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Wex S. Malone

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WORKMEN'S COMPENSATION

*Wes S. Malone**

Although the Louisiana appellate courts handed down more than a hundred decisions on workmen's compensation during the past term, most of these either were resolutions of factual disputes or involved only reiterations of familiar rules and principles. This reviewer was unable to locate more than a dozen decisions whose novelty or contribution to the compensation law of Louisiana justifies any extended comment.

THE EMPLOYMENT RELATIONSHIP

An inmate of a penitentiary is not regarded as an employee entitled to compensation. This is true in the absence of a special provision in the compensation statute, even though the prisoner is paid an incentive remuneration for the work performed and the work is of financial value to the state. This accepted position was adopted by the court of appeal in *Jones v. Houston Fire & Casualty Ins. Co.*¹ In view of the statutory requirement of a contract of hire, the conclusion reached is not subject to criticism. Nevertheless this is an area that is in need of thoughtful legislative attention. The penal laws contemplate that most prisoners will eventually be released, and the social need for compensation here is as great as in the case of the employee who was injured while working under a voluntarily executed contract of hire. In several states there are appropriate provisions for the injured or killed prisoner.²

Situations in which it becomes necessary to distinguish between the employee and the independent contractor have become comparatively rare since the 1948 amendment to the act which abrogates all distinction between the two except in those instances where the claimant cannot show that a substantial part of his work time was spent in manual labor in carrying out the terms of the contract.³ The distinction, however, must still be dealt with when the injured claimant is a roving salesman (whose work can seldom be classified as manual labor) and who may be relatively free of control as to his hours or place of

*Professor of Law, Louisiana State University.

1. 134 So. 2d 377 (La. App. 3d Cir. 1961).

2. *E.g.*, Md. CODE art. 101, § 47 (1939); Wis. Laws 1951, ch. 539.

3. LA. R.S. 23:1021(6) (1950).

work. A rigid adherence to the outworn control test might suggest that such sales agents are not employees entitled to compensation. Nevertheless, for the purposes of the statute the important observation is that salesmen of this kind are economically subservient units of the enterprise they represent, and they cannot properly be regarded as independent enterprisers with bargaining power adequate to exact a charge sufficient to enable them to support their own accident costs. Hence they fall within the purpose of the act and are properly classified as employees.⁴ The status of salesmen has been before our courts on several occasions, and in each instance they were classified as employees. The facts, however, have indicated that the sales agent worked a designated route and that his activities were subject to control at least to that extent.⁵ More recently the Court of Appeal for the Second Circuit has classified as employee a used-car salesman working under a loose arrangement who was paid on a commission basis and who worked when and where he wished.⁶

The decision in question seems eminently sound with respect to the claimant's entitlement to compensation from his employer. The court, however, denied recovery against the employer's insurer on the ground that the compensation insurance policy expressly excluded automobile salesmen. The pertinent statutory provision here is R.S. 23:1162, which, in part, states: "No policy of insurance against liability under this Chapter shall be made unless the policy covers the entire liability of the employer" The court concluded that this provision does not preclude the insurer and insured from excepting a specific class of employees from protection. The court did not refer to its own earlier opinion in *Stepan v. Louisiana State Board of Education*.⁷ In that case the court had expressed its satisfaction with the position that a workmen's compensation insurance policy is a statutory policy and that with the terms of the statute the policy must comply. It had also approved the proposition that the contract of insurance may not limit its coverage to less than the full liability of the employer. The *Stepan* opinion continued:

"This is particularly applicable to all phases of any par-

4. Cf. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 74 (1951).

5. E.g., *O'Connor v. American Mut. Liab. Ins. Co.*, 87 So. 2d 16 (La. App. Orl. Cir. 1956); *Samson v. Borden Co.*, 92 So. 2d 152 (La. App. 1st Cir. 1957).

6. *Gresham v. Speights*, 133 So. 2d 846 (La. App. 2d Cir. 1961).

7. 78 So. 2d 18 (La. App. 2d Cir. 1955).

ticular business. A policy purporting to cover only a limited number of activities of a particular business would be construed as covering all activities of that business under the statute."⁸

The statutory provision in question expressly permits an employer who is engaged in *more than one* business to cover each separate and distinct business by separate policies. By reference to this express exception the court in the *Stepan* case concluded that the insurer of the State Board of Education could effectively insure the Board's compensation liability with reference to certain designated schools without rendering itself liable as insurer for all institutions under the Board's jurisdiction. The latter was regarded as conducting numerous businesses in operating the forty educational institutions of the state. But by the same token it could hardly be contended that the operations of car salesmen constituted a "separate business" for the Caddo Auto Sales Agency, the insured in the instant case.

In defense of the instant decision it might be argued that in Louisiana, the only American state that has neglected to make compensation insurance compulsory, the result reached by the court in the case under discussion will encourage reluctant employers to secure at least limited coverage for those of their employees who can be protected at cheaper rates. The soundness of this concession seems questionable, however, in view of the express language of the statute and in light of the obvious desirability of insisting upon complete insurance protection wherever possible. The obvious and desperately needed remedy, of course, is an amendment of the statute to inaugurate compulsory compensation insurance in Louisiana.

BORROWED EMPLOYEES—RIGHT TO CONTRIBUTION OR INDEMNITY

In an earlier issue of the *Review*⁹ it was pointed out that in *Humphreys v. Marquette Casualty Co.*¹⁰ the Supreme Court of Louisiana adopted a growing (although still minority) position to the effect that a loaned employee may recover compensation from both the lending (general) employer and the borrowing (special) employer. The liability of the two was described in

8. *Id.* at 21.

9. Note, 19 LA. L. REV. 923 (1959).

10. 235 La. 355, 103 So.2d 895 (1958). The case is discussed in the 1962 Pocket Supplement to MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 57 (1951).

a dictum as solidary. Once the position has become established that the borrowed employee may recover compensation from either the lender or the borrower, there arises the further question as to what adjustment, if any, should be made between the two employers once the employee has received satisfaction of his claim from one or the other and is out of the picture.

Recently in *Casualty Reciprocal Exchange Drilling Co. v. Richey Drilling & Well Service*¹¹ the Court of Appeal for the Fourth Circuit held that the borrowing (special) employer is entitled to indemnity from the lending (general) employer or the latter's insurer. The decision is carefully restricted to the situation where the lender is engaged in the business of lending specialist workers to others. This decision is an important one and it deserves extended comment. However, in view of the fact that the case will receive detailed treatment in a forthcoming issue of the *Review*, no discussion of it here is attempted beyond the observations that the decision strikes the reviewer as eminently sound, and that the conclusion that the borrower is entitled to indemnity from the vocational lender is consistent with the analogous situation where the principal who is obliged to pay compensation to his contractor's injured employee is entitled to indemnity from the contractor.¹²

ACCIDENTS OCCURRING DURING THE COURSE OF EMPLOYMENT

Where an employee is transported to and from work in a conveyance furnished by his employer, the problem as to what effect should be given to a substantial deviation from the shortest route home is a novel one. The question of deviation usually arises in cases where the employee, who is already on the job, has been directed to drive to an assigned *business* destination and he then departs from the usual or shortest route to that destination in order to serve some purpose of his own. By contrast, however, in the case of the deviation en route to the employee's home we are obliged to assume at the outset that during the entire journey the employee is engaged in a purely personal trip which is normally outside the course of employment but which is brought within the employment only because the employer has interested himself in the transportation of the employee. There can be no question here of a deviation from

11. 137 So. 2d 127 (La. App. 3d Cir. 1962).

12. LA. R.S. 23:1061 (1950) discussed in MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 127 (1951).

an errand which is being performed as a duty to the employer. It seems therefore that the proper inquiry in this type of case is whether the trip upon which the accident happened was of a kind that was fairly within the reasonable contemplation of the employer when he undertook to provide the transportation. In *Jagneaux v. Marquette Casualty Co.*,¹³ plaintiff and his brother drove to and from work in a truck provided by the employer and which was driven by the brother. On the occasion in question the brother determined to drive to a nearby town on a personal errand before proceeding to their home, which was in another direction. After the completion of the errand and while the brothers were on the route home they were involved in an accident. The court allowed recovery by following the familiar Louisiana position that where the employee has deviated from a business errand but has completed the deviation at the time the accident occurs, he is regarded as having reentered the course of employment. It is suggested that a preferable approach would be to inquire whether the employer fairly contemplated that on trips home by these workers they would occasionally make deviations such as the one in question.

In the *Jagneaux* case the court supported a recovery on the further ground that the injured worker was not driving at the time, and the deviation of the person chosen by the employer to operate the vehicle was not attributable to the plaintiff, a mere passenger.

BOILER DEAFNESS AS OCCUPATIONAL DISEASE

A worker who sustains a progressive loss of hearing by reason of continued exposure to noise may find that he is not entitled to workmen's compensation because the symptoms of injury accumulated gradually and he is therefore unable to establish that he suffered an "accidental injury."¹⁴ In such a situation he will find little comfort from the occupational disease provision of the statute, since deafness is not one of the listed afflictions. Where, however, he complains of deafness within a few days of his initial exposure to noise his situation may be rescued by resort to an observation previously made by our courts that conditions which produce injury within a few days of exposure should be regarded as complying with the

13. 135 So. 2d 794 (La. App. 3d Cir. 1961).

14. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 215 (1951), and cases cited.

"accident" requirement.¹⁵ Such was the conclusion reached during the past term with reference to occupational deafness in *Whitworth v. Kaiser Aluminum and Chemical Corp.*¹⁶

TUBERCULOSIS AS ACCIDENT WHEN CONTRACTED AS RESULT OF SINGLE EXPOSURE

In the recent decision *Vidrine v. New Amsterdam Casualty Co.*¹⁷ claimant, who had previously enjoyed good health, was confined to bed with pneumonitis for several days prior to the date in question. He received an emergency call to report for work, and he thereupon engaged in very strenuous labor in inclement weather for an entire day. Upon his return to his bed he promptly developed tuberculosis of a rapidly progressive type, which disabled him. Medical testimony established that a single day of exposure of the type experienced by claimant would probably account for the immediate development of the tuberculosis condition described. Every element of accidental injury is present in such a situation and the court properly awarded compensation despite the contention that the statute expressly excludes tuberculosis from the scope of the occupational disease provision.¹⁸ That the occasion which constituted the "accident" was an entire day of exposure and strain was not fatal to the worker's claim. Frostbite and sunburn, which may not develop except as the result of extended though not cumulative exposures to the weather, have never been denied their character as accidents for that reason. Injuries resulting from such exposures are in no sense the type of "cumulative harm" that must be characterized as occupational disease.¹⁹

TOTAL DISABILITY

An interesting problem was presented in *Guidry v. Michigan Mutual Liability Co.*²⁰ In that case a worker had suffered an injury prior to the accident in question, but the disabling symptoms had become quiescent. Thereafter, by reason of the accident in question his susceptibility to a reactivation of these symptoms

15. *Glover v. Fidelity & Cas. Co.*, 10 So. 2d 255 (La. App. 2d Cir. 1942).

16. 135 So. 2d 584 (La. App. 4th Cir. 1961).

17. 137 So. 2d 666 (La. App. 3d Cir. 1962).

18. LA. R.S. 23:1031.1(B) (1950).

19. See the discussion in MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 215 (1951) and Supplement § 210 (1962).

20. 130 So. 2d 513 (La. App. 3d Cir. 1961). Accord, *Mitchell v. Travelers Ins. Co.*, 136 So. 2d 143 (La. App. 3d Cir. 1962).

was demonstrably increased. It was held that under such circumstances he was not thereafter obliged to engage in work that would expose him to the risk of further harm and was entitled to compensation for total disability. This is a variation on the general rule that an employee is totally disabled whenever continuation of the same work would present a potential danger to his health or safety.²¹

21. See, for example, *McKnight v. Clemons*, 114 So.2d 114 (La. App. 1st Cir. 1959); *Finn v. Delta Drilling Co.*, 121 So.2d 340 (La. App. 1st Cir. 1960).