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Workmen's Compensation - Occupational Disease - Disability of Employee

Edward A. Kaplan

remove the procedural weapon commonly known as a "hold up" suit, *i.e.*, dilatory tactics aimed at taking advantage of the fact that there is usually considerable pressure on the condemnor to complete the project within a limited time.

Robert W. Collings

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—DISABILITY OF EMPLOYEE

Plaintiff, a sandblaster and painter continuing to perform his duties without pain or discomfort, sought workmen's compensation benefits for disability allegedly resulting from silicosis.[1] The district judge reasoned that even if plaintiff had contracted the disease he had not become disabled by it. The court of appeal reversed, holding that plaintiff was disabled though he could still perform his duties without pain or discomfort. The Louisiana Supreme Court non-suited the plaintiff, and *held* that since plaintiff continued satisfactory performance of his duties with the same employer, without undue pain or discomfort, he could not recover because there was no factual disability. *LaCoste v. J. Ray McDermott & Co.*, 250 La. 43, 193 So.2d 779 (1967).

Factual v. Legal Disability

Louisiana's occupational disease compensation statute[2] removes the necessity of proving an "accident" in occupational disease situations; proof of contraction of one of the listed diseases will satisfy this requirement. Once contraction has been proved the employee need only show resulting disability to recover compensation benefits.[3] Since the statute equates disabling injuries with disabling diseases, the jurisprudence

1. Silicosis is one of the occupational diseases listed in LA. R.S. 23:1031.1 (1950), added by amendment, La. Acts 1952, No. 532, § 1, which provides in part: "A. Every employee who is disabled because of the contraction of an occupational disease as herein defined . . . shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.

"B. An occupational disease shall include only those diseases hereinafter listed when contracted by an employee in the course of his employment as a result of the nature of the work performed."

2. LA. R.S. 23:1031.1 (Supp. 1966), added by amendment, La. Acts 1952, No. 532, § 1.

3. See MALONE, LOUISIANA WORKMEN'S COMPENSATION § 218 (Supp. 1964).

dealing with injuries provides authority for determining what constitutes "disability" in this new area of compensation cases.[4]

The tendency of Louisiana's courts prior to the instant case seems to have been to consistently hold that a worker need not work in pain *or when the performance of important functions of employment materially increases the hazards to his health and safety or that of his fellow employees.* Under these conditions he has been held entitled to compensation for total and permanent disability.[5] In *McCain v. Fohs Oil Co.*[6] plaintiff accidentally lost his right eye while working as a derrick man. In holding plaintiff totally disabled the court found that if the loss of an eye hinders one's ability to perform his usual duties or subjects him to danger by their performance he is entitled to compensation. An ironworker in *Veillion v. Knapp & East*[7] injured his right foot on a job which involved climbing and could no longer climb without pain and aggravation of his injury. He was declared totally disabled even though he worked after the accident on jobs that involved climbing. In *Veillion* the Third Circuit stated that the Louisiana jurisprudence clearly holds that "if a worker is obliged to perform his duties with pain, or increased hazard to himself or his co-workers, he is totally disabled."[8] *Newsom v. Caldwell & McCann*[9] supports the view that an

4. See, *e.g.*, 185 So.2d 553, 559 (La. App. 1st Cir. 1966).

5. Brannon v. Zurich Gen. Acc. & Liab. Ins. Co., 224 La. 161, 69 So.2d 1 (1953): "The law does not [require] . . . that a worker in order to make a living, must work in pain, or that he do so when it will materially increase . . . the hazards to his own health and safety. . . . This is the settled jurisprudence of all of the appellate courts of this state." *Id.* at 166, 69 So.2d at 3. See also Wright v. National Surety Corp., 221 La. 486, 59 So.2d 695 (1952); Morgan v. American Bitumuls, 217 La. 968, 47 So.2d 739 (1950); Scott v. Hillyer, Deutsch, Edwards, Inc., 217 La. 596, 46 So.2d 914 (1950); Stieffel v. Valentine Sugars, Inc., 188 La. 1091, 179 So. 6 (1938); Knispel v. Gulf States Utilities Co., 174 La. 401, 141 So. 9 (1932); Cain v. Wilson Warehouse Co., 193 So.3d 97 (La. App. 1st Cir. 1966); Bankston v. H. E. Wiess, 190 So.2d 485 (La. App. 1st Cir. 1966); Flowers v. E. M. Toussel Oil Co., 190 So.2d 147 (La. App. 4th Cir. 1966); Wells v. Kaiser Aluminum & Chemical Corp., 185 So.2d 37 (La. App. 4th Cir. 1966); Sanderson v. Employers Liab. Assur. Corp., 181 So.2d 869 (La. App. 4th Cir. 1966); Lavergne v. Southern Farm Bureau Cas. Ins. Co., 171 So.2d 751 (La. App. 3d Cir. 1965); Williams v. Zurich Ins. Co., 159 So.2d 391 (La. App. 2d Cir. 1963); Veillion v. Knapp & East, 158 So.2d 336 (La. App. 3d Cir. 1963); Viator v. Hub City Contractors, Inc., 116 So.2d 878 (La. App. 1st Cir. 1959); Pohl v. American Bridge Div., United States Steel Corp., 109 So.2d 823 (La. App. Orl. Cir. 1959); Newsom v. Caldwell & McCann, 51 So.2d 393 (La. App. 1st Cir. 1951); Hibbard v. Blane, 183 So. 39 (La. App. 2d Cir. 1938).

6. 6 So.2d 197 (La. App. 1st Cir. 1942).

7. 158 So.2d 336 (La. App. 3d Cir. 1963).

8. *Id.* at 340.

9. 51 So.2d 393 (La. App. 1st Cir. 1951). See also Sisco v. Liberty Mut. Ins. Co., 153 So.2d 216 (La. App. 2d Cir. 1963); Collins v. Southern Pulpwood Ins. Co., 138 So.2d 638 (La. App. 3d Cir. 1962); Borders v. Lumbermen's Mut.

employee who has contracted an occupational disease should not be forced to continue his employment to prove that he is entitled to compensation when such continuation will endanger his life. In *Newsom* the First Circuit stated that "our law does not require a man to do what in his opinion would amount to risking his life in order to prove . . . that he is entitled to compensation."[10]

Another tendency of the Louisiana courts has been to hold that an employee's ability to continue working following an accident does not preclude him from being found totally disabled.[11] The Court of Appeal for the Second Circuit demonstrated this rule in *Smith v. Houston Fire & Cas. Ins. Co.*[12] The worker in *Smith* suffered a hernia yet continued work in the same capacity, discharging the same duties, and receiving the same pay. In declaring the worker totally disabled the court stated:

> "The rule is firmly established in the jurisprudence of this State that an employee who is unable to perform, without substantial pain, the substantial duties of his employment . . . is considered . . . as totally disabled, *notwithstanding that he has not ceased working for his employer.*"[13] (Emphasis added.)

In *Lindsay v. Continental Cas. Co.*[14] and *Carlino v. United States*

Ins. Co., 90 So.2d 409 (La. App. 1st Cir. 1956); Lee v. International Paper Co., 16 So.2d 679 (La. App. 2d Cir. 1944).

10. 51 So.2d 393, 397 (La. App. 1st Cir. 1951).

11. See Reed v. Calcasieu Paper Co., 233 La. 747, 98 So.2d 175 (1957); Brannon v. Zurich Gen. Acc. & Liab. Ins. Co., 224 La. 161, 69 So.2d 1 (1953); Glidden v. Alexandria Concrete Co., 132 So.2d 514 (La. App. 3d Cir. 1961); McGee v. Reiners-Schneider Co., 102 So.2d 566 (La. App. 1st Cir. 1958).

12. 116 So.2d 730 (La. App. 2d Cir. 1959).

13. *Id.* at 732. Judgment in awarding compensation was subject to a credit for the weeks the employee continued in his employment at full wages. This is in accord with the spirit and purpose of compensation, *i.e.*, to provide funds to sustain the injured employee while he cannot provide for himself. See Trappey v. Lumbermen's Mut. Cas. Co., 229 La. 632, 86 So.2d 515 (1956); Barr v. Davis Bros. Lumber Co., 183 La. 1013, 165 So. 185 (1936); Vautrot v. Maryland Cas. Co., 32 So.2d 500 (La. App. 1st Cir. 1947); Hingle v. Maryland Cas. Co., 30 So.2d 281 (La. App. Orl. Cir. 1947). In Bynum v. Maryland Cas. Co., 102 So.2d 547, 550 (La. App. 1st Cir. 1958), the court stated that the cases holding that "for purposes of prescription the courts will not retrospectively assume as proven a total disability by reason of pain during an interval at which the employee did in fact perform his full duties" do not overrule or alter the "long established jurisprudence that an employee unable to perform his duties without pain is totally disabled."

14. 242 La. 694, 699, 138 So.2d 543, 544 (1962): "Under the jurisprudence it is established that a skilled worker is deemed totally disabled . . . if he is unable to do work of the same character as that which his training, education, and experience qualify him to perform, without unusual difficulty or danger."

Fid. & Guar. Co.,[15] the Supreme Court followed this line of jurisprudence by holding that an injured worker is considered totally disabled even though the necessity of supporting his family compels him to work in pain, discomfort, or under conditions hazardous to himself or his fellow workers. In *Stieffel v. Valentine Sugars*[16] the court stated that total disability "*does not require that the insured become absolutely helpless, but merely requires such disability as renders him unable to perform substantial and material parts of his occupation in the usual and customary way. . . .* He is not to be penalized for the faithful effort which he has made to earn a bare subsistence."[17]

The main issue in the instant case is whether an employee can recover for total disability after contracting an occupational disease while still working at his regular job and performing his usual duties *without substantial pain or discomfort.* The First Circuit supported its compensation award by citing the line of cases viewing an employee as totally disabled when he can only perform his duties with danger to himself, by exposing himself to greater danger,[18] or by aggravating his injury.[19] The court relied primarily on *Johnson v. Travelers Ins. Co.*,[20]

15. 196 La. 400, 199 So. 228 (1940).

16. 188 La. 1091, 179 So. 6 (1938) (stenographer injured his hip resulting in a shortening of his right leg by one-half inch, causing him to experience pain and limp). See Bailey v. Maryland Cas. Co., 34 So.2d 354 (La. App. Orl. Cir. 1948).

17. 188 La. 1091, 1116, 179 So. 6, 15 (1938).

18. See notes 5-10 *supra* and accompanying text.

19. See note 11 *supra.* See also Anderson v. Continental Can Co., 141 So.2d 48 (La. App. 2d Cir. 1962); Braswell v. Fidelity & Cas. Co. of New York, 135 So.2d 532 (La. App. 2d Cir. 1961); Ernest v. Martin Timber Co., 124 So.2d 205 (La. App. 2d Cir. 1960); Sykes v. Stout Drilling Co., 124 So.2d 200 (La. App. 2d Cir. 1960); Daniel v. Transport Ins. Co., 119 So.2d 107 (La. App. Orl. Cir. 1960); Williams v. Southern Advance Bag & Paper Co., 87 So.2d 165 (La. App. 2d Cir. 1956); Zito v. Standard Acc. Ins. Co., 76 So.2d 25 (La. App. 1st Cir. 1954); Anders v. Employers Liab. Assur. Corp., 50 So.2d 87 (La. App. 2d Cir. 1951); Gilmore v. George W. Garig Transfer, Inc., 33 So.2d 99 (La. App. 1st Cir. 1948); Vautrot v. Maryland Cas. Co., 32 So.2d 500 (La. App. 1st Cir. 1940).

20. 99 So.2d 372 (La. App. 1st Cir. 1957). In awarding compensation in the instant case the First Circuit noted that an employer is not entitled to credit against compensation liability for wages fully earned by the disabled employee. In Lindsey v. Continental Cas. Co., 242 La. 694, 138 So.2d 543 (1962), the Supreme Court stated that the basic test for granting credit against compensation liability is whether wages paid following the injury are "presumed to be in lieu of compensation." *Id.* at 702, 138 So.2d at 545. See Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So.2d 218 (1952); D'Antoni v. Employers' Liab. Assur. Corp., 213 La. 67, 34 So.2d 378 (1948); Holiday v. Martin Veneer Co., 206 La. 897, 20 So.2d 173 (1944). In Madison v. American Sugar Refining Co., 243 La. 408, 415-16, 144 So.2d 377, 380 (1926), the Supreme Court stated: "The basic test for determining whether they are made in lieu of compensation is whether the wages paid after the injury are actually earned."

In previous cases the employer was given credit for the number of weeks

which held that an employee would be considered totally disabled if, after recovering from lead poisoning, he could demonstrate that by having had the disease he was more susceptible to a recurrence should be resume his former duties. The court of appeal concluded that an employee need not be disabled in *fact* when suit is brought, *i.e.*, an employee is *legally* disabled when it is established that the occupational disease will ultimately disable or kill him if he continues to perform his usual duties. Citing the medical evidence, the court stated that if plaintiff continued his present work it would "either materially impair his health, cause serious deterioration of his general physical condition, aggravate his disease, expose him to greater risk of danger than that attending an uninjured workman in the same field or accelerate his demise."[21]

In denying compensation the Supreme Court of Louisiana held that "a reading of the act as a whole shows that benefits payable are conditioned upon an existing *factual* disability and it was neither intended nor authorized . . . that an employee would be entitled to recover . . . while he is earning his full salary in the satisfactory performance of the very duties that he claims he is now disabled to perform."[22] (Emphasis added.) The court interpreted "disability" to mean inability to perform the same or similar work the employee was doing when injured,[23] and concluded that even though the medical evidence showed

which the employee continued to work for the employer. *E.g.*, Wilson v. Fogarty Bros. Transfer Co., 126 So.2d 6 (La. App. 4th Cir. 1961); Daniel v. Transport Ins. Co., 119 So.2d 107 (La. App. Orl. Cir. 1960); Smith v. Houston Fire & Cas. Ins. Co., 116 So.2d 730 (La. App. 2d Cir. 1959). In Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So.2d 218 (1952), and Meyers v. Jahncke Service, 76 So.2d 436 (La. App. Orl. Cir. 1955), wages paid injured employees were not credited to employer on compensation awarded employee because such wages were earned while performing services different in character to those he performed before his injury. See also MALONE, LOUISIANA WORKMEN'S COMPENSATION § 402 (Supp. 1964); Mella v. Continental Emsco, 189 So.2d 716 (La. App. 1st Cir. 1966); Millet v. Pullman Co., 181 So.2d 237 (La. App. 4th Cir. 1966); Ortego v. Cabot Corp., 180 So.2d 598 (La. App. 3d Cir. 1965); Ledoux v. William T. Burton Co., 171 So. 795 (La. App. 3d Cir. 1963).

In the instant case the First Circuit noted that plaintiff was fully earning his wages, but stated that "he is entitled to compensation because he is deemed disabled inasmuch as the record established by an overwhelming preponderance of evidence that continuation in his chosen line of endeavor is grossly inimical to his health and general welfare." 185 So.2d 553, 563 (La. App. 1st Cir. 1966).

21. See 185 So.2d at 561.

22. 250 La. 43, 193 So.2d 779, 781-82 (1967).

23. See 2 LARSON, WORKMEN'S COMPENSATION § 57.22, at 8, & 57.53, at 29 (1952), citing Hughes v. Enloe, 214 La. 588, 38 So.2d 225 (1948), and Washington, v. Independent Ice & Cold Storage Co., 211 La. 690, 30 So.2d 758 (1947). See also Stieffel v. Valentine Sugars, Inc., 188 La. 1091, 179 So. 6 (1938), and Barr v. Davis Bros. Lumber Co., 183 La. 1013, 165 So. 185 (1935).

that plaintiff's health will be impaired by continuation of his occupation "the fact remains that plaintiff has continued to work at the same job for the same employer without undue pain or discomfort and, therefore, he cannot be regarded as disabled."[24]

The Peremption Issue

Claims for occupational disease disability must be filed within four months of contraction or the date that the disease first manifested itself.[25] The Supreme Court has construed the statute with emphasis on the word "disablement."[26] An employee who is not in fact disabled, although he knows he has contracted an occupational disease, need not file a claim within four months of knowledge; the peremption period runs only from the point of factual disability.[27] In the instant case the Supreme Court

24. 250 La. 43, 193 So.2d 779, 782 (1967). The Supreme Court stated that an examination of the cases cited by the court of appeal reveals that none is applicable. See Veillion v. Knapp & East, 158 So.2d 336 (La. App. 3d Cir. 1963); Johnson v. Travelers Ins. Co., 99 So.2d 372 (La. App. 1st Cir. 1957); McCain v. Fohs Oil Co., 6 So.2d 197 (La. App. 1st Cir. 1942); Hibbard v. Blane, 183 So. 39 (La. App. 2d Cir. 1938).

250 La. at ——, 193 So.2d at 781 n.2: "In all of the cases cited by the court to buttress its holding, the employees had ceased their employment at the time suit was brought because of a claimed disability. In the *Johnson* case (lead poisoning) the matter was remanded for testimony on the question of whether an employee, who has recovered from lead poisoning, will endanger his life or health by returning to his former occupation of painting provided he uses the customary and standard precaution. The inference in this case was that a worker is not expected to endanger his health by a recurrence of the occupational disease after he had recovered therefrom. However, the situation in that matter is vastly different from that in the case at bar where the employee continues in the employment and is not, in fact, disabled at the time he seeks compensation notwithstanding that there is medical testimony to the effect that he could become disabled in the future and it is predicted that, should he continue, the disease will cause his death."

25. La. R.S. 23:1031.1(c) (1950), added by La. Acts 1952, No. 532, § 1.

26. The Supreme Court in Knispel v. Gulf States Utilities Co., 174 La. 401, 409-10, 141 So. 9, 12 (1932), stated: "The disability should . . . be deemed total to do work of any reasonable character . . . whenever it appears that the employee, due to the injury, is unable to perform work of the same or similar description that he is accustomed to perform." See also Carlino v. United States Fid. & Guar. Co., 196 La. 400, 199 So. 228 (1954); Newsom v. Caldwell & McCann, 51 So.2d 393 (La. App. 1st Cir. 1951); McCain v. Fohs Oil Co., 6 So.2d 197 (La. App. 1st Cir. 1942); Lorch v. American Can Co. Southern, 5 So.2d 35 (La. App. Orl. Cir. 1941); Flanagan v. Sewerage & Water Board, 140 So. 83 (La. App. Orl. Cir. 1932).

27. In Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So.2d 218 (1952), the Supreme Court held that where an employee receives an injury from an accident that later develops into disability, the right of action is not perempted until one year after the injury has developed. Under *Mottet*, therefore, the prescriptive period begins with the development of disability. In Johnson v. Cabot Carbon Co., 227 La. 941, 81 So.2d 2 (1955), and Wallace v. Remington Rand Inc., 229 La. 651, 86 So.2d 522 (1956), the court held that the worker who continues to work in pain is not disabled

stated that "it is only when he becomes disabled that the disease manifests itself and the four month period runs from that time because, unless he is disabled, he has no cause of action for recovery of compensation."[28]

Although the district court's decree[29] dismissed plaintiff's suit with prejudice, the Supreme Court reserved plaintiff's right to file another compensation claim when he becomes disabled in fact.[30]

Conclusion

It is submitted that the Supreme Court's decision in the instant case departs from the previous tendency to hold (1) that if the employee's efforts to continue the same or similar work will be a source of danger he is regarded as totally disabled;[31] and (2) that an employee need not termi-

for the purposes of prescription until he abandons his work because of suffering.

Most courts and writers follow the interpretation that an occupational disease does not "manifest itself" until the worker knows the nature of his affliction, knows that it is compensable, and has reason to believe that it is causally related to his work. See especially 2 LARSON, WORKMEN'S COMPENSATION § 78.41 (1952), and cases cited. This interpretation was adopted in Frisby v. International Paper Co., 76 So.2d 621 (La. App. 2d Cir. 1954). The court, relying on *Mottet*, declared that the prescriptive period does not start running until the worker can avail himself of the benefits conferred by the Compensation Act. In the present case the prescriptive period did not begin until the claimant knew of the causal relation between the disease and his job, which happened to be more than a year after the first manifestation of his symptoms and eleven months after he had become disabled.

The claimant in Bernard v. Louisiana Wild Life & Fisheries Commission, 152 So.2d 114 (La. App. 2d Cir. 1963), *writ refused*, 244 La. 664, 153 So.2d 881 (1963), continued to work in pain after contracting pneumonitis. The court stated that this disease would not be regarded as having "manifested itself" so long as the employee attempted to continue working in pain and suffering or under handicap.

In Ludlam v. International Paper Co., 139 So.2d 67, 70 (La. App. 2d Cir. 1962), the court stated: "Therefore, an occupational disease does not 'manifest itself' within the purview of LSA-R.S. 23:1031.1(C) until the employee has knowledge of the connection between his disease and his employment. It follows the prescriptive period in the instant case commenced only from the date plaintiff became aware of the causality between his employment and his disease." See 2 LARSON, WORKMEN'S COMPENSATION § 95.22, at 474 (1961); Annot., *Limitations—Contracting Disease*, 11 A.L.R.2d 277 (1950); MALONE, LOUISIANA WORKMEN'S COMPENSATION § 218, at 81-85 (Supp. 1964).

28. 250 La. 43, 193 So.2d 779, 782-83 (1967).

29. The district judge's opinion is discussed at 250 La. 43, 193 So.2d 779, 783 n.5 (1967).

30. 250 La. 43, 193 So.2d 779, 783 (1967).

31. See notes 5-10 *supra*. Swaney v. Marquette Cas. Co., 139 So.2d 74 (La. App. 4th Cir. 1962) (machinist held totally disabled after accident to one eye, even though a patch or a contact lens, which he stated that he could not tolerate, would have given him vision a little less than normal); Aymonde v. State Nat. Life Ins. Co., 138 So.2d 460 (La. App. 3d Cir. 1962) (loss of vision in one eye totally disabling to car driver); Finn v. Delta Drilling Co., 121 So.2d 340 (La. App. 1st Cir. 1960) (exertion on job brought

nate his employment in order to be considered disabled.[32]

Through the instant case the Supreme Court seems to have strayed from the "humane theory of the compensation act." Medical testimony stated that continuance by plaintiff of his present work would be detrimental to his health.[33] The only protection awarded plaintiff was the reservation of the right to file another claim when he becomes "disabled."[34]

The Supreme Court's decision in the instant case may invite falsifications by employees of pain and discomfort in instances where continued exposure to the environment of their employment will aggravate an existing disease which may eventually result in their death. Where medical evidence similar to that of the instant case is undisputed, it is submitted that an employee with an occupational disease is as totally disabled as one who works in pain or is unable to perform his usual duties.

To be declared totally and permanently disabled an employee must be (1) unable to reasonably perform the same or similar services, *or* (2) unable to work without pain or discomfort, *or* (3) unable to work without endangering his life and those of his fellow employees. The Supreme Court seems to have disregarded the third basis and, instead, has established as the crucial factor in occupational disease cases whether the employee has stopped working on the job which led to his contracting the disease.

A policy consideration which might have influenced the Supreme Court's decision is the general belief that employees suffering from occupational diseases should be discouraged for their own sake from continuing dangerous employment. The employee's chances of recovery will normally be substantially increased by his receiving proper medical attention while not

about myocardial infarction, depriving claimant of a small loss of reserve heart muscle, thus increasing the hazard to his life from further exertions; regarded as totally disabling); Circello v. Haas & Haynie Corp., 116 So.2d 144 (La. App. 1st Cir. 1959); McKnight v. Clemons, 114 So.2d 114 (La. App. 1st Cir. 1959) (continued heavy labor would prove to be injurious to claimant's heart condition); Trahan v. Louisiana State Rice Milling Co., 100 So.2d 914 (La. App. 1st Cir. 1958) (loss of sight of one eye totally disabling to machinery oiler); Saltzman v. Lone Star Cement Corp., 55 So.2d 674 (La. App. Orl. Cir. 1951) (worker with sensitive foot could continue working by wearing protective clothing; compensation for total disability denied).

32. See notes 11-17 *supra* and accompanying text.

33. 250 La. 43, 193 So.2d 779, 781 (1967); 185 So.2d 553, 555 (La. App. 1st Cir. 1966).

34. 250 La. 43, 193 So.2d 779, 783 (1967).

being exposed to the hazardous conditions which produced the ailment. Reconciling the instant case with the prior jurisprudence results in the somewhat anomalous conclusion that all the plaintiff now has to do in order to collect compensation benefits is to simply quit work and file a new claim.[35] It would appear, however, more beneficial to the worker to be allowed compensation where contraction of the disease has been proven but the employee through necessity continues to work. No worker should be penalized for trying to earn a living, and many may hazard certain risks for a full salary rather than the safe but small compensation reimbursement. For example, an honest employee who can work without substantial pain may elect to continue work as long as possible to provide support for his family even if it endangers his health. It is submitted that the employee who is legally disabled should be awarded compensation regardless of whether he has continued to work.

Edward A. Kaplan

35. Brief for Appellee, p. 9, LaCoste v. J. Ray McDermott & Co., 185 So.2d 553 (La. App. 1st Cir. 1966): "Accordingly, if the [plaintiff] had not been working for the defendants at the time of the trial below there would be no question but that [he] would be totally and permanently disabled. Defendants point to the fact that [plaintiff was] still working and apparently doing [his] job as well as [he] did prior to the discovery of silicosis and hence defendants argue that [he] cannot be 'disabled' as long as [he is] performing [his] duties. The answer to this is that the definition of 'disability' is not that a man is able to perform his work *or that he is actually performing the work!* A man is disabled . . . if continuing to work at the kind of work he is in would constitute (among other tests) a danger to himself. There is no question that if Murphy [Lacoste] continued to work that [he is] in danger."