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NOTE

ODD MAN IN: LOUISIANA ADOPTS THE ODD-LOT DOCTRINE—A SUGGESTED ANALYSIS

The most serious industrial risk which the law must address is the permanent loss of a worker's ability to earn a living.¹ In some respects, the plight of an injured worker is worse than death. He is alive, but cannot earn a living. Determination of the extent of a worker's disability is, predictably, the most difficult problem faced by judges in interpreting a workers' compensation statute. Louisiana courts have encountered unusual problems in this regard, for they have acted against a background of inadequate supervision of awards, liberal compromise provisions, no requirements of rehabilitation, and almost no opportunity to modify the judgment once rendered.² The societal stakes are high, for an error in evaluating a worker's disability may doom him to impoverishment³ and compel the society as a whole to support him—a result entirely in conflict with the compensation principle.⁴

As the risk involved is loss of the ability to earn a living, it is quite appropriate to measure the disability resulting from industrial accidents in terms of the worker's loss of earning capacity. The Louisiana Supreme Court, in *Oster v. Wetzel Printing, Inc.*,⁵ has given the Louisiana courts the ability to analyze each claimant's potential earning capacity by adopting the odd-lot doctrine as the guiding principle in determining total disability:

Simply stated, the doctrine is that a claimant may be considered

1. *Wilson v. Weyerhauser*, 30 Or. App. 403, 567 P.2d 567, 571 (Ct. App. 1977).

2. See W. MALONE & A. JOHNSON, *WORKER'S COMPENSATION* § 276 in 13 LOUISIANA CIVIL LAW TREATISE 619 (2d ed. 1980).

3. Malone, *Total Disability Evaluation Under the Louisiana Compensation Act*, 20 LA. L. REV. 486, 508 (1960).

4. The principle is

that those persons who enjoy the product of a business—whether it be in the form of goods or services—should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product. . . . The expected cost of injury or death to workers can be anticipated and provided for in advance through the medium of insurance, and the premiums can be regarded as an item of production cost in fixing the price of the commodity or service. . . . [T]his cost will eventually pass down the stream of commerce in the form of increased prices until it is spread in dilution among the ultimate consumers.

W. MALONE & A. JOHNSON, *supra* note 2, at § 32.

5. 390 So. 2d 1318 (La. 1980).

totally disabled if, after his injury, he is considered an "odd-lot" in the competitive labor market, *i.e.*, that he may be capable of performing various jobs from time to time, but that the kind of work he may perform is so limited in quality, dependability or quantity that a reasonably stable market for that work does not exist.⁶

Given the flexibility to resolve each controversy individually, the courts should be able to "approach the task of evaluating a worker's disability with an appreciation of the uncertainties involved,"⁷ and atone for some of the traditional shortcomings still remaining in the Louisiana's Workmens' Compensation Act.⁸ This paper will examine the total and permanent disability standard used prior to the adoption of the odd-lot doctrine, the doctrine itself, with particular emphasis on its application in other jurisdictions, and will conclude with some suggestions for application of the doctrine in Louisiana.

Louisiana History of Total Disability

The Louisiana legislature adopted a "fundamentally conservative"⁹ Compensation Act in 1914. "[D]isability to do work of a reasonable character,"¹⁰ produced by a work-related injury, was considered as total under the Act. Injured employees covered by the Act¹¹ no longer were required to prove fault on the part of the employer.¹² In return, the employee was forced to give up his claim for damages for "compensation payable according to a definitely limited schedule,"¹³ based upon the extent of the disability. Disability was classified as either partial or total, and either temporary or permanent.¹⁴ The paramount consideration in making the classification was loss of earning capacity.¹⁵ Once the extent of disability was

6. Johnson, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term - Workmen's Compensation*, 39 LA. L. REV. 881, 889 (1979).

7. Malone, *supra* note 3, at 504.

8. See the compensation principle in note 4, *supra*.

9. W. MALONE & A. JOHNSON, *supra* note 2, at § 36, at 50.

10. 1914 La. Acts, No. 20.

11. For a discussion of employees covered by the Louisiana Workers' Compensation Act see W. MALONE & A. JOHNSON, *supra* note 2, at §§ 91-100.

12. Employees are only required to prove, by a reasonable preponderance of the evidence, see *Newell v. United States Fidelity & Guaranty Co.*, 368 So. 2d 1158 (La. App. 3d Cir. 1979); *Barre v. Hong-Kong Restaurant Inc.*, 346 So. 2d 318 (La. App. 4th Cir. 1977); *Van Vracken v. Bryant & Assoc.*, 338 So. 2d 981 (La. App. 4th Cir. 1976), that they "received personal injury by accident arising out of and in the course of employment." LA. R.S. 23:1031 (1950).

13. W. MALONE & A. JOHNSON, *supra* note 2, at § 32, at 40.

14. LA. R.S. 23:1221(1)-(3) (Supp. 1975).

15. W. MALONE & A. JOHNSON, *supra* note 2, at § 271, at 594.

determined, compensation was recoverable for only a fixed number of weeks.¹⁶

The Louisiana Supreme Court attempted to give meaning to this phrase in *Knispel v. Gulf States Utilities Company*.¹⁷ The *Knispel* rule stated that whenever an employee was "unable to perform work of the same or similar description that he . . . [was] accustomed to perform," the disability was deemed total within "the intendment of the law."¹⁸

The *Knispel* rule was refined in subsequent years. If a skilled or semi-skilled laborer was unable to perform his special skill following an injury, he was considered unable to perform work of "the same or similar description that he was accustomed to perform" and therefore was regarded as totally disabled.¹⁹ The common laborer was considered totally disabled if his injury substantially decreased his ability to compete with able-bodied workers in the flexible general labor market.²⁰

The skilled and common laborer tests were merely extensions of the *Knispel* rule. However, these extensions led to inequitable results, as the benefits of the *Knispel* rule effectively became available only to skilled and semi-skilled workers.²¹ This result was unfortunate because, arguably, the common laborer who lacks education and skills is much more in need of any benefits proffered by such a system than his more skilled counterparts.

16. 1914 La. Acts, No. 20, § 8.

17. 174 La. 401, 141 So. 9 (1932).

18. 174 La. at 410, 141 So. at 12 (where injury to the claimant's eye caused double vision and prevented him from returning to his former occupation).

19. See *Lindsey v. Continental Cas. Co.*, 242 La. 694, 138 So. 2d 543 (1962) (Lindsey was a farm equipment mechanic).

20. See *Booker v. Avondale Shipyards, Inc.*, 389 So. 2d 84 (La. 1980); *Ball v. American Marine Corp.*, 245 La. 515, 159 So. 2d 138 (1963). The *Knispel* rule, as applied to common laborers, was based on the notion that all jobs in the flexible general labor market are of the same or similar description. The common laborer, therefore, was to be deemed totally disabled only if his injury decreased his ability to compete with able-bodied workers for practically any steady job available.

21. Malone, *supra* note 3, at 506. Indeed, as Professor Emeritus Wex Malone has pointed out:

The fact that the benefit of the *Knispel* rule is available to only the skilled or semi-skilled worker, heightens an impression . . . that human dignity is offended when a skilled employee is obliged to undertake work that is less elevated than that which he has been accustomed to perform. It is doubtful that considerations of this kind should play a role of any importance in the administration of social legislation.

Id.

In spite of the criticism it has received, some good reasons justify the use of the *Knispel* formula. See generally *id. passim*.

In addition, relief was afforded the laborer plagued by chronic pain. Through a refinement of the *Knispel* rule, the injured employee who would incur substantial pain by returning to his former employment would be entitled to an award of total disability. The cases indicated that a worker was not expected to work in pain in order to make a living or to do so when it would increase materially the hazards to his own health and safety, or would jeopardize the well being of his fellow employees.²² To be considered disabling, however, the pain had to be substantial and appreciable.²³

In 1975, the Louisiana legislature again amended the Act, and in so doing changed its character.²⁴ "Disability of an employee to engage in any gainful occupation for wages"²⁵ is considered as total under the new Act. In addition, the amended statutory definition of *partial* disability²⁶ is strikingly similar to the former judicial test for total disability, a fact indicative of legislative intent to bring about a new test for evaluating total disability.²⁷ Although the amended Act does not refer to claimants working in pain, the courts have declared that the working-in-pain jurisprudence "continues to be viable" under the amended definition of total disability.²⁸ The 1975 amendments also eliminated any limit on the number of weeks for which compensation is recoverable for total disability. With no such limit, and in light of the apparent legislative intent to overrule the existing judicial principles for estimating the claimant's disability, the courts were given the opportunity to develop a rule which would correspond to the character of the amended Act.

Following the 1975 amendments, there was much speculation about how the courts might evaluate total disability. Some indications were given in *Whitaker v. Church's Fried Chicken, Inc.*,²⁹ in

22. See *Brannon v. Zurich Gen. Accident & Liab. Ins. Co.*, 224 La. 166, 69 So. 2d 1, (1953).

23. See *Bailey v. Schott & Co., Inc.*, 334 So. 2d 753 (La. App. 4th Cir. 1976); *Breaux v. Kaplan Rice Mill, Inc.*, 280 So. 2d 923 (La. App. 3d Cir. 1973).

24. See *Johnson*, *supra* note 6, at 893.

25. LA. R.S. 23:1221(1), (2) (Supp. 1975).

26. LA. R.S. 23:1221(3) (Supp. 1975). ("For injury producing partial disability of the employee to perform the duties in which he was customarily engaged when injured or duties of the *same or similar* character, nature or description for which he was fitted by education, training, and experience. . . ." (emphasis added).

27. See *Johnson*, *supra* note 6, at 885. See also *Dusang v. Henry C. Beck Builders, Inc.*, 389 So. 2d 367, 370 (La. 1980).

28. *Whitaker v. Church's Fried Chicken, Inc.*, 387 So. 2d 1093 (La. 1980). This result previously had been recommended. See *Johnson*, *supra* note 6, at 886. See also *Phillips v. Dresser Eng'r Co.*, 351 So. 2d 304 (La. App. 3d Cir. 1977), *cert. denied*, 353 So. 2d 1048 (La. 1978).

29. 387 So. 2d 1093 (La. 1980).

which the evidence indicated that the injury rendered the claimant unable to work without experiencing substantial pain. The Louisiana Supreme Court, after declaring that the working-in-pain jurisprudence continued to be viable, held that a finding of total and permanent disability was in order. In a concurring opinion, Justice Dennis stated his belief that "substantial pain cases should be incorporated into the broader analysis of disability using the odd-lot doctrine."³⁰

Several months later, in *Dusang v. Henry C. Beck Builders, Inc.*,³¹ the court denied compensation for total disability despite finding, as did the court of appeal,³² that the claimant worked in "substantial and appreciable" pain.³³ Citing *Whitaker*, the court distinguished the two situations by stating that "Mr. Dusang's pain is not so strong as in Whitaker's case."³⁴ After discussing the odd-lot doctrine and its applicability to substantial pain cases, Chief Justice Dixon discussed other evidence³⁵ that, considered with the claimant's alleged pain, convinced the court that the claimant was not entitled to total disability benefits. The court observed that the claimant was not a marginal employee; he had found work, and there was no clear indication of possible inability to find work in the future. The court indicated that substantial and appreciable pain alone was not enough to support a finding of total disability, suggesting that it is one of many factors to consider and is to be given weight proportionate to the severity of the pain and its impact on ability to compete in the labor market.³⁶

Approximately one month later, in *Oster v. Wetzel Printing, Inc.*,³⁷ the Louisiana Supreme Court considered the plight of a sixty-

30. *Id.* at 1097 (Dennis, J., concurring).

31. 389 So. 2d 367 (La. 1980). Claimant, employed as an ironworker and welder, slipped on a wet concrete floor and injured his shoulder and wrist. After treatment he returned to work and was employed as a welder, but he complained of constant pain. *Id.*

32. *Dusang v. Henry C. Beck Builders, Inc.*, 379 So. 2d 775 (La. App. 4th Cir. 1979).

33. 389 So. 2d at 370.

34. *Id.* at 371.

35. The record indicated the following:

- (1) Claimant had worked steadily since the accident;
- (2) the alleged disability did not require hospitalization or absence from work;
- (3) although claimant needed assistance in the performance of some tasks, his employer never had to substitute another employee for him;
- (4) claimant is not a marginal employee, for he has found work, and there is no clear indication that he will not be able to find work in the future.

Id. at 372.

36. A pain so severe as to prevent claimant from performing any function whatsoever could be sufficient to support a finding of total disability. See also note 76, *infra*, and accompanying text.

37. 390 So. 2d 1318 (La. 1980).

one year old bookbinder who was injured while attempting to unclog a printing machine. The claimant, who was right handed, lost large portions of the index and middle fingers of her right hand, and sustained severe lacerations of her ring finger as well. She suffered from hypersensitivity in the injured area, and the injury also caused her certain emotional problems. She had no formal education past one year of junior high school, and her previous employment had been limited to manual labor as a bookbinder for the past fifteen years.³⁸ The claimant argued that she was no longer capable of performing her old duties³⁹ and sought benefits based upon total and permanent disability.

The court declared that the odd-lot doctrine was to be used as the guiding concept in determining total and permanent disability:

In determining whether an employee is permanently and totally disabled, it is not a prerequisite that he be absolutely helpless. If the evidence of his physical impairment and of other such factors as his mental capacity, education, and training indicate that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, the injured employee is entitled to total disability compensation unless the employer or his insurer is able to show that some form of suitable work is regularly and continuously available to the employee within reasonable proximity to his residence.⁴⁰

Applying the doctrine to the facts of the case, the court held that Mrs. Oster was totally and permanently disabled.⁴¹

The *Oster* decision marks the beginning of a new era of total disability determination. Although the odd-lot doctrine is in its infancy in Louisiana, it is by no means an untested legal theory. The doctrine has its roots in England,⁴² and it has been utilized in many other jurisdictions. Indeed, traces of an odd-lot analysis can be found in some of the Louisiana cases applying the *Kinspel* rule.⁴³

38. *Id.* at 1324.

39. *Id.* at 1322.

40. *Id.* at 1320.

41. The court concluded that due to Mrs. Oster's "severely injured hand, her neurosis, her lack of education and her age," *id.* at 1324, she could perform no services for which a reasonably stable market would exist. Furthermore, the court found the defendant's evidence insufficient to rebut Mrs. Oster's prima facie showing.

42. The origin of the doctrine has been traced to language used in 1911 by Judge Monlon in *Cardiff Corp. v. Hall*, [1911] 1 K.B. 1009.

43. See *Futrell v. Hartford Accident & Indem. Co.*, 276 So. 2d 271 (La. 1973). See also cases cited in *Lewis v. St. Charles Parish Hosp. Serv. Dist.*, 337 So. 2d 1137 (La. 1976) (former Justice Tate writing for the majority).

In addition, the common laborer test evaluates the worker's ability to compete with

While the language employed by each jurisdiction may differ, the doctrine is essentially the same in all jurisdictions which apply it. The court must look at the totality of the evidence in assessing the claimant's disability.⁴⁴ The underlying question is whether the worker can compete with able-bodied workers in the labor market in the absence of business booms, sympathy, temporary good luck, or super-human efforts by claimant to rise above his handicap.⁴⁵ The focus of the inquiry is the claimant's ability to get a steady job, because inability to obtain steady employment has been described as "tantamount to the inability to perform work."⁴⁶

The odd-lot doctrine will not eliminate the difficulties of total and permanent disability evaluation that courts have encountered in the past, for most of the basic reasons for the creation of the *Knispel* rule still exist.⁴⁷ The doctrine is not intended for, nor capable of, mathematical application. What the doctrine will do, however, is to give the courts a mechanism to determine fairly and accurately the extent of each claimant's disability. An individual determination should eliminate the possibility that an injured employee could obtain a higher paying job in a dissimilar field and still receive total disability compensation.⁴⁸

The doctrine should give the courts the ability to examine the factors peculiar to each claimant.⁴⁹ The following analysis of the doctrine is largely based on its applications in other jurisdictions. Although some of the most important and frequently recurring factors are listed, the list is by no means exclusive.

Presentation of Prima Facie Case

To establish a prima facie case for classification in the odd-lot category, the claimant must demonstrate that a combination of factors have placed him at a substantial disadvantage in the labor

able-bodied workers in the flexible general labor market. See *Ball v. American Marine Corp.*, 245 La. 515, 159 So. 2d 138 (1960), where the court afforded the common laborer basically the same treatment as he would have had in other jurisdictions under the odd-lot analysis. See also *Malone*, *supra* note 3, at 506.

44. "The law fixes disability in terms of *loss of earnings capacity*, which includes the extent of physiological impairment as only one factor." *Futrell v. Hartford Accident & Indem. Co.*, 276 So. 2d 271, 274 (La. 1973) (citing *W. MALONE, LOUISIANA WORKMEN'S COMPENSATION* § 272 (Supp. 1964) (emphasis added)).

45. A. LARSEN, *WORKMEN'S COMPENSATION* § 57.50, at 10-18 (desk ed. 1977).

46. Kumpf, *Unemployability and the Odd-Lot Doctrine in Worker's Compensation*, 102 N.J.L.J. 2, 2 (1978).

47. See note 2, *supra*, and accompanying text.

48. 390 So. 2d at 1323 (La. 1980).

49. *W. MALONE & A. JOHNSON*, *supra* note 2, at § 276.

market.⁵⁰ The claimant's prima facie showing is significant because "such proof . . . satisfies his burden of proving that he should be awarded benefits for permanent and total disability,"⁵¹ and places the onus on the employer to show that jobs are available to claimant which will provide steady income.⁵² In determining whether the claimant has established his prima facie case, the courts should not weigh one element more heavily than another, but rather should examine how various factors have affected the individual's ability to compete in the labor market. Furthermore, the *impact* of individual factors upon the claimant—not the *quantity* of factors—is determinative of odd-lot status.⁵³

Physical Impairment

Any physical infirmity undoubtedly will limit the type of work the claimant will be able to perform.⁵⁴ A truck driver suffering from a severe injury to a leg resulting in permanent impairment might find it difficult to re-enter that job market. Limitation in use of the leg might interfere with the "safe and adequate performance" of his job.⁵⁵ Furthermore, the claimant's physical condition will limit the location in which he can perform those tasks.⁵⁶ For example, a claimant confined to a wheelchair due to a work related injury might encounter problems in trying to secure employment in a small town.

The degree of physical impairment will be a factor in the vast

50. See Johnson, *supra* note 6, at 890. Other jurisdictions employ slightly different word formulas, but in essence, they all require the claimant to demonstrate that he probably no longer possesses earning capacity. See, e.g., *Bradly v. Henry Townsend Moving & Storage Co.*, 78 N.J. 532, 397 A.2d 323 (1979) (unemployable on a regular basis in a reasonably stable job market).

51. 390 So. 2d at 1324 (La. 1980).

52. *Id.*

53. See, e.g., *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 335 A.2d 642 (1979), in which evidence indicated that the work related accident left the claimant with a deformed hand. The deformed hand and a language barrier were sufficient to establish a prima facie case.

54. The physical infirmity need not stem entirely from that accident.

The jurisprudence indicates that an employer takes an employee as he finds him. An employee's injury is compensable if a work-related accident aggravates or accelerates a pre-existing condition to produce disability. . . . An employee who is abnormally susceptible to disability from the accident is entitled to Workmen's Compensation benefits even though the same accident or injury would have caused little or no harm to a healthy employee.

Weller v. Brown, 398 So. 2d 551 (La. App. 1st Cir. 1979). See also *Cadiere v. West Gibson Prods. Co., Inc.*, 364 So. 2d 998 (La. 1978); *Crawford v. Al Smith Plumbing & Heating Services, Inc.*, 352 So. 2d 669 (La. 1977).

55. *Lee v. Pratt-Fransworth Constr. Co., Inc.*, 397 So. 2d 2 (La. App. 4th Cir. 1981).

56. See *Whitaker v. Church's Fried Chicken, Inc.*, 387 So. 2d 1093 (La. 1980). Cf. *Celestine v. Henry Indus.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981).

majority of cases⁵⁷ because compensable injury, by definition, must result from "violence to the physical structure of the body."⁵⁸ Therefore, physical damage is a likely consequence, resulting possibly in some degree of infirmity. Should the infirmity render the claimant absolutely helpless, the inquiry need proceed no further, and compensation for total and permanent disability should be awarded. Otherwise the impairment should be analyzed with regard to the effect that this injury will have on the earning capacity of the claimant.⁵⁹

Mental Capacity

The mental capacity of the claimant often determines the scope of potential jobs for which he may be trained. Claimants with low intelligence quotients are in a more precarious position than their more gifted counterparts following industrial accidents which render them unable to return to their former employment.⁶⁰ They are thus more deserving of assistance in finding employment under the terms of the odd-lot doctrine, for they are less likely to be capable of retraining themselves and competing in the labor market with able-bodied workers.

57. See *Perez v. International Minerals & Chem. Corp.*, 95 N.M.2d 628, 624 P.2d 1025 (Ct. App. 1981). The claimant found it necessary to take frequent rest breaks due to pain in his lower back and legs. He was performing only sixty percent of the work he was doing before the injury, and evidence indicated his worsening condition eventually would render him unable to perform his duties. "A severe pain, however, which does disable a workman is compensable injury. . . . A workman may retain all of the normal bodily functions of his organs and still be so weak or be in such pain that he would be totally or partially disabled from retaining or obtaining remunerative employment." 624 P.2d at 1032 (citation omitted).

58. LA. R.S. 23:1021(7) (Supp. 1975); Cf. *Franklin v. Complete Auto Transit Co.*, 397 So. 2d 60 (La. App. 2d Cir. 1981). See W. MALONE & A. JOHNSON, *supra* note 2, at § 211, for a detailed discussion of how the courts have interpreted this language.

59. A claimant possessing the mental capacity necessary to train himself for another job may not be capable physically of undertaking such a rehabilitation program. *Jeness v. State Accident Ins. Fund*, 493 P.2d 73 (Ct. App. 1972) (claimant, suffering from pain in his lower back, could not sit longer than 30 to 40 minutes; he had difficulty in standing for more than 45 minutes, and a "sense of weakness" in his left leg caused him to fall from time to time when walking).

60. Claimant's intelligence quotient is relevant in determining whether he can be rehabilitated. *Morrison-Knudsen Constr. Co. v. Industrial Comm'n*, 18 Utah 2d 390, 424 P.2d 138 (1967) (a counselor of the Division of Vocational Rehabilitation testified that due to claimant's low intelligence quotient, he believed rehabilitation was impossible).

"One with a low intelligence quotient cannot be expected to learn a new trade or calling and thereafter sell his services in the labor market as readily as a more gifted person might do." *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797, 800 (1978) (claimant, a sixty-one year old laborer with an intelligence quotient of fifty had no special skills which were transferrable to another job; his formal education had ended in the third grade). See also *Turner v. American Mut. Ins. Co.*, 390 So. 2d 1330 (La. 1980).

Education

An employee with very little education is likely to encounter greater difficulty in seeking a new job than will a high school or college graduate, and many of the jobs available to a person with the claimant's physical handicap might be restricted to only high school or college graduates.⁶¹ An Oregon court has correctly concluded, however, that the fact that claimant was well educated will not alone be sufficient to defeat a claim for total and permanent disability.⁶²

Training

The less training an individual has, the more difficult it will be for him to overcome his handicap because "the demand for unskilled and semi-skilled workers has been rapidly declining with the advent of mechanization and automation and the great bulk of hard core unemployment in the United States is in these categories."⁶³ On the other hand, a claimant with training in a wide variety of job areas will be at less of a disadvantage upon re-entering the job market by virtue of his varied skills.⁶⁴ In 1981, in *Allor v. Belden Corp.*,⁶⁵ the

61. "[I]t is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood. . . ." A. LARSON, *supra* note 45, at § 57.50, at 10-20.

62. Claimant, a thirty-five year old high school graduate with no formal training whose work experience had been limited to farm labor, was declared totally disabled. *Miller v. I.P. Miller Lumber, Inc.*, 19 Or. App. 730, 528 P.2d 1100 (Ct. App. 1974).

63. A. LARSON, *supra* note 45, at § 57.60, at 10-25. However, if claimant's physical impairment is not total and permanent, and she is able to do light work, the fact that she has no training for specific jobs and does not know what kind of work she can do will be insufficient to justify a finding of permanent disability. *Potterf v. State Accident Ins. Fund*, 41 Or. App. 755, 598 P.2d 1290 (Ct. App. 1979); *Briggs v. State Accident Ins. Fund*, 36 Or. App. 709, 585 P.2d 719 (Ct. App. 1978).

Although claimant may have training in only one area and his injury prevents him from returning to work at the same job he was performing prior to the accident, his expertise in the field may indicate that other jobs in that area are available. Claimant may be able to compete for those jobs on an equal footing with able-bodied workers. For example, in one case a classified machinist's job related accident rendered him capable of handling only light duties. After the injury, claimant was promoted to shop foreman. *Liberty Mut. Fire Ins., Co. v. Applewhite*, 612 S.W.2d 281 (Tex. Civ. App. 1981).

64. Unwillingness to apply these skills and training "to a job reasonably within his present abilities" does not render a claimant permanently and totally disabled. *Audas v. State Accident Ins. Fund*, 43 Or. App. 819, 604 P.2d 428, 429 (Ct. App. 1979). In *Audas*, the claimant had taken courses in construction estimating and architectural drafting; he also passed his high school GED and received training from the division of vocational rehabilitation. Unable to return to his job as a roofer, claimant was unwilling to apply his training to find employment.

65. 393 So. 2d 1233 (La. 1981).

Louisiana Supreme Court took into consideration the claimant's "varied work history"⁶⁶ in holding that he was not entitled to total and permanent disability benefits. The claimant had failed to establish a prima facie case of odd-lot status because he had not shown that, in light of his education, training, and physical condition, he would be at a severe disadvantage in competing with others in the labor market.⁶⁷

Age

The older the claimant, the more difficult it will be for him to find employment. The younger the claimant, the better the chances that, in time, he will be able to overcome his handicap and eventually be self-supporting. An employer, seeking to fill jobs requiring some degree of training, probably would be more eager to hire the younger disabled employee than his aged counterpart.⁶⁸ After rehabilitating the worker, the employer naturally can expect the thirty-five year old employee to remain in his employ longer than his sixty year old counterpart. However, the odd-lot doctrine gives the judiciary the opportunity to treat each controversy individually, and each claimant's age should be considered with, and not apart from, the other relevant factors. In some situations the sixty year old will have greater job prospects than a thirty-five year old, and the courts should remember that job marketability is the major concern.⁶⁹

Pain

The vast majority of the claimants seeking odd-lot status will experience some degree of pain. However, not every degree of pain should play a part in the awarding of total disability benefits. Unless the pain is substantial,⁷⁰ no societal notions of decency are offended

66. Claimant had received a high school equivalency degree and was trained in the Marine Corps as a heavy equipment engineering mechanic. He had in the past operated heavy equipment, driven trucks and wreckers, tended bar, and managed a service station. At the time of the accident he was a cook in the Louisiana National Guard. *Id.*

67. *Id.* at 1237.

68. Older workers may have the advantage in certain circumstances; but in the majority of cases the preponderance of evidence suggests that the older claimant would encounter greater difficulty in seeking employment.

69. "The fact that a person has worked . . . long past retirement age, does not effect that person's eligibility for benefits. . . ." *Findorff v. Pinkerton's, Inc.*, 295 N.W.2d 373 (Minn. 1980) (the seventy-two year old claimant, feeling himself capable of returning to work, had not tried to find work and offered no evidence indicating the lack of available jobs for which he was qualified; he was found not to be totally disabled).

70. The claimant must prove disabling pain to a legal certainty and fair preponderance of the evidence. The totality of the evidence, including the medical and

by refusing total disability benefits to a claimant experiencing some lesser degree of pain, and thus requiring him to work. Indeed, one of the purposes of the odd-lot doctrine is to promote rehabilitation of injured employees.

To an employer, a worker seeking employment who will experience substantial pain in performing assigned tasks will not be particularly desirable,⁷¹ and such a worker will thus find his opportunities severely limited.⁷² Moreover, the pain the prospective employee experiences may restrict the scope of activities he may be able to perform.⁷³ Absenteeism might also be a problem.⁷⁴ Furthermore, the pain may make the prospective employee more susceptible to a second injury, and the employer will be liable for the resulting disability.⁷⁵ Thus, substantial pain may place a worker at a serious disadvantage when he seeks employment and, consequently, should be considered with other factors in determining the claimant's odd-lot status.

Situations surely will arise in which the claimant will experience substantial pain in the performance of some jobs but not in others. Should those jobs which the claimant could perform without experiencing substantial pain be realistically unavailable to the claimant due to a combination of other factors, a *prima facie* case conceivably could be established. However, a claimant's substantial pain, in combination with other factors, must place him at a disadvantage in competing for the available jobs, or he will have failed to establish a *prima facie* case.

Substantial pain alone, like physical impairment, may in some circumstances be sufficient to establish a *prima facie* case.⁷⁶ An injury which will subject the claimant to unbearable pain in his every movement, if not in fact rendering the claimant unable to perform any tasks, clearly would place the claimant at a severe disadvantage in seeking employment, regardless of how well-trained or gifted the claimant might happen to be. Indeed, to require a claimant to work in unbearable pain would be contrary to the social policy of the

lay testimony, are to be considered to determine if he has carried his burden. *See* *Turner v. J. & J. Wells Contractors, Inc.*, 396 So. 2d 552 (La. App. 3d Cir. 1981).

71. *See* *Lattin v. Hica Corp.*, 395 So. 2d 690 (La. 1981).

72. *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248, 1252 (La. 1981).

73. *Id.* at 1252.

74. *Id.* For example, the employee would have to miss work on days when the pain became particularly acute, and also on days he may require medical treatment.

75. *Id.*

76. "A worker may retain all of the normal bodily functions of his organs and still be so weak or in such pain that he would be totally or partially disabled. . . ." *Perez v. International Minerals & Chem. Corp.*, 95 N.M.2d 628, 624 P.2d 1025 (Ct. App. 1981).

Act.⁷⁷ However, in view of the potential for abuse, courts should recognize a prima facie showing based solely upon substantial pain only in the most extreme circumstances. A lesser standard would lead inevitably to a higher percentage of total and permanent disability awards, a result contrary to the "narrower definition of total disability" very probably intended by the 1975 amendment to the worker's compensation statute.⁷⁸

In addition, courts should give less weight to a showing of substantial pain in situations in which the claimant's condition will improve only if he works, even if he must do so in substantial pain.⁷⁹ At first glance this rule may seem harsh and unduly favorable to industry. However, such a rule will serve to foster and encourage rehabilitation, one of the purposes of the doctrine. In addition, a finding of substantial pain should not establish conclusively total and permanent disability. Substantial pain, as has been demonstrated above, is to be used to establish the claimant's prima facie case. The employer is then given the opportunity to come forward and demonstrate that actual jobs are available to the claimant within a reasonable proximity to his residence which the claimant could perform without pain.

In *Wilson v. Ebasco Service, Inc.*,⁸⁰ the Louisiana Supreme Court announced that "a worker who cannot return to *any* employment without suffering substantial pain is entitled to compensation. . . ."⁸¹ While the court's intent in this language is clear, the actual burden the claimant must carry is uncertain. Surely the court did not intend that a claimant prove the universal negative, i.e., that he will experience substantial pain in all types of employment, as that is exactly what the odd-lot doctrine is designed to avoid. The burden on the claimant should be to demonstrate that he does experience substantial pain performing certain functions, and that the inability to perform these functions, possibly with a combination of other factors, will place him at a serious disadvantage while competing in the labor market.

The fact that a claimant may be working in pain at the time of the

77. One writer has stated that requiring a claimant to work in *substantial* pain would be contrary to the social policy of the Act. See Johnson, *supra* note 6, at 886. Unbearable pain, for the purpose of this note, is intended to mean the most severe degree of substantial pain. Requiring a claimant to work in unbearable pain, a fortiori, would likewise be contrary to the social policy of the Act.

78. 390 So. 2d at 1323.

79. Cf. *Lattin v. Hica Corp.*, 395 So. 2d 690 (La. 1981) (Lemmon, J., dissenting) (claimant was not motivated to undertake the activity necessary to lessen the pain).

80. 393 So. 2d 1248 (La. 1981).

81. *Id.* at 1251.

trial in an effort to support his family should not preclude a finding of total and permanent disability on the basis of substantial pain.⁸² Furthermore, the judgment is to be made on the evidence presented at trial, and should not be based on speculation as to whether the pain will subside at some future date.⁸³

Motivation

Louisiana is now one of the many states in which a claimant found totally and permanently disabled will be entitled to compensation for the duration of the disability. Some believe that claimants may feign injury in an attempt to reap potentially huge benefits. As a result, the claimant's motivation to return to work has become a very important consideration in the odd-lot analysis. Indeed, Justice Lemmon recently made reference to the claimant's motivation, or more correctly the lack of it, in his dissent in *Lattin v. Hica Corp.*⁸⁴

Though not yet a significant factor in Louisiana jurisprudence, motivation is a major factor in evaluating odd-lot status in other jurisdictions. An excellent statement of the proper role of motivation appeared in *Deaton v. State Accident Insurance Fund*⁸⁵ in which the Oregon court of appeals stated:

1. Motivation is not necessary to establish a *prima facie* case of odd-lot status if the medical facts, when considered along with other factors, such as age, education, mental capacity and training, of themselves support the claimant's inability to work.
2. Evidence of motivation to seek and work at gainful employment is necessary to establish a *prima facie* case of odd-lot status if the injuries even though severe, are not such that the trier of fact can say that regardless of motivation this man is not likely to be able to engage in gainful employment.⁸⁶

82. "Claimant . . . continued working with pain because he had a pregnant wife and three children." *Beatrice Foods Co. v. Clemons*, 54 Ala. App. 150, 306 So. 2d 18, 20 (Cir. App. 1975). "The rule is established in this state that the fact that an injured employee resumes work after an injury, but only under the whip of necessity, does not necessarily preclude a finding of total permanent disability." *Consolidated Underwriters v. Whittaker*, 413 S.W.2d 709 (Tex. Civ. App. 1967). When claimant disregards his pain and continues to work due to "hardship and economic necessity" a finding of total and permanent disability should not be precluded. *Liberty Mut. Ins. Co. v. Peoples*, 595 S.W.2d 135 (Tex. Civ. App. 1980).

83. See *Wilson v. Ebasco*, 393 So. 2d 1248 (La. 1981).

84. "Plaintiff was simply not motivated to undertake the activity necessary to lessen the pain." 395 So. 2d 690, 694 (La. 1981) (Lemmon, J., dissenting).

85. 13 Or. App. 298, 509 P.2d 1215 (Ct. App. 1973).

86. *Id.* at 1218. "The fact that claimant was highly motivated and felt optimistic about gaining employment does not render him ineligible for odd-lot status when other

The foregoing statement of the role of motivation in the analysis was clarified and reaffirmed in *Wilson v. Weyerhaeuser Company*,⁸⁷ which stressed that "motivation is *not essential* to the establishment or disproof of a claim of permanent total disability." Motivation is to be given equal weight with all other factors by the fact finder.⁸⁸

Other courts have expressed similar views,⁸⁹ and some have car-

factors indicate that he will be at a disadvantage in competing for a job." *McCoy v. Transport Indem. Co.*, 27 Or. App. 437, 556 P.2d 711 (Ct. App. 1976). Claimant was a sixty-six year old truck driver who sustained a back injury in a work related accident. A vocational rehabilitation counselor had testified that the probabilities for employment were poor, and claimant was found totally and permanently disabled despite his optimism.

87. 30 Or. App. 403, 567 P.2d 567 (Ct. App. 1977). Claimant, 53 years old with an eighth grade education and no special skills, had worked his entire life at jobs involving heavy labor. An injury to his lower back rendered him unable to "place heavy demands on his back." In addition he was unable to sit, stand or drive for prolonged periods, and occasional numbness in his legs made him physically unstable. Claimant sought and was refused employment at several locations, and a vocational rehabilitation counselor concluded that there was no real prospect of retraining him for some other employment.

88. 567 P.2d at 573. The court also stressed that motivation is not the thing to be proved, "[it is] merely evidence of something else. . . . Motivation is only one among many possible circumstances which may be helpful in determining ultimate facts." *Id.* at 572. The relevant ultimate facts regarding motivation are *availability of employment and extent of disability*.

Availability of Employment: Factors such as claimant's unsuccessful attempts to find employment or his refusal to accept "proffered employment for which he or she is fit," *id.*, are to be considered with the "entire mix of evidence" to determine if regular gainful employment exists. *Id.*

Extent of Disability: Less severe emotional status

may reflect and be subject to claimant's exercise of will. As such, the injury is not causal—it merely gives opportunity for expression of common work avoidance desires. These mental states are not pathological, but attitudinal. The claimant's attitude towards return to work, if positive, may be relevant in assessing whether the condition excludes the claimant from the labor market, or if negative, whether the claimant is excluded from employment by his or her own will rather than by that of employers.

Id. at 572-73.

89. In *Findorff v. Pinkerton's, Inc.*, 295 N.W.2d 373, 376 (Minn. 1980), the Supreme Court of Minnesota stated that claimant's lack of attempts to find unskilled light work "may have evidentiary value, but we will not require an employee to seek and be denied employment as a prerequisite to his claim for total disability benefits."

In *Zanchi v. S & K Construction Co.*, 124 N.J. Super. 405, 411, 307 A.2d 138, 141 (1971), the claimant was a sixty year old functional illiterate with little educational training and a work record of only very strenuous unskilled labor. Medical evidence indicated that the heart attack (myocardial infarction) suffered at work rendered him unable to do heavy or strenuous labor again. Although the claimant introduced no evidence that he had tried to find employment, the court stated that such evidence, while "valuable to the petitioner . . . , is not essential where other circumstances indicate that the search for employment would probably be fruitless."

In *Scott v. Southview Chevrolet Co.*, 267 N.W.2d 185 (Minn. 1978), a sixty-five year

ried the analysis further, indicating that motivation should be considered in light of certain psychological considerations. The trauma of constant rejection for employment was considered in *Barbato v. Alsan Masonry & Concrete*,⁹⁰ in which reference was made to two other claimants who had filed 40 and 100 job applications respectively. Moreover, where injuries have resulted in physical deformities, some courts have not subjected claimants to further emotional stress by requiring them to seek employment in order to establish a prima facie case.⁹¹

Other Factors

The odd-lot doctrine gives judges flexibility in deciding permanent total disability cases, and judges should take into consideration any facts peculiar to the case which properly have been brought to their attention. Reference to the mental state of the employee will, at times, prove helpful.⁹² The claimant's lack of English fluency may prove a barrier to finding employment in some cases.⁹³ The

old male employed as a used car attendant suffered a collapsed left lung in the course of his employment. Continuing to suffer from obstructive lung disease, the claimant did not seek post injury employment. The court stated "a disabled employee need not seek or be denied employment as a prerequisite to being found totally disabled. The fact that the claimant has not sought post injury employment goes only to the evidentiary weight of the assertion that he is totally disabled." *Id.* at 186.

90. 64 N.J. 514, 318 A.2d 1 (1973).

91. See A. LARSON, *supra* note 45, at § 57.50. See also *Lightner v. Cohn*, 76 N.J. Super. 461, 184 A.2d 878 (1962) (claimant encountered laughter and disdain at his attempts to find employment with his mangled hand).

92. The psychological ramifications of a particular injury, e.g., one leaving the claimant with an obvious deformity, play a significant part in establishing total disability. *Barbato v. Alsan Masonry & Concrete*, 64 N.J. 514, 318 A.2d 1 (1973).

Mental or emotional condition is often a contributing factor to incapacitation and the severity of the mental condition may affect the extent of disability. Such conditions may range in severity from psychopathological conditions such as chronic depression at one end to self pity, malaise, or loss of ambition on the other. The former class of recognized forms of emotional disturbances are significant elements of the extent of disability in odd-lot cases where they complement the physical injury. If caused by the industrial accident, mental conditions may themselves constitute the injury.

Wilson v. Weyerhaeuser Co., 30 Or. App. 403, 567 P.2d 572, 573 (Ct. App. 1977). "A broken body can cause a broken spirit." *Seaberry v. State Accident Ins. Fund*, 528 P.2d 1103, 1107 (Ct. App. 1974). Claimant, after suffering two back injuries in previous employment, pursued and completed vocational training as a barber. Finding himself unable to stand for long periods because of his back problem, the claimant was forced to give up his work as a barber. The difference between psychopathological and attitudinal breakage is one of degree "which the fact finder must infer from all evidence." 30 Or. App. at 403, 567 P.2d at 573.

93. In *Germain v. Cool-Rite Corp.*, 70 N.J.1, 8, 355 A.2d 642, 646 (N.J. 1976), claimant, a native of Haiti, spoke very little English, and the court stated that "it is com-

claimant's employment experience may be important if his record indicates that he has been unable in the past to secure regular gainful employment.⁹⁴ In general, any facts relevant to the claimant's earning capacity should be considered.⁹⁵

Defenses

After the claimant has established a prima facie case, the defendant employer or his insurer then has the burden of showing that jobs are available within reasonable proximity to the employee's residence which will provide regular and continuous employment to a person in claimant's condition.⁹⁶ In *Turner v. American Mutual Insurance Company*,⁹⁷ for example, the Louisiana Supreme Court remanded the case, stating that "[n]o evidence was introduced . . . that would establish that . . . work was actually available, nor that any employer would hire a person in Turner's condition over healthy competitors."⁹⁸ To impose upon the employer the burden of determining whether regular employment is available for the claimant is not considered unjust because "assuredly, if the labor market offers employment to such a claimant, the normal facilities for the ascertainment of that fact should be more easily available to an employer of labor than an individual employee."⁹⁹

The best evidence the employer could produce would be an offer of employment or a referral to a prospective employer. The former employer's refusal to hire the claimant will carry substantial weight.¹⁰⁰ Evidence that claimant has sought and was refused work

mon sense that his language difficulty would additionally hinder petitioner in obtaining work in a competitive job market."

94. On the other hand, claimant's record of past failures may indicate that he will not be a particularly desirable employee and that his employment experience could aid him in establishing his prima facie case. The trier of fact should make the determination based on the particular facts of each case.

95. At least one other jurisdiction, New Jersey, has taken into account the fact that Second Injury Fund liability was no longer available and as a result would decrease the willingness of employers to hire applicants who had been subject to a previous injury. See *Lewicki v. New Jersey Art Foundry*, 76 N.J. Super. 358, 423 A.2d 645 (1980). Louisiana adopted a Second Injury Fund which entitles an employer to reimbursement for compensation under certain circumstances. See LA. R.S. 23:1378 (Supp. 1975). "The purpose of the Second Injury Fund is to encourage the employment of handicapped persons." *Wilson v. Ebasco Services, Inc.*, 393 So. 2d 1248 (La. 1981).

96. *Oster v. Wetzel Printing, Inc.*, 390 So. 2d 1318 (La. 1980).

97. 390 So. 2d 1330 (La. 1980).

98. *Id.* at 1334.

99. *Lightner v. Cohn*, 76 N.J. Super. 461, 184 A.2d 878 (1962).

100. See *Cohn v. Haile*, 589 S.W.2d 600 (Ark. Ct. App. 1979). The refusal could be for the previous job or for different work. *Leonardo v. Uncas Mfg. Co.*, 77 R.I. 245, 75 A.2d 188 (1950). However, the refusal by the former employer should not be conclusive

elsewhere is also an important consideration.¹⁰¹ Should the former employer offer the claimant a job, on the other hand, the offer must be actual rather than speculative,¹⁰² and the work must be for regular and continuous employment.¹⁰³ Furthermore, the offer of work must be a type which claimant can perform with his handicap.¹⁰⁴

Employers in other jurisdictions have been allowed to satisfy their burden through testimony by medical and employment experts.¹⁰⁵ In the case of conflicting testimony by medical experts, the court should give more credence to the testimony of a physician who has examined the claimant shortly before the trial than to a physician who examined the claimant many months previous.¹⁰⁶ However, the credibility of experts is not unassailable, and it should be remembered that they are offering only opinions, not jobs.¹⁰⁷

A further requirement is that the available job be within

evidence of disability in all circumstances. In some cases the employer simply has no jobs which claimant can perform in his condition. See *Mastrogiovanni's Case*, 332 Mass. 228, 124 N.E.2d 246 (1955) (Claimant contacted dermatitis while working at defendant's plant. Evidence indicated that because of her condition she would be unable to return to work for the defendant, but the condition would not prevent her from working elsewhere).

101. See *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 355 A.2d 642 (1976).

102. See *Ayoub v. Ford Motor Co.*, 101 Mich. App. 740, 300 N.W.2d 508 (Ct. App. 1980) (realistic and definite offer required).

103. Special jobs created grudgingly by the employer will not be sufficient. *Allen v. Department of Labor & Indus.*, 16 Wash. App. 692, 559 P.2d 572 (Ct. App. 1977).

104. Cf. *Beth-Allen Ladder Co. v. Workmen's Compensation Appeal Bd.*, 417 A.2d 854 (Pa. Comm. Ct. 1980) (claimant was discharged from post injury employment because he was unable to do the work). See also *Shaw v. Portland Laundry/Dry Cleaning*, 47 Or. App. 1041, 615 P.2d 1134 (Ct. App. 1980) (claimant denied permanent and total disability compensation when she refused an offer for work she may or may not have been able to do).

105. See *Barbato v. Alsan Masonry & Concrete Co.*, 64 N.J. 514, 318 A.2d 1 (1974). See also *Farley v. Wilamette W. Corp.*, 25 Or. App. 903, 551 P.2d 115 (Ct. App. 1976) (opinion of three experts that claimant could perform limited work precluded an award of permanent total disability).

106. See *Day v. Zenith Paper Stock Rag Co.*, 270 Minn. 420, 134 N.W.2d 4 (1965). However, the testimony of a treating physician who has had "benefit of repeated examinations and sustained observation" is to be given more weight than the opinion of an expert making only a cursory examination prior to trial. *Rodriguez v. American Int'l Ins. Co.*, 394 So. 2d 621, 624 (La. App. 3d Cir. 1981).

107. "The trial judge may accept or reject an opinion expressed by any medical expert depending on how impressed he is with the qualifications, credibility and testimony of the experts." *Rodriguez v. American Int'l Ins. Co.*, 394 So. 2d 621, 624 (La. App. 3d Cir. 1981). An expert's speculative testimony about a job market with which he is unfamiliar has little value. The expert must demonstrate actual availability of jobs to rebut the claimant's prima facie showing. See *Balczewski v. Department of Indus.*, 76 Wis. 2d 487, 251 N.W.2d 794 (1977).

reasonable proximity to the claimant's residence. One commentator has argued that in today's mobile society, requiring a claimant to relocate to find employment is not unreasonable.¹⁰⁸ While our society is transient, the mobility of a disabled claimant is questionable. In addition, requiring a claimant to move to a different area or to a larger city to find work arguably is "contrary to natural human rights."¹⁰⁹ Requiring a claimant to drive long distances might be equally undesirable.¹¹⁰

Other Considerations

No presumption exists that merely because a claimant is physically capable of performing light work, steady employment will be available.¹¹¹ However, an important inquiry in other jurisdictions has been the effect of post injury employment on a claimant's prayer for total disability benefits.¹¹²

According to Professor Larson, total disability judgments should be influenced by "the duration and presumed permanence" of the new job, especially if a conclusion that claimant has found steady employment would be justified.¹¹³ Clearly, the jurisprudence requires the employer to be ready to rebut the presumption established by the claimant's odd-lot status.¹¹⁴ If the job lacks permanence and fac-

108. See Juge, *The Odd-Lot Doctrine*, 27 LOY. L. REV. 69 (1981).

109. *McMannis v. Mad-Ray Modular, Inc.*, 289 So. 2d 715, 717 (Fla. 1974).

110. Claimant may be unable to travel long distances in his condition. See *Celestine v. Henry Indust., Inc.*, 394 So. 2d 1260 (La. App. 1st Cir. 1981).

111. In *Petrone v. Moffat Coal Co.*, 427 Pa. 5, 233 A.2d 891 (1967), the claimant was a forty-six year old coal miner stricken with anthracosilicosis after thirty-three years of work in the mines. Defendant's contention that claimant could still perform work of a general nature could not guarantee that such light work would be available to a worker with claimant's physical disability, limited education, and vocational background. The law will not support a presumption that such light work will be available; the defendant must prove its existence. 427 Pa. at 5, 233 A.2d at 891.

112. Simply because an employee has failed to find work does not establish conclusively that he cannot earn a livelihood in work of a reasonable character. On the other hand, "a showing that after the accident the worker was in fact employed for a while in another capacity does not establish per se that his disability is not total." W. MALONE & A. JOHNSON, *supra* note 2, at § 276, at 624.

113. See A. LARSON, *supra* note 45, at § 57.60.

114. See *Port Everglades Terminal Co., Inc. v. Canty*, 120 So. 2d 596 (Fla. 1960) (a claimant physically capable of performing light work which is available is not totally and permanently disabled); *Pulley v. Detroit Eng'r & Mach. Co.*, 378 Mich. 418, 145 N.W.2d 40 (1966) (claimant, formerly a common laborer, left a steady, higher paying clerical job of his own volition and was denied compensation for total disability); cf. *Tretton v. Attwood Crawford Co.*, 202 A.2d 286 (R.I. 1964) (after his injury claimant did return to his former employment and earned wages in excess of those he had earned prior to his injury. When a successor employer informed him of an intention to reduce

tors indicate that claimant will have trouble competing in the labor market, that job should have little effect in evaluating the extent of the disability.¹¹⁵

An additional consideration in other jurisdictions is the matter of supplemental income for claimants.¹¹⁶ The question is whether the existence of such income should be considered by courts in determining the claimant's entitlement to odd-lot status. The jurisprudence indicates that the answer is clearly in the negative. While a claimant receiving income from other sources may be less needy than his less fortunate counterpart, the issue is whether the claimant can sell his services to the competitive job market. There is no guarantee that income from these sources will be available indefinitely. Some day the claimant may be thrust into a labor market in which he can no longer compete.

Even if supplemental income were guaranteed to cover every expense the claimant ever would incur, the fact remains that the claimant has been rendered incapable of competing in the labor market and will forever lose the possible fruits of his labor. One of

his pay, claimant quit the job and was unable to find regular employment. The court denied claimant compensation for loss of earning capacity).

However, at least one court has allowed recovery for total and permanent disability to a claimant who was attempting to rehabilitate himself and to do "some light work to aid in his support and maintenance," especially where the "hours worked and wages received were negligible when compared to pre-injury figures." *Elliot v. Gooch Feed Mill Co.*, 147 Neb. 612, 24 N.W.2d 561 (1946). In addition, the ability to perform limited services, even though steadily, in one's own or family enterprise may not of itself be sufficient to negate industrial unemployability. See *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 355 A.2d 642 (1976).

115. Claimant, formerly a journeyman boilermaker, was unable to perform the heavy tasks required for that job. He had been employed as a boilermaker foreman, a job requiring only light tasks, for five months at the time of the trial. The temporary employment, even though it had lasted five months, was to be considered with other relevant factors in determining the impairment of future earning capacity. *Shroyer v. Industrial Comm'n*, 98 Ariz. 388, 405 P.2d 875 (1965).

Another issue is whether finding a job because of the claimant's relationship with the employer should preclude a finding of total and permanent disability. In *Stebbins v. Dodge County Service Co.*, 309 Minn. 563, 564, 244 N.W.2d 55, 55 (1976), the court held that such a job should not preclude a finding of disability, stating that "the employee should not be penalized for this effort to create a work situation that would not be available in the regular competitive job market."

116. Income from a business owned by claimant should not be used to reduce disability unless the income results "almost entirely from personal management and endeavor." *Connolly v. Workmen's Compensation Appeal Board*, 301 A.2d 109, 112 (Pa. Comm. Ct. 1973). Furthermore, a return from investments should not have the legal effect of negating unemployability. *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 355 A.2d 642 (1976). Receipt of social security benefits by claimant, however, "does not necessarily mean that he has withdrawn from the labor market, nor does it mean that claimant no longer has earning capacity." *McQuade v. Vahlsing, Inc.*, 377 A.2d 469 (Me. 1977).

the underlying reasons for granting compensation is to prevent the claimant from becoming a burden on society. This reason for compensation does not exist in a situation in which the claimant is guaranteed a supplemental income sufficient to cover living expenses. However, the claimant has suffered greatly from an industrial accident, and someone should pay for the loss. If the accident is covered by compensation, no other remedy against the employer will exist.¹¹⁷ Therefore, the claimant, having possibly no other remedy, should be allowed to seek compensation; and if he can no longer compete in the labor market, the supplemental income should not effect the claimant's attempt to establish his prima facie case.

For many of the same reasons mentioned above, the possibility of recovery of damages from a third party¹¹⁸ should not play a part in evaluating total and permanent disability. In addition, the legislature has provided a scheme for the apportionment of damages recovered in such suits,¹¹⁹ and the claimant will benefit only if the award of damages exceeds the total amount of the compensation awarded.¹²⁰ Therefore, the claimant will not be reaping a double recovery unless his employer fails to intervene in the suit.¹²¹ Any relation such a possible recovery could have on the ability of the claimant to compete in the labor market is too speculative and tenuous to warrant consideration.

Another consideration is whether the determination of the claimant's ability to compete in the labor market should be influenced by his filing for unemployment compensation. This question was examined in *Jackson v. New Orleans Public Service, Inc.*,¹²² in which the claimant had filed for unemployment compensation, asserting that he was physically able to work. Although claimant's stated belief that he was able to work in his application for unemployment compensation and his prayer for total disability benefits in compensation appear to be contradictory positions, the *Jackson* court reached

117. See LA. R.S. 23:1032 (Supp. 1976); see also W. PROSSER, THE LAW OF TORTS 531 (1972). But see LA. R.S. 23:1101 (Supp. 1976).

118. See LA. R.S. 23:1101 (Supp. 1976). Claimant's compensation remedy against his employer will not "impair existing claims against third persons." 2 W. MALONE & A. JOHNSON. *supra* note 2, at 180.

119. See LA. R.S. 23:1101-1103 (Supp. 1976). See also LA. R.S. 23:1032 (Supp. 1976).

120. See LA. R.S. 23:1101 (Supp. 1976).

121. 1 W. MALONE & A. JOHNSON, *supra* note 2, at § 369, at 182. If the employer fails to intervene in the suit, he loses his claim to reimbursement of compensation already paid to the claimant. Since lump sum payments are quite common, the loss to the employer is potentially large. However, as the employer must be given notice of the suit, LA. R.S. 23:1102 (1950), such a result does not seem unjust.

122. 386 So. 2d 1049 (La. App. 4th Cir. 1980).

a correct solution.¹²³ The court stated that the application "must be considered with all other evidence, but it does not in itself preclude plaintiff from recovering benefits at the time he was applying for unemployment compensation benefits."¹²⁴ A claimant's belief that he is able to perform some work does not mean necessarily that someone will give him a job.

Procedure

Other jurisdictions have tried to impose a procedural framework within which odd-lot cases are to be litigated.¹²⁵ Louisiana courts should adopt some orderly procedure, and the model below is suggested.¹²⁶ In order to put the defense on notice that odd-lot status will be sought, the claimant should be required to state in his pretrial memorandum that he intends to utilize the doctrine. At the close of the claimant's case, the employer or his insurer could ask the judge to make a determination of whether a prima facie case has been established. If the judge rules affirmatively, the employer or his insurer must attempt to rebut the prima facie showing by presenting his own evidence of claimant's earning capacity or of job availability. Should the employer or his insurer fail to present such evidence, a finding of total and permanent disability is in order.

123. Recovery of compensation from both systems for the same period of time is prevented by law. See LA. R.S. 23:1601(7)(b) (Supp. 1978). See, also *Harris v. Woodcrest Mobile Homes*, 359 So. 2d 243 (La. App. 2d Cir. 1978).

124. *Id.* at 1050.

125. For a discussion of the New Jersey system, see *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 8, 355 A.2d 642, 647 (1976). See also *Bradley v. Henry Townsend Moving & Storage Co.*, 78 N.J. 532, 397 A.2d 323, 324 (1979).

126. Some similarities exist between the proposed system and the New Jersey system. The actual burden the claimant must carry in establishing his prima facie case is unclear. One New Jersey court has held that if the claimant has presented his prima facie case and the employer offers no proof of employment availability, the claimant may be found to have failed to satisfy his ultimate burden—proof by a preponderance of the evidence. *Bradley v. Henry Townsend Moving & Storage Co.*, 78 N.J. 532, 534, 397 A.2d 323, 324 (1979). This holding implies that the prima facie case can be established in that jurisdiction by less than a preponderance of the evidence.

The position taken by the New Jersey court should not be followed in Louisiana. Requiring the claimant to demonstrate his prima facie case by a preponderance of the evidence is a more desirable approach. As claims are not tried before a jury, the prima facie showing is not designed, as in the case of *res ipsa loquitur*, as an evidentiary aid to help the claimant escape a directed verdict. A lesser burden would be more consistent with the doctrine because it would allow more claimants the benefit of having their past employers aid in finding work, but the lesser burden would be very dangerous in light of the potentially large awards. Furthermore, the claimant's ultimate burden is proof by a preponderance of the evidence, and a lesser burden to establish the prima facie case may prove to be of little aid in carrying the ultimate burden.

Otherwise, the claimant must establish his claim for total and permanent disability by a preponderance of the evidence.

By the very nature of the odd-lot doctrine, burdens of proof can often best be carried with the introduction of expert testimony.¹²⁷ The expertise of vocational experts can be utilized to demonstrate to the court the availability of jobs. The use of such specialists has presented a discovery problem in applying the doctrine,¹²⁸ in that no provision exists in either the Act or in the Louisiana Code of Civil Procedure which would provide for the testing of the claimant by an employment expert. Although the court can appoint an expert at trial to aid in deciding the case,¹²⁹ the efficient administration of justice would be facilitated if a provision allowed the claimant to be examined by a vocational expert in advance of the trial. The interests of justice would be served if the employer were allowed to have the claimant examined by his own expert to prepare his defense. The claimant already is required to submit to a physical examination;¹³⁰ an evaluation by a vocational expert would be no greater intrusion upon his privacy.

One writer has expressed concern that the application of the odd-lot doctrine in Louisiana, because of our "vast pool of citizens of little education and limited training," will have a marked effect on Louisiana's already high weekly compensation rate, as "these individuals are the most difficult group of workers to place in jobs."¹³¹ Although insurance premiums may indeed rise, such an increase may not be justified. Compensation insurance rates for each industry are based upon the possible wage loss of employees in the industry, the safety record of the industry, and the compensation act in that jurisdiction. One of the reasons Louisiana ranked among the leaders in the amount of insurance premiums paid in the past was the *Knispel* formula,¹³² which was designed by the Louisiana courts to make up for the shortcomings of the statute.¹³³ That formula, by encouraging nuisance claims which were largely settled by compromise, had the effect of "frittering away the pool of funds."¹³⁴ But with the demise of the formula, the class of individuals who had benefited previously from the rule will no longer have a claim for

127. See *Bradley v. Henry Townsend Moving & Storage Co.*, 78 N.J. 532, 533, 397 A.2d 323, 324 (1979).

128. See *Juge*, *supra* note 108 at 69.

129. See LA. CODE CIV. P. art. 192.

130. See LA. R.S. 23:1121 (1950).

131. *Juge*, *supra* note 108, at 184.

132. *Malone*, *supra* note 3, at 506.

133. *Id.* at 508.

134. *Id.* at 507.

total disability benefits. Therefore, the overruling of the *Knispel* formula need not have the effect of increasing premiums.

The argument also could be raised that the potentially higher awards of the new Act will cause premiums to rise. Although compensation is payable for the duration of the disability, the persons most likely to fall into the odd-lot category will be those advanced in age.¹³⁵ Although their work-life expectancy may be greater than the previously imposed limit on the number of weeks in which compensation was payable, in most instances the increase will not be very great. One of the purposes of the odd-lot doctrine is to aid the injured employee in finding a job. The number of those who eventually will be entitled to benefit for total and permanent disability may be reduced by the number who have found employment through application of the odd-lot doctrine. Therefore, the impact of the elimination of the number of weeks compensation is payable will not be as great as one might expect initially if the odd-lot doctrine is applied.

Younger employees occasionally may qualify for odd-lot status and conceivably could receive huge benefits; that result might force premiums to rise. However, if a younger employee should be faced with the prospect of going through life totally unemployable due to a work related injury, the only socially acceptable remedy is to grant him a judgment for compensation, thus permitting him to support himself for the rest of his life and removing the potential burden on society. The cost should be borne by the enterprise as a cost of doing business and passed on to the consumer,¹³⁶ even if the net effect is to increase premiums. Dealing with the genuinely disabled employee is the primary reason for the existence of the Compensation Act.

One might also argue that the odd-lot doctrine is unacceptable because the employer should not be held accountable for disability which results, in part, from many factors which are beyond his control. While total disability often will result from a combination of factors under the odd-lot doctrine, the fact remains that claimant's total disability was triggered by his work-related accident. The employer is undoubtedly in the best position to distribute the loss. Furthermore, the reasons supporting compensation when the claimant's injury was the sole cause in rendering him totally incapacitated apply equally to situations in which a combination of factors render the claimant unemployable.

135. Johnson, *supra* note 6, at 892.

136. "The cost of the product should bear the blood of the workman." W. PROSSER, *supra* note 117, at 530.

Even if the net effect of applying the odd-lot doctrine in Louisiana should be an increase in premiums, more important factors are involved than the limited education and training of the workers to which the increase can be attributed. Some of the most dangerous industries in the country are found in Louisiana, and these same industries have high wage rates. Clearly, many of Louisiana's workers encounter a high risk of great danger, and to attribute an increase in insurance premiums solely to the lack of education and training of the people involved is to address merely a part of the problem.

Conclusion

The primary concern addressed in a compensation statute is, and should remain, the plight of the injured worker. Courts should

[a]pproach the task of evaluating a worker's disability with an appreciation of the uncertainties involved and . . . be inclined to so shape their definition of disability as to lessen somewhat the chance that the worker will suffer thereafter because of the uncertainty of medical estimates or from any unpredictable changes in the economy or from the caprices of human nature. This is best demonstrated . . . by the . . . "Odd Lots" doctrine.¹³⁷

The above passage exemplifies the importance of assessing the plight of *each* claimant in evaluating disability. In addition, the potential for large awards militates against making total disability awards indiscriminately.¹³⁸ The odd-lot doctrine, with its emphasis on the plight of each claimant, should prove an acceptable principle for evaluating disability.

Calvin P. Brasseaux

137. Malone, *supra* note 3, at 504.

138. W. MALONE & A. JOHNSON, *supra* note 2, at § 276, at 626.

