Louisiana Law Review

Volume 17 | Number 4
June 1957

Workmen's Compensation - Award to a Wage-Earning Working Partner

Joseph G. Hebert

WORKMEN'S COMPENSATION — AWARD TO A WAGE-EARNING WORKING PARTNER

Plaintiff, a wage-earning working partner, received a small portion of the partnership profits as remuneration in addition to his wages. While in the course of his employment as manager of the firm's bottling plant, he was injured. Plaintiff then brought suit directly against the insurer of the partnership for compensation. The district court dismissed the case, sustaining defendant's exception of no cause of action, and the First Circuit Court of Appeal reversed and remanded.[1] Because of the conflict between the ruling of the First Circuit and prior decisions in the Second Circuit on the same issue, the Supreme Court granted certiorari. *Held*, affirmed. In Louisiana a partnership is an abstract, ideal being with legal relations separate and distinct from those of its individual members. To construe the Workmen's Compensation Act so as to exclude from its provisions a working member of a partnership would be an exceedingly narrow construction of the act and directly contrary to its spirit. *Trappey v. Lumbermen's Mut. Cas. Co.*, 229 La. 632, 86 So.2d 515 (1956).

Workmen's compensation legislation[2] seeks to allocate better the inevitable accident costs of industrialization and relieve the worker from the full burden. Generally, the worker and not the enterpriser is the primary object of protection.[3] Nevertheless, where the two personalities are in some way combined, coverage has been extended, as in the case of a corporate stockholder employed by the corporation.[4] Similarly, in Louisiana the independent contractor, an enterpriser, has been granted compensa-

1. Trappey v. Lumbermen's Mut. Cas. Co., 77 So.2d 183 (La. App. 1954).

2. Brownfield v. Southern Amusement Co., 198 So. 670, 673 (La. App. 1940): "The Compensation Law is a separate and distinct law from any other or branch of law and is governed solely by the provisions of the act creating it." See also Puchner v. Employer's Liability Assur. Corp., 198 La. 921, 5 So.2d 288 (1941) (the common law forms of action are inapplicable to the compensation act); Scott v. Caddo Parish School Bd., 6 So.2d 806 (La. App. 1942) (the Code articles do not apply to the compensation act); Kroncke v. Caddo Parish School Bd., 183 So. 86 (La. App. 1938) (compensation actions are not tort cases).

3. See generally MALONE, LOUISIANA WORKMEN'S COMPENSATION c. 4 (1951).

4. Franz v. Sun Indemnity Co., 7 So.2d 636 (La. App. 1942) (president of corporation was also director of the funeral home); Staples v. Henderson Jersey Farms, 181 So. 48 (La. App. 1938) (deceased owned one share of the corporate stock); Hodges v. Home Mort. Co., 201 N.C. 701, 706, 161 S.E. 220, 223 (1931) ("[O]ne of the fundamental tests of the right to compensation is not the title of the injured person, but the nature and quality of the act he is performing." The application of the "dual capacity doctrine" extends compensation coverage to an enterpriser in a very limited manner by allowing an award to one doing labor generally performed by regular workmen or employees.).

tion coverage where he performs manual labor.[5] However, the statutory amendment extending coverage to independent contractors was by no means intended to include all enterprisers.[6] The failure to note the distinction between the enterpriser and the workman has engendered varying conclusions as to the coverage of partners. The weight of authority as to the status of a member of a general partnership[7] within similar compensation statutes is clearly contrary to the instant decision.[8] Prior to this decision, Oklahoma was the only jurisdiction allowing recovery in the absence of special statutory provisions.[9] A great deal of the litigation over this issue is disposed of on the basis of theories of partnership,[10] either as an aggregation of mem-

With the latter compare Mr. Warren's comment: "The language of the act

5. La. Acts 1948, No. 179, § 8, p. 490, incorporated in LA. R.S. 23:1021 (1950).

6. To allow the enterpriser to recover under the compensation act would be to allow a system of self insurance where none was intended. The recent amendment of the act permitting the application of its provisions to independent contractors seems to have been intended only to broaden the classes of workers covered and not to include *any* enterpriser in coverage. See MALONE, LOUISIANA WORKMEN'S COMPENSATION 446 (1951). It should be noted that the act including the independent contractor is constructed around the words "manual labor." La. Acts 1948, No. 179, § 8, p. 490, incorporated in LA. R.S. 23:1021 (1950).

7. *But see* Albertini v. Lease, 54 Idaho 30, 28 P.2d 205 (1933) (partner allowed compensation award on finding that under special law a mining partnership was an entity); Carle v. Carle Tool & Engineering Co., 36 N.J. Super. 36, 114 A.2d 738 (1955) (compensation allowed to partner on the finding that a limited partnership was an entity).

8. There is extensive reasoning of the problem in two first impression cases: Penderson v. Penderson, 229 Minn. 460, 39 N.W.2d 893 (1949) and Chambers v. Macon Grocery Co., 334 Mo. 1215, 70 S.W.2d 884 (1934). For further cases to the same effect see Brinkley Heavy Hauling Co. v. Youngman, 223 Ark. 74, 264 S.W.2d 409 (1954); United States Fidelity & Guaranty Co. v. Neal, 188 Ga. 105, 3 S.E.2d 80 (1939); *In re* Montgomery & Son, 91 Ind. App. 21, 169 N.E. 879 (1930); Wallins Creek Lumber Co. v. Blanton, 228 Ky. 649, 15 S.W.2d 465 (1929); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Lyle v. H. R. Lyle Cider & Vinegar Co., 243 N.Y. 257, 153 N.E. 67 (1926). See also HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 198 (1944); 1 SCHNEIDER, WORKMEN'S COMPENSATION § 222(a) (1941). A somewhat different situation was interestingly presented in Keegan v. Keegan, 194 Minn. 261, 260 N.W. 318 (1935), where the plaintiff was allowed to receive a compensation award from the partnership of which she was a member for the death of her husband, an employee of the partnership upon the finding of the court that the partnership was an entity. But thereafter in Penderson v. Penderson, 229 Minn. 460, 39 N.W.2d 893 (1949), when direct recovery was sought by a partner from his firm it was refused upon the conclusion that a partnership is not always an entity.

9. Ohio Drilling Co. v. State Industrial Comm'n, 86 Okla. 139, 207 Pac. 314 (1922). See also Knox & Schouse v. Knox, 120 Okla. 45, 250 Pac. 783 (1925); Ardmore Paint & Oil Products Co. v. State Industrial Comm'n, 109 Okla. 81, 234 Pac. 582 (1955). This line of cases is criticized thoroughly in Chamber v. Macon Wholesale Grocery, 334 Mo. 1215, 70 S.W.2d 884 (1934) and United States Fidelity & Guaranty Co. v. Neal, 188 Ga. 105, 3 S.E.2d 80 (1939), and cited with disapproval in many other cases.

10. For an examination of both theories and how they are used see the articles concerning the Uniform Partnerships Act, see Crane, *The Uniform Partnership Act — A Criticism*, 28 HARV. L. REV. 762 (1915); and Lewis, *The Uniform Partnership Act — A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158 (1916).

bers or a separate and distinct entity. Other courts have adjudicated similar claims on the presence or absence of an employer-employee relationship without mention of partnership theories.[11] A few courts apparently see no incompatibility in recognizing a partnership as an entity and denying compensation to a claimant partner.[12] The use of such conceptual reasoning as a basis for decision has been criticized in that the inherent nature of an organization should not completely replace considerations of merit and policy.[13] To alleviate the results of this course of judicial reasoning, several states[14] have provided for awards to a partner by specific statutory amendment. These provisions are generally based upon some requirement that a partner be a wage-earner in order to justify his claim.[15] In some instances coverage by statute is extended to a partner where he gives special notice to the insurer or commission that he elects to be covered.[16]

Although Louisiana courts[17] have consistently followed the entity theory in other areas of partnership affairs,[18] prior deci-

---

[U.P.A.] reminds us of the language of some political platforms. There is some language which will please those who approve the aggregate theory. There is other language which will please those that approve the entity theory." WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 300 (1929).

11. *In re* Montgomery & Son, 91 Ind. App. 21, 169 N.E. 879 (1930); Wallins Creek Lumber Co. v. Blanton, 228 Ky. 649, 15 S.W.2d 465 (1929); Lyle v. R. H. Lyle Cider & Vinegar Co., 243 N.Y. 257, 153 N.E. 67 (1926); LeClear v. Smith, 207 App. Div. 71, 202 N.Y. Supp. 514 (3d Dep't 1923).

12. United States Fidelity & Guaranty Co. v. Neal, 188 Ga. 105, 3 S.E.2d 80 (1939); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); LeClear v. Smith, 207 App. Div. 71, 202 N.Y. Supp. 514 (3d Dep't 1923).

13. Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943). See also O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LOUISIANA LAW REVIEW 307, 470 (1949): "The use of the entity or aggregate conception is not helpful in interpreting statutes or contracts . . . . Unwary courts often carry deductions from a particular theory over into areas where such deductions properly have no application."

14. California, Michigan, Nevada, and Utah. See note 30 *infra*.

15. See note 31 *infra*.

16. Miss. Laws 1950, c. 412, § 34, p. 507 (election of partner to be covered evidenced by signing policy; see American Surety Co. v. Cooper, 222 Miss. 429, 76 So.2d 254 (1954)); 4 UTAH CODE ANN. § 35-1-43(4) (Supp. 1951) (notice to commission required); WASH. REV. STAT. § 7675 (Remington Supp. 1949) (see Johnson v. Department of Labor and Industries, 33 Wash.2d 399, 205 P.2d 896 (1949) (partner paid salary or wage is covered by compensation as employee if notice is given to the director of labor and industries)).

17. Five states presently maintain a court method of settlement of workmen's compensation claims: Alabama, Louisiana, New Mexico, Tennessee, and Wyoming. Louisiana's use of the courts to adjudicate the claims has been criticized as being inefficient. Vonau, *Administration of Workmen's Compensation Cases in Louisiana*, 7 TUL. L. REV. 217 (1933).

18. The first case apparently incorporating the fiction is Dick v. Byrne, 7 Rob. 465 (La. 1844), citing Blanchard v. Cole, 8 La. 153 (1835), which had adopted the concept of Toullier. See O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LOUISIANA LAW REVIEW 307, 470 (1949). See also Brinson v. Monroe Auto. Sup. Co., 180 La. 1964, 158 So. 558 (1935); Succession of Pilcher, 39 La.

sions on this question[19] have followed the prevalent common law reasoning based on the aggregate theory,[20] thus denying recovery.

Although the court of appeal[21] cited an array of authority pertaining to the inherent nature of a partnership as an entity,[22] it appears that its decision may have been influenced by the basic policy considerations of the compensation statute.[23] The Supreme Court's opinion in the instant case brings out this latter element more fully, and it would seem that the decision is explained better in terms of policy than by the entity concept. The purpose of the entity fiction is summed up in the statement that it is "not a premise to reason from, but merely a shorthand state-

---

Ann. 362, 1 So. 929 (1887); Pittman & Barrow v. Robicheaux, 14 La. Ann. 108 (1859). *But see* Drews v. Williams, 50 La. Ann. 579, 583, 23 So. 897, 899 (1898) ("We are not of opinion that always, and in every case, the firm is a legal entity, separate and distinct from its members); Davenport v. William Adler & Co., 129 So. 382 (La. App. 1899).

The commercial code was to have carried the articles applicable to the commercial partnership. LA. CIVIL CODE art. 2823 (1825): "The particular rules, by which commercial partnerships are governed, will be found in the Commercial Code . . . ." *Cf.* LA. CIVIL CODE art. 2852 (1870). The failure of the adoption of this code has caused difficulties concerning litigation relating to the commercial partnership. On this general problem see Morrison, *The Need for a Revision of the Civil Code*, 11 TUL. L. REV. 213 (1937). See also Kimbal v. Blanc, 8 Mart. (N.S.) 386 (La. 1829); O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LOUISIANA LAW REVIEW 307, 453, 494 (1949).

19. Shows v. Employer's Lumber Co., 77 So.2d 72 (La. App. 1955); Harper v. Ragus, 62 So.2d 167 (La. App. 1952); Wall v. Aldrich, 50 So.2d 680 (La. App. 1951); Dezendorf v. National Cas. Co., 171 So. 160 (La. App. 1936). The case of Savant v. Goetz & Lawrence, 160 La. 916, 107 So. 621 (1926), though often cited for this point, does not seem pertinent. There there were two partnerships and the Supreme Court refused to set and allow an award because the parties had contracted on a percentage basis and there had been no profits as yet. The court felt that to set an award under such circumstances would require the assumption of some amount which would constitute making a contract between the parties in violation of Article 1963 of the Code, since no remuneration of a specific amount had been agreed upon or earned. Note the language of the appellate court quoted in the opinion: "We cannot fix wages under the law on the subject of compensation . . . when there is no way *under the evidence* whereby we can compute same *by analogy or otherwise.*" (Emphasis added.)

See O'Neal, *An Appraisal of the Louisiana Law of Partnership*, 9 LOUISIANA LAW REVIEW 307, 467 (1949), where the author accurately predicted the instant decision when the entity fiction would be extended logically.

20. 1 BATES, LAW OF PARTNERSHIP 172 (1888); CRANE, HANDBOOK ON PARTNERSHIP 9 (1952); 1 ROWLEY, MODERN LAW OF PARTNERSHIPS 118 (1916); TELLER, PARTNERSHIPS 6 (1949).

21. Trappey v. Lumbermen's Mut. Cas. Co., 77 So.2d 183 (La. App. 1954).

22. For the civilian concept see generally Crane, *The Uniform Partnership Act — A Criticism*, 28 HARV. L. REV. 762, 764 (1915); 1 ROWLEY, MODERN LAW OF PARTNERSHIPS 127 (1916).

23. See MALONE, LOUISIANA WORKMEN'S COMPENSATION 36 (1951), in which the author discusses the "compromise character" of workmen's compensation. See also Malone, *Workmen's Compensation*, 12 LOUISIANA LAW REVIEW 150, n. 3 (1952); Puchner v. Employer's Liability Assur. Corp., 198 La. 921, 5 So.2d 288 (1941); Kroncke v. Caddo Parish School Bd., 183 So. 86 (La. App. 1938).

ment of a conclusion."[24] The presence of an insurer in the instant case is another highly significant factor. It is notable that the court of appeal[25] stated that the entity theory allowed plaintiff a cause of action even though the right to exercise it against the partnership might be barred by special law. The appellate court went on to state that any defense of the partnership was personal to it and that plaintiff had a right of action against the partnership's insurer. The opinion of the Supreme Court held that the appellate court had correctly concluded that the plaintiff stated a right of action against defendant's insurer. This device is one which Louisiana courts have used previously in allocating risks. For example, the defense of coverture has been regarded as personal to a spouse and unavailable in a suit brought against that spouse's insurer by the other spouse.[26] Further, the defense of municipal immunity from tort liability[27] has been held to be personal to a municipality and not available to a municipality's liability insurer. To what extent the Supreme Court actually intended to endorse this theory as expressed by the court of appeal is not entirely clear. After indicating the correctness of the appellate decision, the Supreme Court continues in general terms, as if to create the impression that a working partner should be entitled to recover regardless of whether the suit be brought against an insurer or the partnership directly. It is certain that the instant case represents the proposition that a wage-earning partner injured in the course of his employment has a right to assert his cause of action directly against the partnership's compensation insurer. Whether this holding will be extended is problematical. However, the present amplification appears to be consonant with the underlying employee-weighted[28] factors of the compensation law of Louisiana.

It is believed that the instant case should be supported in its strictist holding that a wage-earning working partner can recover compensation from the partnership's insurer. An extension of this case to an uninsured partnership[29] or to a non-wage-

24. Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943).

25. Trappey v. Lumbermen's Mut. Cas. Co., 77 So.2d 183, 188 (La. App. 1954).

26. Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935); McDowell v. National Sur. Corp., 68 So.2d 189 (La. App. 1953).

27. Rome v. London & Lancashire Indemnity Co., 169 So. 132 (La. App. 1936).

28. See note 23 *supra*.

29. It should be noted that in Louisiana's two prior cases squarely in point there was an insurer who was made a party defendant but recovery was denied. Shows v. Employers Lumber Co., 77 So.2d 72 (La. App. 1955); Dezendorf v. National Cas. Co., 171 So. 160 (La. App. 1936).

earning partner should be avoided. Restriction of the award to wage-earning partners is supported by most of the statutes[30] of those states allowing recovery by a partner, since the award is generally based upon wages[31] rather than enterprising profits. Wages should here be understood to mean that remuneration which a partner receives for his labors as a worker and not that received as an enterpriser since compensation for the latter is not properly within contemplation of the act. There is little reason, however, to deny an award for the former simply because some enterprising profits are also received by the claimant. In such a situation, although a partner's enterprising profits may continue, his wage payments cease, and for these he should be compensated.

Joseph G. Hebert

30. CALIF. LABOR CODE ANN. § 3359 (1943) ("wages irrespective of profits"); 12 MICH. STAT. ANN. § 17:147 (1951) (same); Nev. Laws 1947, c. 168, § 10(d), p. 570 (same). See note 16 *supra* for other instances of statutory recovery by a partner.

31. *But see* Kramer v. Charlevoix Beach Hotel, 342 Mich. 715, 71 N.W.2d 226 (1955), where on the basis of the interpretation of the Michigan statute and on the finding that a prior agreement for premiums had been settled, the court permitted a husband of a husband-wife partnership to recover compensation awards although he was not receiving wages.