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Workmen's Compensation

*Wex S. Malone**

The case *Vinzant v. L. L. Brewton Pulpwood Co.*¹ centered around a factual dispute as to whether claimant, who for a period of four or five years previously had been employed as a hauler by defendant, was, in fact, an employee of the latter at the time of his injury. The decision is of interest because of the following observation by Justice Viosca:

“Where one is employed by another over a period of time to do certain work, he has a right to presume that the same relationship continues when he does additional work of the same character, unless it is made clear to him that there will be a new relationship.”²

Computation of Compensation — Death Benefits

Recently, in *Farley v. Ryan Stevedoring Co.*,³ the Supreme Court, relying on well-established Louisiana rules governing the computation of compensation and dependency benefits, reached a conclusion regarding the amount of a death award that might be regarded as surprising by any reader who is not familiar with our jurisprudence. A worker, separated from his wife to whom he paid only \$15 weekly, was killed in the course of his employment. During the year preceding his death he had received net earnings of only \$1,650 (an average of about \$32 weekly). Yet his widow received a weekly award of \$35, which was more than the deceased's total earnings and considerably more than twice the amount that she was receiving from her husband prior to his death. Nevertheless, the decision is entirely correct under established Louisiana law. With reference to deceased's small earnings, the court followed the well-settled principle that compensation is based upon *earning capacity*, rather than actual earnings.⁴ Here, deceased was a stevedore

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1. 239 La. 95, 118 So.2d 117 (1960).

2. *Id.* at 103, 118 So.2d at 120. Cf. *Banks v. Kent Piling Co.*, 87 So.2d 138 (La. App. 1st Cir. 1956). For other cases involving similar fact disputes, see MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 54, n. 16 (1951).

3. 238 La. 1048, 117 So.2d 587 (1960).

4. *Rylander v. T. Smith & Son, Inc.*, 177 La. 716, 149 So. 434 (1933); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 323 (1951).

who, when he worked, was able to get \$2.50 per hour. Thus his earning capacity was \$120 weekly (hourly wage multiplied by 48, the number of hours in a full work week), and this served as the basis for compensation. Secondly, although it is necessary for a dependent to show that contributions were made by deceased for her support prior to his death, yet, once dependency is established, the remaining crucial question is whether the dependency is total or partial. Total dependency exists if the claimant has no appreciable source of support apart from the contributions of the deceased, irrespective of how little the contribution may have been.⁵ In the instant case Mrs. Farley succeeded in establishing to the satisfaction of the Supreme Court that such was her situation, and she was therefore entitled to 32½% of \$120, or \$39 which, under the overall limitation, was reduced to \$35 weekly.

Disability — Modification of Award

Louisiana Revised Statutes 23:1331, providing for modification of a compensation award on the ground that the incapacity of the worker has been subsequently increased or decreased, is not infrequently invoked by employers. However, as pointed out in the recent decision *Belsome v. Southern Stevedoring, Inc.*,⁶ a bare showing that the employee has been able to secure similar work since the rendition of the judgment is not enough to justify a modification. This is sound, and it is consonant with the court definition of total disability, since such a showing alone does not indicate that the claimant can work without pain and suffering or that he can perform substantially all the operations required of his job, or even that he could retain his position in the face of able-bodied competition. In either of these events he would still be entitled to compensation for total disability.

5. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 307 (1951).

6. 239 La. 413, 118 So.2d 458 (1960).