages increase.⁸⁶ Perhaps this provision is meant only to say that no formal modification is required when post-injury wages increase or decrease; upon proper proof, the parties should be able to agree upon the changes.

Since this subsection refers only to the "calculation" of SEB, a worker could still seek modification to change his benefits from SEB to total and permanent disability in the event that his condition changes to that extent.

83. LA. R.S. 23:1331(B) (Supp. 1984).

84. LA. R.S. 23:1331(C) (Supp. 1984).

85. This is a novel proposition. There are very few instances, if any, in which a final judgment of a district court may be reviewed and modified by an administrative officer. Perhaps the possibility of further review in the judicial system is a sufficient protection, but this approach is nonetheless unusual.

86. If this subsection does mean that there can be no review after the appropriate monthly benefit is once fixed, such a result is entirely inconsistent with the continuing-subsidy notion of supplemental earnings benefits and the concept of wage-loss benefits as a measure of loss of capacity.

Role of the Director in Approving Settlements and Compromises

With respect to both a lump sum settlement and a compromise, the amendments to Louisiana Revised Statutes 23:1271 now express the commendable policy that it is "in the best interest of the injured worker to receive benefit payments on a periodic basis" as he had received his wages. In light of that policy, a lump sum settlement or compromise in exchange for a release of the employer or the insurer is permitted only when three requisites are met: (1) the parties must agree, including specifically a duty upon the insurer to obtain the employer's consent; (2) it must be demonstrated that the lump sum payment is clearly in the best interests "of the parties"; and (3) six months must have elapsed after termination of temporary total disability.

If these requisites are met, the parties may petition the director for approval of a compromise or a lump sum settlement. In the case of a compromise, all parties must sign a joint petition to the director for approval; the petition must be verified by the employee or his dependent.⁸⁷ The director is required to "determine" whether the employee understands the compromise and may hold a hearing for that purpose. Presumably, this language is intended to depart from the present requirement that a district judge must "discuss" the compromise with the employee in every case, and thus probably is intended to overrule cases invalidating compromises not effected after such discussion.⁸⁸ How the director will "determine" that the employee understands the compromise is left unsaid, but undoubtedly the employee does not have the same protection under the revised system as he did under the system in which the district judge was required to "discuss" the compromise with him. One of the director's promulgated rules requires that the joint petition include a "statement of how the compromise settlement will provide substantial justice to all parties," including the reason for the compromise and "what benefit the injured employee will receive as a result" of the settlement.⁸⁹

The amended section no longer contains limitations on what types of issues may be compromised, as did the former section. The previous wording had been so broadly interpreted, however, that this change is not likely to accomplish any substantive change in the law.

If the director finds that the compromise accomplishes substantial justice between the parties, he is to approve it "by order." His order is then not subject to annulment or modification except by a proper district court upon a showing of fraud or misrepresentation made or induced by the employer or insurer.⁹⁰ This is a standard in the prior law.

87. LA. R.S. 23:1272 (Supp. 1984).

88. *Smith v. Cajun Insulation, Inc.*, 392 So. 2d 398 (La. 1980).

89. LA. DEP'T OF LABOR, OFFICE OF WORKER'S COMPENSATION ADMIN. R. LWC-23.

90. LA. R.S. 23:1272(B) (Supp. 1984).

If the director refuses to approve the compromise, the parties may present the compromise to the proper district court,⁹¹ again in a joint petition verified by the employee or his dependent. The district judge is then to "determine" whether the employee understands the compromise. Again, the specific requirement that he "discuss" the compromise with the employee is deleted.

Also deleted is the requirement that the court appoint an attorney to advise the claimant, if he does not have one. This relatively minor protection for the claimant should have been retained. The director's office will probably be unable to perform the same function as this appointed attorney has performed in the past. If there were worries that the appointed attorney would do nothing other than advise rejection of the compromise and foment litigation, the solution is to make the compromise fair rather than to eliminate the advisor. Moreover, in some parishes the existence of these minor curator fees for young attorneys has been the inducement to take indigent criminal defense appointments, and some different scheme might have to be devised to keep that system functioning.

If the court approves the compromise, then it too cannot be set aside except upon a showing of fraud or misrepresentation induced or made by the employer or insurer.⁹²

No major changes were made in the lump sum settlement provisions.⁹³ Such settlements are first to be presented to the director under the existing limits on the rate of discount and penalties for discounts deeper than that rate. The amendments do, however, delete the prohibition against agreements to settle schedule losses and death claims for terms shorter than those listed in the statute as well as the provision authorizing the use of a mortality table to calculate lump sum settlement in total disability cases. Presumably, the parties will be free to reach whatever agreement they wish in these matters, but how will it be determined in a total disability case that only a proper discount rate has been used? The discount rate cannot be calculated unless one knows what the full amount payable would have been.

Miscellaneous Procedural Changes

There are some additional procedural changes of minor importance. Amendments to Louisiana Revised Statutes 23:1312, relative to venue for suits against public boards, commissions, and agencies, delete the domicile

91. LA. R.S. 23:1273(A) (Supp. 1984). The venue provisions are retained after the amendments: parish of the domicile or principal place of business of the defendant, parish where the accident occurred, or parish of the domicile of the employee or his dependent, all at the option of the employee or his dependent. LA. R.S. 23:1311(A) (Supp. 1984).

92. LA. R.S. 23:1273(B) (Supp. 1984).

93. LA. R.S. 23:1274 (Supp. 1984).

of the defendant as a proper venue and add as a proper venue the district court of the parish in which the injury occurred. The amendments also delete the phrase "as it existed at the time of the accident or injury on which the suit is based" as a modifier of the domicile of the employee, thus leaving open the question of whether a dependent seeking death benefits may sue at his own domicile. Service must be made on the president or chairman of the defendant public body, or upon any other officer authorized by law to accept service.

Further amendments to section 1312 add to the Louisiana Nineteenth Judicial District Court (East Baton Rouge Parish) as a proper venue for actions against the state, the district court of the domicile of the employee and the district court of the parish in which the injury occurred. Service still must be made both on the governor and on the attorney general. The venue provision is inartfully drawn; what if the suit is against the state, but the plaintiff is the dependent of a deceased employee? Is venue proper in the domicile of the dependent?

Prior to the 1983 amendments, Louisiana Revised Statutes 23:1315 required the fixing of a hearing date upon the filing of a petition in district court not less than three weeks after the date of service. As amended, the section retains that provision and adds "nor more than six weeks" after service.

Louisiana Revised Statutes 23:1318, relative to the taking of depositions, was renumbered 1319 by the amendments, and its substance was altered slightly. It now provides that any party may take a deposition (except of the director or his employees, forbidden under amended section 1318), but only after the receipt of the recommendation of the director. This provision may work a hardship in an exceptional case in which testimony needs to be preserved, and there appears to be no important reason to deny completely the right to take a deposition prior to the director's recommendation. Upon a proper showing under article 1429 of the Code of Civil Procedure, the court would probably have the power to order the deposition before receipt of the recommendation despite this amended provision.

Finally, Louisiana Revised Statutes 23:1123, concerning medical examinations, was amended to place the choice of a physician "if any dispute arises as to the condition of the employee" in the director. If he should refuse to make the choice, the court is then entitled to make it.

COMPROMISE WITH ALLEGED TORTFEASOR

Next in order of importance among the amendments are the new provisions relating to compromise of pending tort claims. Important consequences may follow such a compromise, either for the employee or for the tortfeasor himself. Act 1 amended Louisiana Revised Statute 23:1102

to deal specifically with the decision in *Crabtree v. Bethlehem Steel Corp.*,⁹⁴ imposing severe sanctions upon the employee and the tortfeasor in order to protect the employer's right to reimbursement of compensation already paid or due in the future. These amendments were not in the 1981 or 1982 proposals, and were reportedly added at the insistence of one particular group in the employer community.

The provisions of subsection 1102(A) were retained; the amendment simply added to the subsection the insurer as a potential plaintiff against a "third person." Thus either the employee, his dependent, or the employer or the insurer who initiates litigation against a third person must notify the others that he has done so, and the others may then intervene.

The provisions of subsections 1102(B) and (C) are new, and they attack the problem of settlement with the third person from two different angles. The first, in subsection 1102(B), concerns the consequences for an employee who settles with the third person without the employer's consent. The second, in subsection 1102(C), concerns the consequences for the third person who settles an employee's action without the employer's consent.

An employee who settles with "such third person" is entitled to continue to receive compensation from his employer or the insurer in excess of the amount recovered⁹⁵ "only if written approval of such compromise is obtained from the employer *or* insurer"⁹⁶ contemporaneous with or prior to the compromise. If the employee (1) fails to notify the employer *or* insurer of the institution of suit or (2) fails to obtain the necessary written approval of the compromise from the employer *and* insurer, the employee forfeits the right to "future compensation, including medical expenses."⁹⁷ The employee who runs afoul of this provision has only one escape. He

94. 284 So. 2d 545 (La. 1973), discussed in W. MALONE & A. JOHNSON, *supra* note 2, § 373.

95. Is the "amount recovered" the net amount the employee has received from the compromise after paying his attorney, or is it the total amount of the compromise? This is a matter of some significance. Some opinion has been expressed that it should be the total amount of the compromise, *i.e.*, that the employer is entitled to a credit for whatever the compromise is. While this is a possible interpretation, it is not in accord with the more reasonable meaning of the words "amount recovered." The employee "recovers" only the amount that he walks away with, not an amount that he shares with his lawyer. The legislature could easily have used the phrase "total amount recovered" which it used elsewhere in the subsection if it meant the total amount of the compromise. *Cf.* Landry v. Carlson Mooring Serv., 643 F.2d 1080 (5th Cir. 1981) (credit that employer got from payments under state law against Longshoremen's and Harbor Workers' Compensation Act responsibility was the net amount that the employee received, not the gross amount prior to deduction of his attorney fee).

96. LA. R.S. 23:1102(B) (Supp. 1984) (emphasis added).

97. LA. R.S. 23:1102(B) (Supp. 1984). The phrasing of this provision indicates that it is intended to reach payments due between the filing of suit and settlement, as well as that after settlement.

may in essence "buy back" the right to future compensation by paying to the employer or insurer "the total amount of compensation benefits, medical benefits, attorney's fees, and penalties, previously paid to or on behalf of the employee, exclusive of attorney's fees arising out of the compromise."⁹⁸ This "buy back" is subject to a ceiling, however: "[I]n no event shall the amount paid to the employer or insurer exceed fifty percent of the total amount recovered from the compromise."⁹⁹

Although the general thrust of this amendment is clear, some of the details are not. It is clearly intended to strengthen the employer's hand when the possibility of a recovery against a tortfeasor exists, and when the possibility ends in settlement rather than judgment.

Prior consent to settlement is supposed to be obtained. Here the first point of confusion appears. The employee preserves his right to future compensation if he obtains written approval of his compromise with the tortfeasor from "the employer or insurer." However, the employee who fails to obtain written approval of the "employer and insurer" will forfeit the right to future compensation. This can only mean that the approval of *both* is required. Read together, one must conclude that absent the approval of the employer (regardless of the insurer's agreement), the right to future compensation will be forfeited. This provision is poorly drafted, and the precise meaning should be clarified at the first opportunity.

The "buy back" provision also has a very disturbing aspect. In order to preserve his right, the claimant must reimburse the "total amount" of weekly benefits, medical benefits, attorney fees, and penalties previously paid to or on behalf of the employee. With respect to weekly benefits and medical benefits, this is entirely understandable and restates present law under Louisiana Revised Statutes 23:1103 as to judgments. But can this mean that if an employer or insurer dragged its feet so substantially on the initial compensation claim that it incurred penalties and attorney fees, the employee must reimburse these as well out of his settlement?¹⁰⁰

To illustrate the point, assume that the worker was forced to litigate his compensation claim and ultimately received a judgment for \$20,000.00 in weekly benefits, \$10,000.00 in medical benefits and \$5,000.00 in attorney fees and penalties due to behavior under the amended provisions sufficient to cause the imposition of such sanctions. If the language of subsection 1102(B) means what it says, the employee who settles a pending tort action without employer consent must reimburse the employer for the \$30,000.00 in benefits and the \$5,000.00 in penalties and attorney fees

98. LA. R.S. 23:1102(B) (Supp. 1984).

99. LA. R.S. 23:1102(B) (Supp. 1984).

100. This seems the only plausible interpretation. The only "attorney's fees and penalties" paid to the employee would be those under the Act, and they would only be payable by the employer or the insurer.

in order to preserve his right to future compensation. Thus, the employee in effect returns to the employer the statutory penalty for the employer's conduct. This seems grossly unfair, if that is indeed the intent of the language.

The repayment provision, subsection 1102(B), is also afflicted with a dangling modifier:

[The] right to future compensation in excess of the amount recovered from the compromise shall be reserved upon payment to the employer or insurer of the total amount of compensation benefits, medical benefits, attorney's fees, and penalties, previously paid to or on behalf of the employee, exclusive of attorney's fees *arising out of the compromise . . .*¹⁰¹

The only sensible meaning of that phrase is as a modifier of "the amount recovered from the compromise" rather than of the clause which it immediately follows. If the employee, for example, settles for \$20,000.00 and realizes only \$15,000.00 of that amount because he pays his attorney \$5,000.00 as a contingent fee, only the \$15,000.00 would be the "amount recovered from the compromise." Thus, if he properly "buys back" his right to future compensation payments, the right to those payments commences when \$15,000.00 is due to him rather than when \$20,000.00 is due.

The subsection contains one other important provision. The amount of any "buy back" of future rights is limited to fifty percent of the "total amount recovered from the compromise." Here again there is ambiguity. Suppose that the employee above has been paid \$11,000.00 in compensation benefits and must "buy back" that amount to preserve future compensation rights. If the fifty percent limit is literally applied to the total amount of the settlement itself, then he must reimburse \$10,000.00 (50% of \$20,000.00) of the employer's expenditure. If the fifty percent limit is applied to the amount he actually "recovered" from the compromise, then he must reimburse \$7,500.00 (50% of \$15,000.00) to preserve his future rights. The latter seems to be the preferable interpretation. If the former interpretation is chosen, the employee will have wholly borne the legal expenses of an action which benefits both the employee and the employer. The latter interpretation forces the employer and employee to share that legal cost by taking fifty percent of a figure reduced by a legal fee.

Louisiana Revised Statutes 23:1102(C) imposes restrictions upon the tortfeasor as well. If "the third party defendant or his insurer" does not obtain written approval of a compromise with the employee from the employer *or* his insurer, and if the employee does not "buy back" his

101. Emphasis added.

rights through the reimbursement procedure discussed above, then the "third party defendant or his insurer shall be required to reimburse the employer or his insurer" to the extent of the total amount which otherwise should have been reimbursed by the employee.¹⁰² One reading of this provision, and probably the more plausible one, is that it imposes the extreme sanction upon the tortfeasor who settles without the employer's consent. He waives his defense on the merits of the tort claim, and finds that he automatically owes reimbursement to the employer simply because the statute says that he does. This reading seems harsh, but certainly it will tend to defeat settlements by the tortfeasor without employer consent. Constitutional arguments against such a sanction would be plausible.¹⁰³

Difficult cases may arise. What if a tortfeasor settles in ignorance of the fact that a compensation claim might have been involved, and there are no facts from which he should reasonably have known that it was a possibility? Will the same sanction apply? Do the same rules apply before a tortfeasor becomes a "third party defendant"? Previous subsection 1102(B), and indeed the rest of the Act, talk about a "third person." If the language of this subsection is taken literally, it applies only when a tortfeasor has become a third-party defendant. A court which was not particularly fond of this subsection could do considerable damage to it by reading it literally. In the ordinary course of events, a tortfeasor rarely becomes a third-party defendant in these matters. The employee sues in tort, the employer or carrier intervenes, and the tortfeasor is a defendant on the main demand. Even when the employer sues to enforce its own claim for reimbursement, the tortfeasor is not a "third party defendant."¹⁰⁴

Another possibility is that the court could interpret this subsection to have no application to a tortfeasor who never becomes a defendant, third party or otherwise. If the employee simply negotiates a settlement with the tortfeasor without ever bringing a suit, then arguably this subsection never comes into play.

This subsection also contains the objectionable provision that the reim-

102. Subsection 1102(C) continues:

Notwithstanding said reimbursement, all rights of the employer or his insurer to assert the defense provided for herein against claims for future compensation by the employee or his dependent shall be reserved. Nothing herein shall be interpreted to affect the rights of the employer or his insurer to otherwise seek reimbursement for compensation benefits, medical benefits, attorney's fees, or penalties against a third party defendant or his insurer without regard to the actions of the employee on whose behalf said compensation and medical benefits were paid.

103. Can due process of law be preserved by denying a hearing on the merits of the tort claim to the tortfeasor simply because he engages in the ordinarily favored process of settlement of a different claim without litigation?

104. LA. CODE CIV. P. arts. 1111-1116.

bursement to be paid to the employer must include the amount of attorney fees and penalties which might have been paid to the employee. This casts the sanction for the employer's conduct onto the tortfeasor, who has no control over the employer's conduct, without demonstrable reason why this should be the case. This also seems inconsistent with an analogous new provision in the penalty section prohibiting an insurance policy from covering penalties if a court determines that the employer should pay the penalty.¹⁰⁵

Whatever else may be said of the new provisions in Louisiana Revised Statutes 23:1102, a significant restructuring of the three-sided relationship between employee, employer, and tortfeasor has been made.

TREATMENT OF PART-TIME EMPLOYEES

Specific Legislative Provisions for Part-Time Employees

Act 1 added provisions to the definition of "wages" under Louisiana Revised Statutes 23:1021 specifically to govern the problems of part-time employees. The effect of the amendments is to overrule the jurisprudential position that a part-time employee is entitled to compensation on the basis of wages that he would have earned if he had been employed full time at his work. In other words, the judicial choice of earning capacity over actual earnings is rejected in the case of part-time employees.

In a new subsection numbered 1021(9), a part-time employee is defined as a person who "as a condition of his hiring knowingly accepts employment that (a) customarily provides for less than forty hours per work week, and (b) that is classified by the employer as a part-time position." This of course describes a position which is part-time at the designation of the employer rather than at the discretion of the employee. This latter situation is also provided for in subsection 1021(10)(a)(ii), which reads:

If the employee is paid on an hourly basis and the employee was offered employment for forty hours or more but regularly, and at his own discretion, works less than forty hours per week for whatever reason, then, the average of his total earnings per week for the four full weeks preceding the date of the accident [shall be his average weekly wage].

These amendments appear to produce a mixed blessing. Certainly they will be a great boon to some employers, who will no longer have to pay compensation premiums for part-time employees on the basis of hypothetical full-time wages, as undoubtedly has been the case in the past. Employers should be careful to define part-time status of certain employees and establish some procedure to satisfy the criterion that the employee has "knowingly" taken a part-time job.

105. LA. R.S. 23:1201(E) (Supp. 1984).

But the amendments could prove to be a serious detriment to protection of the earning capacity of the part-time employee. A good number of persons in the work force "moonlight" at a second job (usually part-time) in order to make ends meet in difficult economic times. The worker who is injured in his part-time job will be just as disabled as if he had been injured in the same way in his full-time job. The effect on his earning capacity will probably be the same, despite the fact that his part-time job rather than his full-time job produced the effect on his earning capacity. Due to the unfortunate fact that the mishap is within his part-time job, however, the benefits intended to restore partially his earning capacity will be significantly less.

A simple example will suffice. A clerical employee works a full forty-hour work week in an office, earning \$300.00 per week. She "moonlights" as a clerk in a retail store in the evenings and on weekends, working twenty hours and earning \$100.00 per week. If she slips and hurts her back in her full-time job and is temporarily totally disabled for six months, she would be entitled to two thirds of \$300.00, or \$200.00 per week in benefits. That in itself would be a substantial reduction from the \$400.00 per week she made at the two jobs. But if she has the misfortune to slip and hurt her back in the same manner at her part-time job rather than her full-time job, she would be entitled to two thirds of \$100.00, or \$66.67 per week.¹⁰⁶

A loss of earning capacity is of paramount importance to the employee. Although true, it is harsh to tell an employee that it is just his tough luck that he lost his complete earning capacity in his part-time job rather than his full-time job. The new provisions imply potential punishment for industrious workers who try to hold more than one job.

Neither the legislature nor the judiciary has ever tried to force an employer to pay an employee for more than a forty-hour work week (in modern times), unless the employer has by his own choice assigned more hours per week to that employee with his own consent. This is consistent with the underlying policy that the Act is not a wage-protection plan, but rather a protection of earning capacity up to a certain level. The most disturbing thing about the amendments is that they depart from the policy of protecting earning capacity and adhere to a sort of minimum wage replacement scheme. The change will save some employers some money. But the money thereby saved by the employers may be cast upon the general taxpaying public for medical expenses and perhaps public assistance for the hapless employee who suffers disabling injury in his part-time job rather than his full-time job.

106. These calculations are not based on the supplemental earnings benefits section and its formula (74% of the difference between 90% of the old wage and the new wage). These are temporary total disability benefits at a simple two thirds of prior wage.

Common sense dictates that workers who now hold part-time jobs will not weigh these alternatives and then decide to give up their part-time employment because of the risk that they may lose their earning capacity without the ordinary remedy for that loss. Thus, the part-time employee is likely always to be a problem. Thus one must consider whether society's best interests are served by these amendments, which depart from the long-standing principle of protection of earning capacity in order to serve the interest of certain employers who regularly hire part-time employees.

There may also be some difficulty in interpreting the provisions relating to employees who are offered full-time employment but choose to work fewer hours. The Act now calls for calculation of their wages at actual hours worked if the employee "regularly, and at his own discretion" works fewer than forty hours. It is unclear what the word "regularly" means in this context. If, in the critical four weeks preceding injury, the employee took a few hours off for sick leave or annual leave, this should not be considered "regularly" working fewer than forty hours. He should be entitled to calculation on the basis of his ordinary forty-hour work week. On the other hand, if he takes a job which is nominally a forty-hour-a-week job but consistently conducts himself so that he works only thirty-five hours in a week, then perhaps his wages should be calculated under this provision. He should not be able to convert a full-time job (for which the employer is paying premiums on that basis) to a part-time job with full protection of wage earning capacity, at least not without the employer's consent. The employer may well want a genuine full-time employee protection. But, of course, this is a matter which the employer can control for himself. If he wants a full-time employee and has one in the position who "regularly and at his own discretion" works fewer hours, that employee can be terminated. The legislation on that point seems largely unnecessary.

On balance, the legislative amendments relative to part-time employees seem unwise as written, and the detrimental effect of departure from the principle of protection of earning capacity seems to outweigh the benefits gained by certain employers.¹⁰⁷

107. The amendments will also have an impact on the problem of successive employment. It was suggested by Professor Malone and this writer, W. MALONE & A. JOHNSON, *supra* note 2, § 325, that for successive employment situations, a worker should at least be entitled to calculation based upon loss of full (forty hours) earning capacity in the job in which he was injured, regardless of whether that job happened to be for fewer than forty hours a week. This suggestion was simply an extension of the concept of protection of full earning capacity for part-time employees to a situation in which the injured worker held successive employments.

But since the legislature by its amendments to LA. R.S. 23:1021(10)(a) has specifically provided that part-time employees are not entitled to calculation upon a hypothetical full-

REDUCTION WHEN OTHER BENEFITS ARE PAYABLE

Act 1 revised the statutory provisions relating to reduction of compensation when other benefits are payable. In 1978, the legislature had amended the Act to take advantage of the federal statutory provision permitting a reduction in state compensation payments when those payments coupled with social security payments would amount to more than the federal maximum.¹⁰⁸ Such a reduction placed a greater burden on the federal system than on the state compensation payor.¹⁰⁹

In light of other duplicative provisions, further legislative action would very likely be required. That further action occurred in 1983. Like the Florida source provision,¹¹⁰ Louisiana Revised Statutes 23:1225(B) was amended to provide that no compensation benefits (whether for total disability or SEB payments) shall be payable for any week in which the employee has received unemployment compensation benefits.¹¹¹ The Florida statute goes on to provide that if an employee is entitled to both unemployment and wage-loss (SEB) payments, the former "shall be primary" and wage-loss benefits shall be payable only in amounts necessary to make up the total of wage-loss benefits which would otherwise be due.¹¹² Absence of this provision from the Louisiana statute suggests that the payment of any amount of unemployment compensation benefits would entirely defeat the payment of any SEB payments, which seems inexplicably unfair.

time calculation, this suggestion cannot be applicable. If the employee works part-time in each of his successive employments, the undesirable result envisioned by the court in *King v. American Tank & Equip. Corp.*, 144 So. 283 (La. App. 2d Cir. 1932) (worker employed daily for six days at six different jobs would have benefits calculated on basis of daily wage per week of one working day; such could not be the "purpose of the law") will obtain. These amendments eliminate the problem of potential "aggregation" of wages to reach a full-time figure, but they cause serious problems by removing the protection of full earning capacity from part-time workers. See W. MALONE & A. JOHNSON, *supra* note 2, § 322 (Supp. 1984).

108. W. MALONE & A. JOHNSON, *supra* note 2, § 289.

109. The 1983 amendments add to these provisions the statement: "However, there shall be no reduction in benefits provided under this Section for the cost-of-living increases granted under the federal law after the date of the employee's injury." LA. R.S. 23:1225(A) (Supp. 1984).

110. FLA. STAT. ANN. § 440.15(11)(a) (West 1981).

111. Subsection 1225(B) continues: "[E]xcept as provided for in R.S. 23:1601(7)(b)." This appears nonsensical, since LA. R.S. 23:1601(7)(b) provides that a person is ineligible for unemployment compensation in any week in which he receives workmen's compensation. If literally interpreted, the worker could receive neither unemployment compensation because he "is receiving" workers' compensation, nor workers' compensation because he "is receiving" unemployment compensation. One reasonable interpretation, in light of the manner in which LA. R.S. 23:1225(B) is drafted, is that the worker should receive the full workers' compensation benefit, since he presumably would not receive any unemployment compensation under LA. R.S. 23:1601(7)(b).

112. FLA. STAT. ANN. § 440.15(11)(b) (West 1981).

Amended section 1225 provides a sort of state maximum on such payments. If an employee is receiving "remuneration" from (a) Louisiana workers' compensation, (b) old-age insurance benefits under social security to the extent not funded by the employee, (c) disability benefits under a private plan in the proportion funded by the employer, and (d) any other workers' compensation benefits,¹¹³ then his Louisiana compensation benefits are reduced to the extent necessary to limit him to two thirds of his average weekly wage at the time of injury.¹¹⁴ He and the employer may agree to the contrary, and the reduction of benefits provisions do not apply when he receives benefits under the Louisiana Act "or any other laws" for "injury or death sustained by another person."¹¹⁵

The final amendment to section 1225 concerns the frequent overlap between state workers' compensation and "any federally enacted worker's compensation law" (presumably the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)). The amended language seems internally inconsistent, but there is probably a method to such madness. The amendment appears to be an attempt to provide a two-way bar to successive recoveries, one by magic words that will lead into case law and the other by a specific legislative statement.

The entire background scenario is too lengthy to repeat here. The plot concerns successive compensation awards to injured employees, either first in one state and then another, or first in a state and then the LHWCA (or vice versa). The early acts may be reviewed elsewhere.¹¹⁶ Briefly, in *Magnolia Petroleum Co. v. Hunt*,¹¹⁷ the United States Supreme Court held that a Louisiana court had to give final effect to a Texas compensation adjudication of the injured worker's rights even though the Louisiana remedy would have been more favorable. The Texas provision was held to provide for exclusivity, though it was a rather broad and commonplace statement of exclusivity as to common law remedies against the employer. Several years later, in *Industrial Commission v. McCartin*,¹¹⁸ the same court reached a different conclusion (permitting successive awards) under an Illinois statute which was only superficially different from the Texas statute. In *McCartin*, the Supreme Court preserved a very narrow

113. What will happen if another state has a similar provision, and wants to reduce those benefits by the amount which is paid under the Louisiana statute?

114. LA. R.S. 23:1225(C)(1) (Supp. 1984). Presumably, the credit would be 50% of any social security payment, and would vary according to the amount of a private disability plan funded by the employer.

115. LA. R.S. 23:1225(C)(2) (Supp. 1984). If an individual receiving compensation payments for his own injury is also dependent upon another person, and that person is killed in a compensable accident, the payments made to the first person would not cause a reduction in benefits.

116. See W. MALONE & A. JOHNSON, *supra* note 2, § 409.

117. 320 U.S. 430 (1943).

118. 330 U.S. 622 (1947).

application for *Magnolia*: if a state statute contained "unmistakable language" making its remedy exclusive, then *Magnolia* would control and another state could not grant a successive award.

The United States Supreme Court later returned to these problems in *Thomas v. Washington Gas Light Co.*¹¹⁹ In a plurality opinion, four members of the Court "overruled" *Magnolia*. In a separate opinion, three justices joined in the result, but on the traditional basis that the state statute at issue in *Thomas* failed to contain the "unmistakable language" that would bar a second recovery.

Shortly after *Thomas*, the Fifth Circuit reviewed all of this in a controversy involving Texas state law and the LHWCA and decided that *Magnolia* had not been overruled; that "unmistakable language" in a state statute could still be a bar; but that "unmistakable language" was not present in the Texas statute in question.¹²⁰

It thus appears that in the minds of four justices writing in 1980, *Magnolia* should have been overruled. The inference may be drawn from that position that no language in a state statute would be sufficient to require a second state to deny a successive remedy under its own statute.

Looming over all of this, especially because it is a state law/LHWCA interplay, is the Supreme Court's decision four days before *Thomas* in *Sun Ship, Inc. v. Pennsylvania*.¹²¹ In *Sun Ship*, the Court continued its consistent protection of certain workers covered by the LHWCA by holding that a state may apply its law to land-based injuries which fall within the coverage of the LHWCA. In reaching that decision, the Court offered several revealing statements which may have a bearing on the *Magnolia-McCartin-Thomas* problem and the Louisiana amendments. Without dissent, the court opined that the intent of Congress in amending the LHWCA was to assure a certain federal standard of benefits in the face of the paucity of state benefits, and that concurrent jurisdiction promoted rather than hindered that objective. It noted that workers who commenced their actions under state law "will generally be able to make up the difference between state and federal benefit levels by seeking relief"¹²² under the LHWCA when it is applicable. In an important footnote at that juncture, the court stated:

119. 448 U.S. 261 (1980).

120. *Landry v. Carlson Mooring Serv.*, 643 F.2d 1080 (5th Cir. 1981). In *Landry*, the employer was held to be entitled to a credit for the amount received by the employee under the Texas state law settlement. But the amount received was interpreted to be the net amount after deduction of an attorney fee. Thus, though the employee had settled for \$200,000 under state law, he received only \$15,000. The employee was required to credit only the latter amount against an eventual award under the LHWCA.

121. 447 U.S. 715 (1980).

122. *Id.* at 724.

Most often, state workmen's compensation laws will not be treated as making awards thereunder final or conclusive Admittedly, if a particular state compensation law provision does indisputably declare its awards final, a conflict with the LHWCA may possibly arise where a claimant seeks inferior state benefits in the first instance. But the consequences to the claimant of this error would be less drastic than those of a mistake under the rule appellant [employer] contemplates—under which a misstep could result in no benefits. At any rate, although the question is not directly before us, we observe that if federal preclusion ever need be implied to cope with this remote contingency, a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to preempt the entire state compensation statute as appellant suggests.¹²³

What the court termed "this remote contingency" in *Sun Ship* was described in similar terms by the plurality in *Thomas*.

[I]t was immediately recognized that *Magnolia* no longer had any significant practical impact. Moreover, since a state legislature seldom focuses on the extraterritorial effect of its enactments, and since a state court has even less occasion to consider whether an award under its State's law is intended to preclude a supplemental award under another State's Workmen's Compensation Act, the probability that any State would thereafter announce a new rule against supplemental awards in other States was extremely remote. As a matter of fact, subsequent cases in the state courts have overwhelmingly followed *McCartin* and permitted successive state workmen's compensation awards.¹²⁴

This "extremely remote" possibility is seemingly the objective of these Louisiana amendments. The amendments to Louisiana Revised Statutes 23:1225(D) begin by stating that the "filing of a claim or suit" or the "receipt or acceptance" of benefits under a statute such as the LHWCA does not preclude entitlement to any benefits under Louisiana state law.¹²⁵ Despite that statement, and clearly to provide the "unmistakable language" barely preserved in *Thomas*, the following sentence states that payment of benefits under state law is "irreconcilable"¹²⁶ with benefits under a

123. *Id.* at 724 n.6 (citations omitted).

124. 448 U.S. at 274-75 (footnotes omitted).

125. This is meant to distinguish the initiation of an action, or simple acceptance of benefits, from a final resolution of the matter. One can expect that the employer will be given credit for the amounts due under one system but paid under the other, though the amended statute does not specifically address the issue. The United States Supreme Court appears to take this for granted. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 725 n.8 (1980); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

126. Perhaps this word is drawn from the opinion in *Newport News Shipbuilding &*

statute such as LHWCA. Thus no benefits shall be payable under state law once an employee receives "favorable final adjudication, judgment or settlement" under the LHWCA "regardless of the adequacy thereof."¹²⁷ Filing under the LHWCA, however, suspends the prescriptive periods under state law under section 1209.¹²⁸

Apparently, the statement that state benefits are "irreconcilable" with federal benefits is intended to satisfy the *Magnolia-McCartin-Thomas* requirement and bar any further recovery under the LHWCA after "payments of benefits" under state law. And the sentence following provides legislatively for a bar to any state claims after a final determination of LHWCA claims. Thus the injured worker is put to a compulsory election of remedies.

Given the history of this area of the law, it is unlikely that this amendment will go unchallenged. In light of the ominous comment in the *Sun Ship* footnote, the challenge has a good chance for success. Ultimately, the Supreme Court will probably end up in the only reasonable position: accord to the worker who has potential remedies under either system the more favorable remedy, and permit successive remedies to achieve that level if necessary. Should the worker choose settlement under one system, he should be required to waive any rights which he has under the other. If he settles without such a waiver, he should be required to demonstrate that the "successive" award that he seeks will not take him beyond the "more favorable" remedy.

REVISION OF PENALTY AND ATTORNEY FEES PROVISIONS

Act 1 made some significant changes in the provisions relating to penalties and attorney fees. Various specific time periods for certain types of payments are prescribed by amended Louisiana Revised Statutes 23:1201, and applicable penalties for failing to meet those deadlines are provided within that same section with new standards for their imposi-

Dry Dock Co. v. Director, 583 F.2d 1273, 1277 (4th Cir. 1978) (prosecution of claim under state law does not bar LHWCA proceeding if the second proceeding is not "theoretically irreconcilable" with the first claim), which was itself quoted in *Landry*. Mere use of the word may not be sufficient, however. The *Newport News* opinion elaborated by indicating that such theoretical irreconcilability would consist of requiring a claimant "to assume a position inconsistent with that which he took in his initial quest for relief." *Id.* That would probably not be required in order for a worker to assert rights under the LHWCA which he had asserted under a state act.

127. A very narrow interpretation would have the adjective "favorable" modify judgment and settlement as well, suggesting that unless the judgment under the LHWCA is in the employee's favor, he may seek benefits under the state Act. The addition of the phrase "regardless of the adequacy thereof" suggests that this is the less plausible meaning.

128. LA. R.S. 23:1225(D) (Supp. 1984). Would it be possible to settle for a designated amount, "divide" it between state law and the LHWCA and get some kind of binding final determination under each on that basis?

tion. Section 1201.2, which had been the basis for penalties and attorney fees against non-insured employers, was amended to eliminate any reference to penalties and to provide the same treatment for attorney fees as to insurers and non-insured employers alike.

Subsection 1201(B) now provides that the first installment of compensation payable for temporary total disability, permanent total disability, or death is due on the fourteenth day "after the employer has knowledge of the injury or death and resulting loss of income." Two significant changes should be noted. The time period does not begin to run until the *employer* has knowledge of the necessary facts. Thus, in an instance in which an insurer might have knowledge of the facts but the employer did not, the period would not have begun to run. In fact, there appears to be no provision starting the time period for these types of benefits when only the insurer has knowledge of the necessary facts. But by the same token, the period begins to run against an insurer once the employer has knowledge. And secondly, the necessary facts are (a) knowledge of the injury or death *and* (b) resulting loss of income. In theory, if the employer knows of an injury or death but is not made aware of any resulting loss of income, the fourteen-day period does not commence.

For SEB, subsection 1201(C) provides a fourteen-day period for commencement of such payments, to begin when either the employer or insurer has knowledge of the "compensable . . . benefits." Presumably this is meant to convey the concept that the employer or insurer must have information tending to demonstrate compensability. For partial disability benefits (the former schedule losses), there is a thirty-day period for commencement of such payments, to begin when the employer or insurer "receives a medical report giving notice of the permanent partial disability."¹²⁹ There is no apparent reason for the different references with respect to the two groups of payments (knowledge of employer for one type, knowledge of employer or insurer for the other).

If these time periods are not respected, a twelve percent penalty is to be added to each unpaid installment unless the causes for excuse from the penalty are established. These causes are listed in subsection 1201(E): either as a result of "conditions over which the employer or insurer had no control" or "[w]henver the employee's right to such benefits has been reasonably controverted by the employer or his insurer." In the latter case, the section states simply that the penalties "shall not apply." The latter exception seems to establish a standard which is more favorable to the employer than the standard previously delineated in the cases. Interpreted in its most extreme fashion, it would permit an employer or insurer to "reasonably controvert" a claim at any point in the proceedings and never thereafter incur any penalties. The exception provides "whenever

129. LA. R.S. 23:1201(D) (Supp. 1984).

the employee's right . . . *has been* reasonably controverted."¹³⁰ So interpreted, the standard seems too lenient. An employer or insurer might have reasonably controverted the claim at an earlier point, but may thereafter have received additional facts or medical reports which indicate it should begin payments. Since its "contrary" position is no longer "reasonable," the condition for non-imposition of penalties no longer applies. This interpretation would avoid the anomalous result of an employer or insurer taking a reasonable position on the facts available to it at the time, but then being protected against any future penalties regardless of further developments.

Subsection 1201(E) goes on to provide that the penalty, if applicable, is to be assessed against either the employer or the insurer, "depending upon who was at fault in causing the delay." And the subsection prohibits an insurer from paying the penalty if it is determined that the employer was the one who caused the delay.

If a dispute proceeds to judgment, a twenty-four percent penalty is imposed on the amount of the judgment if a "final, nonappealable judgment is not paid within thirty days after it becomes due."¹³¹ Presumably, this is simply meant to say that the penalty applies if a final judgment is not paid within thirty days after it becomes final under the ordinary rules of civil procedure. The use of both "final" and "nonappealable" seems to add no additional meaning. There are also exceptions to this penalty: if "the order is appealed" or if non-payment results from conditions over which the employer (but not the insurer) had no control. This exception is poorly worded, but presumably means that if a judgment is appealed, the time period does not begin to run—which is simply another way of saying that the judgment is not yet final.

Finally, subsection 1201(G) requires that the employer or insurer notify the director of the commencement, suspension, or modification of any compensation payments.

Less substantial changes are made to Louisiana Revised Statutes 23:1201.2. As noted earlier, all penalties with reference to untimely payments are removed and placed in section 1201 as amended. Thus, section 1201.2 only concerns attorney fees. The amended section retains the time period of payment of "any claim due" within sixty days after receipt of written notice. If the payment is not made within that period, and the failure to do so is arbitrary, capricious, and without probable cause, attorney fees may be imposed. Apparently, the previous jurisprudential standards will continue to be applicable as to the award of attorney fees.

130. Emphasis added.

131. LA. R.S. 23:1201(F) (Supp. 1984).

However, the net effect of the amendments to the two sections is to establish different standards for the award of penalties and for the award of attorney fees. The time periods are different, and penalties might be awarded in an instance in which an insufficient period of time had elapsed for an award of attorney fees. The substantive basis for the two awards differs. An insurer or employer could "reasonably controvert" a claim and escape penalties. But if the narrow construction mentioned earlier is chosen and the insurer or employer did not change its position upon changed facts at a later point, it could find itself tagged with attorney fees for arbitrary and capricious behavior.

Insurers are now specifically included in section 1201.2, and any application of Louisiana Revised Statutes 22:658 is prohibited.

REHABILITATION

Following the 1983 amendments to the Act, Louisiana for the first time has a mandatory rehabilitation provision.¹³² It is very closely patterned on a portion of the Florida workers' compensation statute.¹³³ In fact, it is an almost verbatim adoption of the Florida statute with a few changes which appear to be primarily in the employer's interest.

Louisiana Revised Statutes 23:1226(A) provides that when an employee has suffered a compensable injury which precludes¹³⁴ him from earning wages "equal to wages earned" before the injury, he is entitled to "prompt rehabilitation services." This standard is not the same as the threshold for SEB. An injured worker who is able to earn ninety percent or more of his former wage is not entitled to SEB¹³⁵ but under this language would be entitled to rehabilitation services if needed.

The same subsection requires the employer or insurer to provide suitable training and education, which "may" be state or federal programs "when conveniently available" or "may" be public or private agencies "cooperating" with the state or federal agencies. And "in the absence of such programs," the employer or insurer is required to provide rehabilitation with available private agencies. Government agencies are clearly preferred, if not in fact mandated to be used first. There is an interesting difference between this provision and the Florida source provision. The Florida statute specifically requires that these rehabilitation services be provided by the employer or insurer "at its own expense"

132. LA. R.S. 23:1226 (Supp. 1984).

133. FLA. STAT. ANN. § 440.49 (West 1981).

134. The Florida source provision says when "it appears that the injury will preclude" the employee from earning his prior wage. FLA. STAT. ANN. § 440.49(1)(a) (West 1981).

135. LA. R.S. 23:1221(3) (Supp. 1984).

and contains no preference for governmental agencies. In fact, the Florida statute says simply that the employer or insurer "may cooperate" with such agencies as well as public or private non-governmental agencies.

These deletions raise some intriguing questions. Is there an inference that if rehabilitation services are available through governmental agencies, the cost should be borne by the general taxpayers and not by the employer or insurer? The absence of the phrase "at its own expense" could be so interpreted, in light of the mandate that governmental agencies be used. Does anyone know whether these governmental agencies are sufficiently staffed to provide such services? And if the governmental entities decided that a charge should be made for that service, is there any authority to impose such a charge? Could the director establish by rule some kind of fund for rehabilitation services rendered to be maintained by uniform assessments? This solution would unfairly penalize the employers who are careful and do not often have to utilize the services.

If this provision is an attempt to cast the rehabilitation costs on the public fisc and the taxpayers rather than the employer or insurer in question, it is unwise. It does nothing to assign the cost of workplace injuries to the proper party, and does little if anything to encourage safety and discourage carelessness. Hopefully, some method will be devised to calculate the fair cost of such services, if provided by a governmental agency, and to assign that cost to the employer or insurer.

Louisiana Revised Statutes 23:1226(B) provides a definition of the "suitable gainful employment" at which the rehabilitation program is directed. It means "employment or self-employment, after rehabilitation, which is reasonably attainable and which offers an opportunity to restore the individual as soon as practical and nearly as possible to his average earnings at the time of the injury." Again, there is a curious omission from the Florida statutory provision. Following the phrase "reasonably attainable," the Florida law continues "in light of the individual's age, education, previous occupation and injury." The legal result of that deletion is unclear. Arguably, it could mean that the employer or insurer is only required to pay for rehabilitation which will offer "an opportunity" to restore a person to his former wage in any employment which is "reasonably attainable," regardless of whether a person's age or education might indicate that such a job is not attainable as a practical matter. If that interpretation is chosen, the worker might find himself "rehabilitated" but not able to support himself. The full Florida provision seems preferable, as it affords some flexibility in the standard of "reasonably attainable" employment.

If the required rehabilitation services are not voluntarily offered or accepted, the director may refer the employee to a qualified physician to evaluate the practicality and need for rehabilitation services. Upon receipt of that evaluation, the director may then recommend that service

or another deemed necessary.¹³⁶ And here it is specifically provided that this service will be at the expense of the employer or insurer, an indication that the earlier omission was not unintentional.

Under Louisiana Revised Statutes 23:1226(E) the mandatory rehabilitation period is twenty-six weeks, which can be extended for another twenty-six weeks upon a showing to the director that the extension is "necessary and proper," or, if he disagrees, to the court. Voluntary continuation of rehabilitation by the employer or insurer is permitted.¹³⁷ These provisions are identical to those of the Florida statute. However, subsection 1226(E) adds to the Florida statute by requiring an injured employee to request and begin rehabilitation within two years of termination of temporary total disability.

The same section requires the employer or insurer to bear the cost of board, lodging, and travel if the rehabilitation service is located away from the employee's customary residence. But such services are required to be performed "within the state" when such facilities are available, thus imposing some limitation on this responsibility.

Finally, subsection 1226(E), like the Florida provision, imposes a penalty for refusal to accept rehabilitation deemed necessary by the director or the court of a fifty percent reduction in weekly compensation benefits for each week of the refusal. No sanction is placed upon the employer who does not tender rehabilitation services or resists requests for them.

An employee who is undergoing rehabilitation is entitled to temporary total disability benefits during that period, and any determination as to the permanency of his total disability is suspended while he is in the program.¹³⁸ Louisiana Revised Statutes 23:1226(D) provides specifically that prior to a recommendation of the director or adjudication of a court that the worker is permanently and totally disabled, an evaluation of rehabilitation potential must be made.

On balance, this new section is a step in the right direction and has justifiably been cited by the employer community as an important benefit accorded to the worker in the 1983 amendments. However, the curious deletions from, and additions to, the Florida source provisions suggest some tinkering with the provision to temper its pro-worker slant. For the most part, these changes seem unnecessary and unwise and could cast doubt on the depth of the commitment of the employer community to rehabilitation.

136. LA. R.S. 23:1226(C) (Supp. 1984).

137. If the rehabilitation program should take longer than a total of 52 weeks (and some apparently do), there is no mandatory coverage of that cost by the employer.

138. LA. R.S. 23:1226(F)-(G) (Supp. 1984).

CHANGES IN DEFENSES

Defense of Statutory Violation Abolished

Act 1 deleted from section 1081 the defense of deliberate violation of statutory regulations affecting life and limb.¹³⁹ No doubt this deletion is a reflection of the paucity of instances in which the defense was used, and of the argument that in most such instances, a violation would only be ordinary negligence and would not be a bar to recovery of benefits.¹⁴⁰

Aggressor Defense Partially Codified

The aggressor defense which had grown up under the "intent to injure" defense was at least partially codified by Act 1. As amended, Louisiana Revised Statutes 23:1081(1)(d) now provides that compensation is to be denied for an injury caused "to the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor."

In some instances, this will be nothing more than legislative recognition of the jurisprudential defense. One may suspect that the denial of benefits in cases such as *St. Pierre v. Baifield Industries*¹⁴¹ and *Armstrong v. Jefferson Disposal Co.*¹⁴² will continue under this statutory standard. In each instance, the claimant attempted or achieved the first blow following a verbal dispute; in *St. Pierre* the claimant followed his superior out of a meeting to attempt the first blow.

But some uncertainty is introduced by the concept that the defense is limited to the initial physical aggressor in an "unprovoked" physical altercation. Certainly, if there is no provocation and the claimant takes out physically after someone and ends up being injured, the defense applies. But what if the provocation to which he responds is verbal in nature: he is called a son-of-a-bitch and responds with physical aggression? On the one hand, it may be plausibly argued that this is not an "unprovoked" physical altercation. It *was* provoked by a verbal insult. Thus, one might conclude that compensation should not be denied. On

139. LA. R.S. 23:1081, as amended by Act 1, now contains as subsection (1)(d) a defense based upon the claimant's being the initial physical aggressor rather than the breach of statutory regulations defense.

140. See W. MALONE & A. JOHNSON, *supra* note 2, § 342.

141. 225 So. 2d 96 (La. App. 2d Cir. 1969) (claimant followed superior out of meeting, hurling verbal insults, and was in process of throwing a punch at him when superior hit him first; compensation denied).

142. 258 So. 2d 213 (La. App. 4th Cir. 1972) (after lengthy verbal dispute, claimant slashed at fellow worker with a knife, but never hit him; claimant was then shot in struggle which ensued after fellow worker drew a gun; compensation denied). See also *Augustine v. Washington Parish Police Jury*, 383 So. 2d 1271 (La. App. 1st Cir.), *cert. denied*, 386 So. 2d 1379 (La. 1980).

the other hand, it may be noted that this interpretation might be inconsistent with some of the cases. In *Garner v. Avondale Marine Ways, Inc.*,¹⁴³ the dispute began with insults. The claimant hit the fellow worker in response to the insults, but then got the worst of the struggle and was injured. Compensation was denied. Would such a claimant now be entitled to benefits because his initial physical aggression was "provoked" rather than "unprovoked"?

If the claimant is the "initial" physical aggressor, then by definition there must be either no provocation on the other side or only verbal provocation. If the other disputant is guilty of physical provocation, then the claimant could no longer be the "initial" physical aggressor, and thus would not be denied benefits.

If that is the meaning of the amendment, then the most sensible approach is the one actually approved in the more recent decisions. If the claimant goes out of his way to initiate physical aggression in response to verbal provocation only or no provocation at all, then compensation may properly be denied. But if the facts indicate an escalating war of insults and then blows in which both claimant and fellow worker appear equally eager to enter the fray, it is probably unfair to deny compensation simply because the claimant happened to be the first one to step over the line. Disagreements, both verbal and physical, are a part of the work place.¹⁴⁴ Perhaps the court in such an instance could simply say that the claimant was not an "aggressor" in the common-sense meaning of that term but rather a mutual combatant.

There is understandable protection in the amendment even for the initial physical aggressor when his aggression is met with excessive force in retaliation. Even the fact that the claimant may have sought out a fellow worker who is not equally eager for the fray without any provocation whatsoever does not give that worker a privilege to do any more than defend himself to the extent reasonably necessary.¹⁴⁵

CONCLUSION

With the exception of a few relatively minor changes elsewhere in the Act,¹⁴⁶ the foregoing discussion summarizes and comments upon the

143. 134 So. 2d 703 (La. App. 4th Cir. 1961).

144. *Attaway v. Farley's Glass Co.*, 430 So. 2d 705 (La. App. 2d Cir. 1983) (law prior to amendment; no denial of recovery).

145. In this regard, consider the rejection of the defense in *Johnson v. East Baton Rouge City Parish Gov't*, 408 So. 2d 1151 (La. App. 1st Cir. 1981) ("out of frustration," a worker threw a bottle at another, who responded with a fatal shot).

146. The amendments adjust slightly the reimbursement amounts for employers under the Second Injury Fund. Although technically flawed in drafting, LA. R.S. 23:1378(A)(1) is probably intended to grant to an eligible employer a reimbursement of 60% of supplemental

important changes wrought by Act 1 of the 1983 Extraordinary Session. The faithful reader who has persevered to this point will come away with the impression that the writer has been more than mildly critical of the 1983 amendments. There are certainly sections of the Act which have been benefitted by the amendments; the provisions on rehabilitation come immediately to mind. There is at least the potential in the administrative dispute resolution process for a decrease in litigation, a tempering of the adversarial nature of the present scheme, and some continuous supervision of the entire system.

But on balance, the amendments place the Act in an extreme position, too far removed from the great middleground which should be the foundation of legislation such as this. The current situation can only invite retribution from the employees' side, at whatever propitious moment may present itself. That is simply not a good posture for this problem to be in, though one must candidly admit that it is a traditional posture. The history of Louisiana workers' compensation is one of substantial conflict between employers (arguably a more conservative posture) and the judiciary siding with employees (arguably a more liberal or progressive posture). One has the feeling that the judiciary's reaction has been in response to the legislative position, rather than arising out of some sort of longstanding commitment to the employee's side of the debate.

Past experience indicates that a conservative legislative posture ultimately results in a judicial reaction. One need only recall the early conservative provisions from 1914 until 1930 and the devastating judicial

earnings benefits or permanent partial benefits paid to an employee whose previous disability merges with a compensable disability entitling him to those benefits. There is no substantive change in LA. R.S. 23:1378(A)(2), calling for reimbursement for all benefits after 104 weeks, except that it is now limited to cases resulting in permanent total disability. Due to the amendments to the substantive requirement for permanent total disability, such cases are likely to be rare. There is a rewording of LA. R.S. 23:1378(A)(3) without apparent substantive change, entitling the employer to reimbursement for death benefits after the first 175 weeks of payment. And, for the first time, there is authority for reimbursement of medical expenses at the rate of 50% of the first \$10,000 so paid and 100% of all sums for medical expenses over that amount.

Amendments to LA. R.S. 23:1202 codify the results of several decisions and academic suggestion to provide specifically that the statutory minimum is not applicable to supplemental earnings benefits and permanent partial disability awards (former schedule losses). See *Istre v. Hudson Eng'g Corp.*, 386 So. 2d 366 (La. App. 3d Cir. 1980), *cert. denied*, 392 So. 2d 1067 (La. 1981); *Hollis v. Travelers Ins. Co.*, 368 So. 2d 154 (La. App. 3d Cir. 1978); W. MALONE & A. JOHNSON, *supra* note 2, § 278.

Finally, LA. R.S. 23:1206 was amended to add "or unearned wages paid" to voluntary payments as amounts for which the employer is entitled to credit against compensation due. The amendment also deleted the final proviso which specified that the credit had to be taken by shortening the number of weeks rather than by reducing the amount of each periodic payment.

reaction in *Knispel v. Gulf States Utilities Co.*¹⁴⁷ Perhaps the drafters of the present amendments believe that this time they have finally drawn the Act so tightly that no judicial reaction is possible. It may be so, but one is reminded of the ominous warning of the philosopher Santayana that "those who cannot remember the past are condemned to repeat it."¹⁴⁸ Should history repeat itself in this instance, Hobbes' observation about life in general will be applicable to the life of the 1983 amendments.

147. 174 La. 401, 141 So. 9 (1932).

148. I G. SANTAYANA, *THE LIFE OF REASON* (1905).

