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Private Law: Workmen's Compensation

Wex S. Malone

WORKMEN'S COMPENSATION

*Wex S. Malone**

PRINCIPAL'S LIABILITY TO CONTRACTOR'S EMPLOYEE

The Louisiana courts have held that an employee of a contractor cannot maintain a tort claim against the contractor's principal under Section 7 of the act[1] for an accident that occurred during the course of work that was a part of the principal's regular business.[2] Although the soundness of this position may be open to question,[3] it has been confirmed too often, perhaps, to admit of debate at this late date. When, however, the work being done by the contractor's employee is not part of the principal's regular business, so that the latter cannot be held for compensation as a statutory employer under Section 6, the employee can proceed in tort against the principal for his negligence.[4] It is therefore important to determine what contracted work is, and what is not, a part of the regular business of the principal.

Recently the supreme court held that an employee hired by a specialty contractor to fish lost tools from an oil well being developed by the principal was engaged in work that is part of the principal's regular business in developing the well.[5] For this reason he was not entitled to maintain an action for damages for injuries that occurred while he was so employed. This position is consistent with previous decisions that contractors hired to haul pipe and material for oil development,[6] to pull casings from wells,[7] or to weld oil producing equipment[8] are all engaged

* Professor of Law, Louisiana State University.

1. La. R.S. (1950) 23:1101–23:1103.

2. Gaiennie Co. Ltd. v. John O. Chisolm, 3 La. App. 358 (1926); Dandridge v. Fidelity & Cas. Co. of N.Y., 192 So. 887 (La. App. 1939).

3. The purpose of excluding the direct employer from tort liability to his employee is to accord with the compromise character of the compensation principle: The employer assumes liability for compensation in *every* case of injury to the employee, and in return he is relieved of responsibility for *full damages* even when he was at fault. The principal, however, need never become liable in compensation to his contractor's employees so long as he insists that the contractor either establish his solvency or procure insurance. He is, in effect, only a surety for the worker's claims against the contractor. Therefore, he purchases his tort immunity at an inordinately low price. Nothing in the language of our act compels the conclusion that the principal should not be regarded as a third person within the meaning of Section Seven of the act, and justice does not suggest such a conclusion.

4. Horrell v. Gulf & Valley Cotton Oil Co., Inc., 131 So. 709 (La. App. 1930).

5. Thibodaux v. Sun Oil Co., 218 La. 453, 49 So. 2d 852 (1951).

6. Seabury v. Arkansas Natural Gas Corp., 171 La. 199, 130 So. 1 (1930).

7. Turner v. Oliphant Oil Corp., 200 So. 513 (La. App. 1940).

8. Dandridge v. Fidelity & Cas. Co. of N.Y., 192 So. 887 (La. App. 1939).

in the regular business of the producer. Hence they are entitled to compensation from the principal and are correspondingly precluded from suing him for damages. One court has gone so far as to observe by way of dictum that an oil producing enterprise cannot escape its compensation responsibility by showing that specialty work is customarily done by contractors rather than by the producers themselves.[9]

TOTAL AND PARTIAL DISABILITY

In Louisiana the courts have tested the existence of total disability by determining whether the accident deprived the employee of his capacity to perform "work of the same or similar description that he is accustomed to perform."[10] This formula has been applied with fair consistency in all cases where the claimant was a skilled or semiskilled worker. However, counsel have sometimes objected to this test on the ground that it represents a strained construction of the act and is entirely too liberal to the worker.[11]

There is recent evidence that the test of total disability described above is beginning to suffer from erosion in at least two types of situations: First, where the injured plaintiff is retained in the employment of the defendant the policy to encourage the retention of injured workers seems to influence the courts in minimizing the effect of the injury on the working ability of the claimant.[12]

Second, and perhaps more important, where the claimant is an unskilled common laborer it is admittedly difficult to determine when the accident has deprived him of his ability to do

9. Turner v. Oliphant Oil Corp., 200 So. 513, 514 (La. App. 1940).

10. Knispel v. Gulf States Utilities Co., Inc., 174 La. 401, 141 So. 9 (1932). The test is well stated in Fisher v. Standard Accident Ins. Co., 28 So. 2d 59, 61 (La. App. 1946).

The court of appeal has recently announced that under this test it is quite possible for an employee to encounter several successive permanent total disabilities on separate occasions. The first accident may deprive him of his ability to carry on his normal work, while a second accident disables him from doing even the lighter work that he could still perform after the first mishap. Stansbury v. National Auto. & Cas. Ins. Co. of Los Angeles, Cal., 52 So. 2d 300 (La. App. 1951).

11. See, for example, the recent interesting address of Richard B. Montgomery of the firm of Montgomery, Fenner and Brown, New Orleans, delivered before the Mississippi State Bar, June 1, 1951, 22 Miss. L.J. 326. There is evidence of occasional dissatisfaction with the test on the part of the courts of appeal. See, for example, Boling v. Bituminous Casualty Corporation, 42 So. 2d 567, 568 (La. App. 1949).

12. Boulanger v. Liberty Mut. Ins. Co., 31 So. 2d 888 (La. App. 1947); Weber v. Kieckhefer Container Co., 45 So. 2d 562 (La. App. 1950). Malone, Louisiana Workmen's Compensation Law and Practice § 277 (1951).

the same work he was doing at the time of the accident. In the interest of fair play for the employer the courts have usually applied the accepted test with considerable liberality toward the defendant, emphasizing that so long as the claimant can do work of the "same or similar description" he is not totally disabled.[13]

Several decisions of the courts of appeal have in effect departed completely from the usual test in cases involving common laborers. They have approached the problem by considering the relative effect of the injury on the claimant's ability to compete with others in the common labor market.[14] This latter approach strikes the writer as being more satisfactory in this type of case because it takes into consideration the diversified character of the common labor market and gives the court the necessary elbow room in administering the controversy.[15]

Resort to the effect of the injury on the worker's standing in the common labor market offers the further advantage of obviating confusion which must otherwise attend any attempt to apply the usual test of total disability as adopted in this state. If the presently accepted test is used both for skilled workers and for manual labor, the result may well prove disastrous for skilled workers who suffer injury. Cases evidencing an understandable liberality toward the employer in the case of the common laborer who claims total disability will be urged upon the courts by counsel for employees where the claimant is a skilled or semi-skilled worker. This will tend to lead toward confusion and ultimately to deterioration of our standard test of disability.

The above observations are appropriate for the recent case, *Morgan v. American Bitumuls Company*.[16] Morgan, a common laborer, sustained a shoulder injury which produced a minor and undetermined effect on his ability to do ordinary physical labor. The supreme court reached the conclusion that he was able to do work similar in character to that in which he was engaged at the time of the accident. By employing this test the court was obliged to emphasize that Morgan would not be totally disabled merely because he could not perform the duties of the identical

13. Washington v. Independent Ice & Cold Storage Co., 211 La. 690, 30 So. 2d 758 (1947); Scott v. Hillyer, Deutsch, Edwards, Inc., 217 La. 596, 46 So. 2d 914 (1950); Wright v. National Surety Corp., 49 So. 2d 513 (La. App. 1950), on rehearing, 52 So. 2d 597 (La. App. 1951). Malone, op. cit. supra note 12, at §§ 275, 277.

14. Crawford v. Maryland Casualty Co., 39 So. 2d 102, 103 (La. App. 1949); Young v. Central Surety & Insurance Corp., 41 So. 2d 700, 703 (La. App. 1949).

15. See Malone, op. cit. supra note 12, at § 275.

16. 217 La. 968, 47 So. 2d 739 (1950).

position he held when he was injured. The same conclusion could have been more appropriately justified by simply announcing that Morgan's standing in the common labor market was not substantially impaired.

Since Morgan was not totally disabled, his compensation was fixed in terms of partial disability, which furnishes an inviting compromise in cases of this kind. The supreme court was content to accept the opinion of physicians that Morgan suffered a twenty per cent disability. This method of estimating the extent of a partial disability was criticized in the concurring opinion of Justice McCaleb.[17] He pointed out that payments for partial disability are based on the difference between earnings before and after the accident and they do not depend upon the extent of the disability in mechanical terms. This same position had been adopted by the supreme court in the earlier case, *Sweeney v. Black River Lumber Company*.[18] It is also noteworthy that the Court of Appeal for the First Circuit has recently seen fit to follow this view, relying upon Justice McCaleb's opinion, in a case where the victim was employed for similar work for a third person following the accident.[19]

In the *Morgan* case the facts indicated that the claimant had worked as a common laborer for only three weeks before the accident. Prior to that time he had been engaged in the cleaning and pressing business, and after the accident he again took up this work. However, the supreme court stated by way of dictum that his earnings as a cleaner should not be considered in estimating the extent of his partial disability. The majority opinion said:

> "In cases of total disability it has been held that the employee is entitled to benefits under the statute even though after the accident he engages in, or is qualified to engage in, an occupation dissimilar to that which he was undertaking when injured and more remunerative; and there appears no good reason why a distinction should be made respecting this point in awarding compensation as for partial disability. Too, it would seem inequitable to deny an injured employee disability benefits merely because he had schooled himself for another occupation, wholly unlike the one engaged in when

17. 217 La. 968, 976, 47 So. 2d 739, 742.
18. 150 La. 1061, 91 So. 511 (1922).
19. Wright v. National Surety Corp., 49 So. 2d 513 (La. App. 1950).

sustaining the injury, and elects to pursue it following the accident." [20]

DEATH BENEFITS—PRIORITIES BETWEEN CLAIMANTS

Although it has been generally assumed that the existence of a preferred claimant precludes an award of compensation to a member of a deferred classification, and both the supreme court[21] and the courts of appeal[22] have formerly so held, this assumption recently received a sudden jolt by the supreme court in the case, *Patin v. T. L. James & Company*.[23] Claimant, the infant nephew of a deceased worker's concubine, who had resided with deceased, was found by the supreme court to have been wholly dependent upon him. The worker was also survived by a partially dependent mother. The supreme court held that the claim of the latter would not prevent an award to the dependent child. It rested its decision on the comparatively narrow ground that the existence of a preferred *partial* dependent does not exclude the claim of a *wholly* dependent member of a deferred group. It based its reasoning upon the 1926 amendment to the Compensation Act.[24]

More important even than the actual decision was the clear forewarning that the supreme court is in a mood to throw the entire conception of preferred and deferred claims out the juridical window. Further comment on this important decision is omitted here only for the reason that the case is considered in detail in a note appearing elsewhere in the REVIEW.[25]

BASIS FOR COMPUTING COMPENSATION

Ever since the supreme court decided the case, *Rylander v. T. Smith & Son*,[26] we have accepted the principle that compensation payments are based on the victim's full time earning capacity at the contract rate prevailing when he was injured, rather than on the weekly amount he was receiving from defendant prior to

20. 217 La. 968, 975, 47 So. 2d 739, 741 (1950).

21. Gros v. Millers' Indemnity Underwriters, 153 La. 257, 95 So. 709 (1923); Bradley v. Swift and Co., 167 La. 249, 119 So. 37 (1928).

22. Rentz v. Phoenix Utility Co., 141 So. 802 (La. App. 1932); Lunkin v. Triangle Farms, Inc., 24 So. 2d 213 (La. App. 1945); Williams v. Jahncke Service, Inc., 38 So. 2d 400 (La. App. 1949).

23. 218 La. 949, 51 So. 2d 586 (1951).

24. La. Act 243 of 1926. It is noteworthy that in all other respects the 1926 amendment has been regarded as the supreme bid of employers and insurers to make the act more conservative in its operation.

25. 12 LOUISIANA LAW REVIEW 104 (1951).

26. 177 La. 716, 149 So. 434 (1933). This interpretation of the act was unsuccessfully assailed as unconstitutional in Bolden v. Plant Line Stevedoring Co., 169 So. 189 (La. App. 1936).

the accident. However, a group of cases involving injured relief workers, decided during the depression,[27] laid the groundwork for the contention that where the contract of employment states specifically the amount of work to be done weekly, this is controlling, despite the fact that the victim was employed only part of the time by the defendant and the work contract did not exhaust his full earning capacity. Since that time the law has become very confused on this matter.[28]

So long as the worker was hired under a contract for a specific job of only a few day's or hour's duration the courts have cheerfully based his compensation on the hourly rate multiplied by forty-eight, the number of hours supposedly contained in a full work week.[29] However, if the claimant was regularly hired under a running contract for, say, one day's work per week, there has been a manifest tendency to restrict his compensation to the weekly amount provided by the contract.[30] The most recent case to reach this conclusion was *Jarrell v. Travelers Insurance Company*,[31] decided by the Court of Appeal for the First Circuit in 1949. It is gratifying to report that this decision has been reversed by the supreme court during the last term.[32]

Although the opinion of the supreme court is very brief, it reaffirms the broad principle of the *Rylander* decision. The court properly discounted the two contrary cases against relief agencies, referred to above, by pointing out that these cases represent exceptional situations.

The court also referred to *Gay v. Stone & Webster*[33] and *Abbott v. Swift & Company*.[34] The first of these two cases restricted the plaintiff to compensation based on the prevailing

27. Durrett v. The Unemployment Committee, 152 So. 138 (La. App. 1st Cir. 1934); Young v. Unemployment Relief Administration, 154 So. 642 (La. App. 1st Cir. 1934). See also Barr v. United Gas Public Service Co., 183 La. 873, 165 So. 129 (1935); Suire v. Union Sulphur Co., 155 So. 517 (La. App. 1st Cir. 1934).

28. The position described above was effectively criticized by the Court of Appeal for the Second Circuit in Hayes v. Barras, 6 So. 2d 66 (La. App. 1941).

29. King v. American Tank & Equipment Co., 144 So. 283 (La. App. 2d Cir. 1932); Hayes v. Barras, 6 So. 2d 66 (La. App. 2d Cir. 1941).

30. Stephens v. Catalano, 7 So. 2d 380 (La. App. Orl. 1947). Jarrell v. Travelers' Ins. Co., 41 So. 2d 252 (La. App. 1st Cir. 1949).

31. 41 So. 2d 252 (La. App. 1949). The writer erroneously attributed this decision to the Court of Appeal, Second Circuit, in Malone, op. cit. supra note 12, at 438. He finds that he was in similar error in denying the second circuit credit for the excellent opinion in Hayes v. Barras, 6 So. 2d 66 (La. App. 1941). Malone, op. cit. supra note 12, at 436, 438. To that author, a thorough reprimand for his carelessness.

32. Jarrell v. Travelers Ins. Co., 218 La. 531, 50 So. 2d 22 (1950).

33. 191 So. 745 (La. App. 1939).

34. 6 So. 2d 683 (La. App. 1942).

forty hour week (rather than the usual presumed forty-eight hours); the second case allowed the claimant compensation based on overtime payments provided in the contract.[35] These cases, the supreme court observed, are not inconsistent with the holding in the *Rylander* case. This suggests that our supreme court is prepared to relinquish the notion that "earning capacity" means arbitrarily the ability to work forty-eight hours per week. The spare opinion in the *Jarrell* case throws a valuable light on the supreme court's attitude toward a much disputed area of the compensation law. The decision is certain to invite further litigation in order to clarify remaining uncertainties. The writer's views on this problem are set forth in detail elsewhere.[36]

35. The supreme court did not mention its own opinion to the same effect in Buxton v. W. Horace Williams & Co., 203 La. 261, 13 So. 2d 855 (1943).

36. Malone, op. cit. supra note 12, at § 323.