Private Law: Workmen's Compensation

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cient under the statutory requirement as being clear, unequivocal, unambiguous, and valid and effective.\textsuperscript{20}

V. FIRE COVERAGE

Cases of note in the fire insurance field included a review by the appellate courts of the proper penalty which can be assessed on the non-payment of claims on a fire contract (12%, not 25%);\textsuperscript{21} and a determination that an agreed adjustment after a fire loss becomes a new contract and its enforcement therefore not subject to any policy restriction.\textsuperscript{22}

WORKMEN'S COMPENSATION

\textit{Wex S. Malone}\textsuperscript{*}

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

It is a fundamental observation in workmen's compensation law that an employee is not entitled to compensation unless his work was \textit{in the course of his employer's hazardous trade, business, or occupation}.\textsuperscript{1} Somewhat similarly, an employee of a contractor cannot successfully claim compensation from his employer's \textit{principal} under R.S. 23:1061 unless the employer-contractor was executing work which was \textit{a part of the principal's trade, business, or occupation}.\textsuperscript{2} Thus the relationship between

\textsuperscript{22} McCarter v. National Union Fire Ins. Co. of Pittsburgh, 147 So. 2d 104 (La. App. 2d Cir. 1962).
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\textsuperscript{1} See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 102 (1951).
\textsuperscript{2} Id. § 125.
the nature of the work being done and the business being served may be a matter of importance both in the suit by an employee against his own employer and the suit by a contractor's employee against the principal under R.S. 23:1061.

But although the inquiry is similar in the two types of suits, as suggested above, it is by no means identical in both instances. For example, if the operator of an established hazardous business were to direct his own employee to make repairs or improvements on the employer's business premises, he would be responsible for an accident that befell the employee while so doing.\textsuperscript{3} If, however, the same business operator were to undertake the repair or improvement of his premises through the agency of an independent contractor, an injured employee of the contractor would probably be denied recovery against the principal under R.S. 23:1061 on the ground that the contracted work was \textit{not} part of the business of the principal for the purposes of that section.\textsuperscript{4} The test in a suit of this nature is to inquire whether work of the kind in question is customarily done through the agency of contractors.\textsuperscript{5} Repair work on business premises is customarily performed through the medium of a contract.\textsuperscript{6}

This difference of approach — dependent upon whether the suit is by a contractor's employee or by a direct employee of the principal — poses a difficult question when a claim is asserted by an injured contractor. In Louisiana (unlike most jurisdictions) the contractor who spends a substantial part of his work time in manual labor is entitled to compensation just as though he were an employee.\textsuperscript{7} In the event of such a claim by a working contractor, how should the relationship between the contractor's work and the business of the principal be tested? If the contractor is to be regarded as strictly analogous to the direct employee, the contractor repairing or improving his principal's business premises will be entitled to compensation (even though the contractor's own employee who was injured while doing the same work would be denied recovery against the same principal in a suit based on R.S. 23:1061).

\textsuperscript{3} Speed v. Page, 222 La. 529, 62 So. 2d 824 (1952).
\textsuperscript{4} Horrell v. Gulf & Valley Oil Co., 131 So. 709 (La. App. Orl. Cir. 1930).
\textsuperscript{5} See discussion in \textsc{Malone, Louisiana Workmen's Compensation Law & Practice} § 125 (1951).
\textsuperscript{6} \textit{Ibid}.
The problem outlined above was considered at length by the court of appeal in *Sam v. Deville Gin Co.*\(^8\) The opinion concluded that the contractor entitled to compensation under R.S. 23:1021(6) should be treated in this respect just as though he were a direct employee and that the liberal test that controls the employee’s suit should be made applicable in the suit by the working contractor.

At first glance it may appear difficult to approve an approach that would accord a recovery to the contractor when it would be denied to the contractor’s own employee against the same principal for an identical accident. On further reflection, however, the injustice disappears. We need only reflect upon the purpose of R.S. 23:1061, which requires that the work done by the contractor must be part of the business of the principal before the contractor’s employee is entitled to compensation from the latter. Ordinarily a principal is not and should not be subjected to the compensation claims of his contractor’s employees. The compensation burden in such instances properly rests upon the contractor himself. It is only when the principal seeks to avoid his compensation obligation by farming out part of his own normal operations to a contractor that an evil arises requiring exceptional treatment.\(^9\) Otherwise, the compensation obligation should rest on the contractor alone. If, then, repair work on business premises is customarily done by specialized contractors, there is no sound reason why the principal should be directly responsible to the contractor’s workers. He has in no way sought to avoid his normal compensation responsibility through resort to the use of a contractor as intermediary.

On the other hand, the policy that underlies R.S. 23:1021(6) (granting the contractor doing manual work the same rights as the direct employee) is entirely different. This section was added by amendment in 1948 because the former distinction between contractor and employee had become so tenuous and so difficult to administer that the cases were in a state of almost hopeless confusion, and many injustices were apparent.\(^10\) The new provision was added in order to relieve the courts of this difficulty by requiring that all manual workers be treated the same, whether they were regarded technically as contractors or

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8. 143 So.2d 256 (La. App. 1st Cir. 1962).
10. See *id.* §§ 73-79, inclusive.
employees. The court, by entitling the contractor to the more liberal approach on this matter, does not in any way detract from any entitlements formerly enjoyed by the contractor's employee, who still retains the right to proceed against his own employer, the contractor.

ACCIDENTS ARISING OUT OF THE EMPLOYMENT

The Louisiana courts were among the first in the country to commit themselves to the so-called positional risk test in determining when an accident arises out of the claimant's employment. In the early decision, Kern v. Southport Mill, the Supreme Court announced that "an accident arises out of the employment if the employee was engaged about his employer's business at the time of the accident and the necessities of the employer's business required that he be at the place of the accident at the time the accident occurred." Although the positional risk test, announced above, has come into general usage throughout the United States, it has usually been rejected in situations where the risk that brought on the accident must be attributed to the private affairs of the worker. It is not clear that the Louisiana courts would subscribe to this limitation. In Williams v. United States Cas. Co., deceased, a bar maid, was murdered by her estranged lover who sought her out at defendant's place of business. She was shot while actively attending to her duties. The court used language suggesting that the positional risk test announced in the Kern decision is appropriate even to the case of a personally motivated assault. However, the opinion observed further that the duties of deceased required that she leave a relatively protected place behind the bar and pass near her assailant in order to answer the telephone at the time she was shot. Hence the nature of her work required an exposure to the bullet of her assailant.

PHYSICAL HARM RESULTING FROM EMOTIONAL EXCITEMENT AS ACCIDENT

No problem in recent years has given courts and commissions throughout America more difficulty than the one presented where an employee experiences an emotional shock or strain in the course of his employment which brings about a physical

11. 174 La. 432, 141 So. 19 (1932).
12. Id., 174 La. 432, 438, 141 So. 19, 21 (1932).
13. 145 So. 2d 592 (La. App. 4th Cir. 1962).
collapse, such as heart attack or cerebral hemorrhage. The courts are properly hesitant when faced with this type of situation, and frequent denials of recovery can be expected. It is of great importance, however, to understand the considerations of policy and common sense that underlie the reluctance to award compensation in these cases, because seldom are the true reasons for doubt brought to the surface in the opinions. Instead, courts tend all too frequently to explain their denials of compensation through observations on the nature of the term “accident” or “injury.” This has often resulted in awkward restrictive definitions which have returned to haunt the decisions thereafter.

The chief practical difficulty encountered in controversies of this kind can be attributed to the fact that proof of causal relation is likely to be extremely difficult whenever the only means of associating the nature of the job with the injury is the presence of some emotional excitement. In such cases even the expert evidence on medical etiology is likely to be in sharp dispute, for little is known concerning the effect of emotional strain upon the various bodily functions. The elementary body mechanics involved must remain in serious doubt. But even if the trier can be satisfied at this point, there remains an even more difficult question concerning the causal part, if any, played by the conditions of employment in bringing on the emotional tension that allegedly produced the damage. We human beings are continually beset by emotional anxiety arising from every quarter of our lives. Tensions brought on by domestic or private affairs, the scars of earlier maladjustments, together with concern over the general vicissitudes of life are all operating forces potentially contributing to our emotional distress. Furthermore, we vary greatly from each other with respect to our tolerance of emotional tension. What might be roughly called “job worry” may be only an inconsequential drop in the bucket, and this may be true even when it is conceded that some job event was the precipitating factor of collapse — the straw that broke the camel’s back.

Louisiana courts are accustomed to awarding compensation in cases where physical strain or exertion brings about a general systemic collapse.\textsuperscript{14} Here the judge is competent to appreciate

\textsuperscript{14} See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE §§ 214, 256 (1951).
the body mechanics involved, and he will encounter comparatively little difficulty in relating the physical exertion to the nature of the job or the conditions under which the employee labored.\textsuperscript{15} In physical stress cases of this kind the trier can often satisfy himself that the conditions of work played a sufficiently important part in bringing about the harm to justify the award.

It is noteworthy that it is at this very point that the judge finds himself frustrated in the "emotional strain" cases. Although the familiar notion that "the employer takes the employee as he finds him" furnishes a satisfactory approach in cases involving impact or physical strain,\textsuperscript{16} yet it is questionable whether the same rule is appropriate without qualification in situations involving purely emotional stress. A basic policy question is involved: should the worker who is already loaded down with worries and conflicts arising from his private life be entitled to workmen's compensation whenever it can be shown that some emotional experience on the job was superadded to his troubles and thus led to collapse? Sound judgment may well dictate that in these cases compensation should be denied unless the trier is satisfied that the nature of the job or the conditions of work played a dominant role in bringing about the nervous tension that caused collapse. This writer knows no sound reason why this approach could not be substituted in these situations in place of the "precipitating factor" idea that is characteristic of impact injury and physical strain cases. In final analysis the problem faced by the courts in the emotional strain cases is very closely akin to the familiar arise-out-of-employment issue. The inquiry can be expressed thus: under what circumstances is the risk of physical harm brought about by emotional distress to be regarded as a risk that arises out of the employment?\textsuperscript{17} The

\textsuperscript{15} In a few jurisdictions compensation may be denied for heart attack or cerebral hemorrhage caused by physical exertion unless the exertion can be characterized as "unusual." This position can be productive of great confusion, and has been generally repudiated in the later decisions. See the excellent discussion in 1 Larson, Workmen's Compensation §§ 38.60-38.70 (1952). Louisiana courts have wisely avoided this limitation. See Malone, Louisiana Workmen's Compensation Law & Practice § 214 (1951).

\textsuperscript{16} See Malone, Louisiana Workman's Compensation Law & Practice § 232 (1951).

\textsuperscript{17} Professor Larson has expressed a similar view: "[The] practical consideration is the fear that the heart cases and related types of injury and death will get out of control unless some kind of arbitrary boundaries are set, and will become compensable whenever they take place within the time and space limits of employment. Most states have chosen to press the 'accident' concept into service as one kind of arbitrary boundary, but, with a few exceptions, one gets the dis-
advantage of the arise-out-of approach in these cases is that it affords the flexibility needed in order to pass an intelligent individualized judgment. The court should not be in a position where it feels compelled to deny recovery arbitrarily merely because the harm was inspired by emotional, rather than physical, stress. At the same time the judge should not be obliged to make an award whenever the evidence suggests that the employment was a precipitating factor that played "some" causal part in the eventual physical collapse. Recovery can be appropriately restricted to those situations where some job event or job condition played a substantial and obvious role in the tragedy. It would be entirely appropriate to observe that in the absence of a satisfactory showing in this respect, the accident cannot be regarded as one that arose out of the employment.

Recently, in Danziger v. Employers Mut. Liab. Co.\(^{18}\) the Louisiana Supreme Court denied compensation in a situation involving death from cerebral hemorrhage induced by emotional strain. However, in doing so it adopted a restrictive interpretation of the terms "accident" and "injury" which is likely to be a source of considerable difficulty in future decisions. Under the special facts of the Danziger case a denial of compensation may have been entirely appropriate. Danziger was the general manager and one of three directors of a concern engaged in the manufacture of textile bags. The other two directors (and the chief stockholders) were husband and wife. Both had retired from the active management of the business because of ill health of the husband, and they resided outside the state. Danziger was awakened by phone in the middle of the night and was told of the unexpected death of the wife. His distress over this news was aggravated by frustration in his efforts to make arrangements for transportation to the place where his business associate had died. He suffered a disabling cerebral hemorrhage while engaged in a telephone conversation concerning the incident.

Since the emotional distress involved in Danziger's case was in the nature of grief, worry, frustration, and general concern,
the court could have disposed of the compensation claim simply and effectively by announcing that the risk of bodily harm through general concern and distress under such circumstances cannot appropriately be regarded as one that arises out of the employment and that it falls outside the protective purpose of the compensation statute. 19

The writer suggests that the difficulty with the Danziger decision lies in the court's insistence that Danziger did not suffer an “injury” by “accident” within the meaning of the statute, because there was no showing at the time of “objective symptoms of an injury” 20 and, further, the term “injury” implies “violence to the physical structure of the body.” 21

The court's reference to an absence of objective symptoms is difficult to appreciate. It would seem that an employee who, during the course of a business conversation, suddenly collapses with paralysis presents a rather convincing picture of “objective symptoms” of injury. No previous Louisiana decision has been found that predicates a denial of compensation solely upon this qualification of the term, accident. 22 The only conceivable pur-

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19. However, it is noteworthy that in the more recent decisions from other jurisdictions the courts are allowing compensation for physical harm caused solely by job tension and worry: Firemen's Fund Indemnity Co. v. I. A. C., 241 P.2d 299, aff'd 39 Cal.2d 831, 250 P.2d 148, 11 A.L.R.2d 277 (Cal. App. 1952) (nervous tension caused by negotiating labor dispute brought on cerebral hemorrhage); Insurance Department of Mississippi v. Dinsmore, 233 Miss. 569, 102 So.2d 931 (1958) (emotional strain precipitated thrombosis for worker suffering from hypertension; excellent discussion in both majority and dissenting opinions); Wilder v. Russell Library Co., 107 Conn. 56, 139 Atl. 644 (1927) (job worry caused librarian to commit suicide); Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 176 N.E.2d 714 (1961) (heart attack from protracted emotional strain); Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (criticism of worker's inability to perform his duties brought on disabling neurosis. This case goes further than most decisions in two respects: (1) the injury was psychological rather than physical; (2) the affliction came on gradually and claim was recognized as an occupational disease, rather than accident). See excellent discussion Workmen's Compensation Awards for Psychoneurotic Reactions, 70 Yale L.J. 1129 (1961).

20. La. R.S. 23:1021(1) (1950) defines “accident” as follows: “An unexpected or unforeseen event happening suddenly or violently, with or without human fault and producing at the time objective symptoms of an injury.”

21. Id. 23:1020(7) defines “injury” as follows: “Injury and Personal Injuries includes only injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted.”

22. One court of appeal decision goes so far as to observe: “If the words 'objective symptoms of an injury,' employed in the statute were intended to mean or should be construed to mean what, on their face, they imply, it is obvious that they have been read out of this definition by a multitude of adjudications by the appellate courts of this state and by the supreme court, also. Nearly all strain injuries reveal no 'objective' symptoms at the time of the injury or thereafter.” Rochell v. Shreveport Grain & Elevator Co., 188 So. 429, 431 (La. App. 2d Cir.
pose of the requirement is that of excluding injuries whose objective symptoms did not appear until after a substantial lapse of time following the alleged accident (thus suggesting serious doubt as to whether the accident was a cause in fact of the harm complained of). But even a delay in the appearance of symptoms has not precluded awards of compensation in the past whenever the court became satisfied that the necessary causal relation existed.23

The second aspect of the court's rationale was that there was no violence to the physical structure of the body, and that the occasion therefore lacked the "accidental" character required by the statute. The claim of an absence of "violence" has never served to preclude recovery in the past where the facts were otherwise appropriate. The "violence" notion has been regarded as satisfied by such minor phenomena as the ingestion of germs or lead fumes, by the play of sunlight or heat upon the body, by changes of atmospheric pressure, by the brushing against poison ivy or by contact with petroleum products.24 Physical strains and exertions of all kinds have been regarded as events of "violence," including the mere act of stooping, which in one case unexpectedly caused a fracture of a diseased spine.25 In this connection, it is noteworthy that there is an obvious inconsistency in the statute between the definitions of "accident" and "injury," respectively. The "accident" requirement can be satisfied by proof of an event that happened either "violently" or "suddenly,"26 while "injury is defined as including only "injuries by violence to the physical structure of the body." (Emphasis added.)27 It is difficult to understand how injuries inflicted suddenly but through non-violent means are to be regarded. In view of the fact that in the past the Louisiana courts have consistently succeeded in awarding compensation in the face of earnest contentions that "violence" was lacking, it would appear to be more consistent with the course of decision to regard an injury as compensable if it was either inflicted

1939). See cases discussed in MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 216 (1951).
23. See Kraemer v. Jahncke Services, Inc., 83 So.2d 916 (La. App. Orl. Cir. 1955) (heart attack occurring after worker has left the place of employment may be compensable if causally attributable to strain or exertion on the job).
27. Note 20 supra.
through violence or occasioned suddenly. Certainly Danziger's injury must be regarded as "sudden."

The type of problem involved in the Danziger decision is, in a sense at least, the antithesis of the one presented in the hysteria or conversion neurosis situations. In these latter cases there is usually a traumatic injury of some sort which brings about a disabling emotional disorder without any visible impairment of the body structure, while in the Danziger type situation the harm is obviously physical, but the source of the harm is an emotional, rather than a physical, impact. It seems, therefore, that there would be little or no merit to any contention that the Danziger decision can serve as authority for a denial of compensation in the neurosis cases.

The unfortunate aspect of the Danziger decision is that the rule announced by the court seems to require that the door to recovery be closed arbitrarily in all situations where physical harm is brought about by purely nervous or psychological impact. There is no room left for play of discretion. The result could be particularly unhappy in situations where a definite job event causes shock and fright (as opposed to worry, anxiety, or general concern) with consequent bodily collapse. One illustration will suffice: Three workers are in the path of an oncoming vehicle. One of them is struck and sustains a fractured rib. The second worker manages to avoid actual impact, but his fright causes him to overexert himself in his effort to escape and he suffers a heart attack. The third worker also narrowly escapes being struck, but he is frozen by fright and sustains a cerebral hemorrhage. Under the rationale of the Danziger case there will be compensation for the fractured rib and also for the heart attack brought on by the physical exertion in escaping, but none for the death or disability resulting from the cerebral hemorrhage that was produced by the sheer terror of the third worker. Such a conclusion would be opposed to the overwhelming weight of authority in other states whose statutes are not distinguishable from ours. 28 Although it is true that shock or

28. Among numerous decisions allowing compensation for heart attacks, paralysis, etc., resulting from shock or fright are: J. N. Geipe, Inc. v. Collett, 172 Md. 165, 190 A. 836, 109 A.L.R. 887 (1937) (excitement trying to avoid accident caused driver's heart attack) ; Charon's Case, 321 Mass. 694, 75 N.E.2d 511 (1947) (fright causing hemiplegia as result of lightning producing loud noise and considerable flash of light) ; Roberts v. Dredge Fund, 71 Idaho 350, 232 P.2d 975 (1951) (shock to nervous system resulting in stoppage of heart while witnessing replacement of transformer fuse, attended by roar and ball of fire four feet in
fright, like worry, concern, or frustration, is a nervous or emotional affection, yet in fright cases the causal connection with the job is obvious and the risk of body damage from fright produced by some shocking incident on the job is one that clearly arises out of the employment.

**DISABILITY**

In view of the fact that a common laborer will not be regarded as totally disabled so long as he can compete on a substantially equal basis with able-bodied men in the broad and diversified labor market, an interesting question arises as to the effect that should be given to the fact that a common laborer has been rendered allergic to certain substances, so that he has lost the capacity to work in an environment where he is exposed to them. A common laborer who can no longer work in the vicinity of lime or cement may properly be regarded as totally disabled, since he has been deprived of access to a substantial number of construction jobs.\(^{29}\) On the other hand, a worker suffering from lead poisoning, but who can work in any environment where there is no exposure to the possibility of lead ingestion need not be similarly treated, since the adverse effect of his handicap will not necessarily impair his ability to compete on substantially equal terms with reference to most common labor jobs.\(^{30}\)

The Supreme Court has held recently that a miscarriage by a female worker resulting from a work accident is not to be regarded necessarily as an impairment of function so as to authorize an award under R.S. 23:1221(p).\(^{31}\) Only permanent impairments are contemplated by the above section. It must be shown, therefore, that there is some residual effect upon the

\[^{1}\text{only permanent impairments are contemplated by the above section. It must be shown, therefore, that there is some residual effect upon the}
\[^{2}\text{diameter) ; Januszewski v. Public Service Coordinated Transport, 17 N.J. Super. 164, 85 A.2d 331 (1951) (near collision with truck caused cerebral hemorrhage for city bus driver) ; Egan's Case, 331 Mass. 11, 116 N.E.2d 844 (1954) (cab driver suffered cerebral hemorrhage after being called to side by policeman holding three men at bay with gun and told to secure assistance) ; Aetna Insurance Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App. 1958) (laundry employee suffered stroke after berating by customer) ; Pukaluk v. Insurance Company of North America, 7 A.D. 2d 676, 179 N.Y.S.2d 173 (1958) (cleaning woman in office building who had been warned of prowlers suffered heart attack when she heard steps behind her and unexpected entry of person who turned out to be forelady).}
\[^{3}\text{Bergeron v. New Amsterdam Casualty Co., 243 La. 108, 141 So.2d 832 (1962).}
\[^{30}\text{Lathers v. Schuylkill Products Co., 111 So.2d 530 (La. App. 1st Cir. 1959).}
\[^{31}\text{Robinson v. Travelers Ins. Co., 150 So.2d 98 (La. App. 4th Cir. 1963).}
\[^{31}\text{Bergeron v. New Amsterdam Casualty Co., 243 La. 108, 141 So.2d 832 (1962).}
child-bearing capacity other than the single experience of the loss of a child.

**Credit For Wage Paid to Disabled Employee After Accident**

There has been considerable confusion during recent years with respect to credit that may be allowed the employer for wages paid the disabled employee who after accident was retained on the payroll. For a considerable period the courts of appeal accepted the proposition that the employer was entitled to credit of one week’s compensation for each weekly wage payment that equalled or exceeded the maximum compensation allowable. This appeared to be true irrespective of whether the wage was earned or unearned and irrespective of whether the work done after accident was the same that the employee performed prior thereto or was different.\(^3^2\)

In 1952 the Supreme Court in *Mottet v. Libbey-Owens-Ford Glass Co.*\(^3^3\) adopted a position inconsistent with the one announced above. Mottet, a glass cutter, suffered a herniated disc which caused such pain in the doing of his regular work that he was obliged to accept a position as watchman with his former employer. The latter insisted that he be allowed credit for a week of compensation for each week he had paid claimant wages as watchman. The Supreme Court, finding that Mottet was totally disabled since he could not perform the work of glass cutting, concluded that the wages paid as night watchman were earned in a **different kind of work**, not requiring any special skill or training, and could not be considered in the nature of compensation or serve as a basis for credit for the employer.

The same situation that was before the Supreme Court in the *Mottet* case was later presented to the Court of Appeal for Orleans in *Myers v. Jahncke Service*.\(^3^4\) Myers, a shipfitter, who had lost a hand, was retained for more than a year as a pusher. During the greater part of this period he received both an earned wage and compensation payments of $30.00 per week. When

\(^3^3\) 220 La. 653, 57 So.2d 218 (1952).
\(^3^4\) 76 So.2d 436 (La. App. 4th Cir. 1954), rehearing denied.
Myers instituted suit for compensation the employer claimed credit for the wage payments. This credit was denied by the court in a lengthy opinion reviewing all previous decisions. The denial was based on the authority of the Mottet case. Later, however, the same court made clear that the rule of the Jahncke Service case applies only where the work done after accident is of a character different from that which was performed there-tofore.\(^{35}\)

The policy of crediting the employer with wage payments when the worker continued to do work of the same character,\(^{36}\) but denying credit when the employee was regarded as earning his wage after accident doing work of an entirely different nature,\(^ {37}\) was widely adopted by the courts of appeal following the Mottet decision. On occasions the courts encountered considerable difficulty in determining whether the new work was or was not of the same nature as before the accident.\(^ {38}\)

However, even if the work done after accident was similar to that which was previously performed, the employer was denied credit in two court of appeal decisions when the wage had been reduced because the employee was no longer capable of performing substantial parts of his same duties.\(^ {39}\) This conclusion would seem to suggest that the proper distinction to be

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36. Pohl v. American Bridge Division, United States Steel Corp., 109 So. 2d 823 (La. App. Orl. 1959) (iron worker continued to perform similar work at ground level, but could no longer climb; credit allowed employer for wages); Beloney v. General Electric Supply Co., 103 So. 2d 491 (La. App. Orl. Cir. 1958) (continued same work with pain; credit for earned wage payments); Daniel v. Transport Ins. Co., 119 So. 2d 107 (La. App. Orl. Cir. 1960); White v. Calcasieu Paper Co., 96 So. 2d 621 (La. App. 1st Cir. 1957); Walters v. General Accident & Fire Assurance Corp., Ltd., 119 So. 2d 550 (La. App. 1st Cir. 1960) (fireman unable to ride trucks after accident but retained ability to clean up station; held similar work and credit allowed); Ardoin v. Southern Farm Bureau Cas. Co., 134 So. 2d 323 (La. App. 3d Cir. 1961); Madison v. American Sugar Refining Co., 134 So. 2d 646 (La. App. 4th Cir. 1961) (common laborer who performed different type of common labor after accident was still doing work of same character, and employer allowed credit. Reversed by Supreme Court on appeal). Cf. Howard v. Globe Indemnity Co., 147 So. 2d 912 (La. App. 1st Cir. 1962).
drawn should be in the direction of earned versus unearned wage, rather than in terms of differences in the nature of the work performed before and after accident.

There came a decided turn in the jurisprudence with the Supreme Court's decision in Lindsey v. Continental Cas. Co. In that case, claimant, who was a tractor mechanic, lost substantially all the sight of his right eye through an employment accident. Thereafter he was handicapped in performing any task, such as measurement, alignment, et cetera, that required binocular vision. However, he was retained by his employer and was, in fact, assigned additional duties of a supervisory nature with additional pay. The court of appeal affirmed the trial court's determination that Lindsey was totally disabled, and it denied the employer credit for the wages paid following the accident. The court of appeal and the trial court, however, clearly followed the approach of the Mottet case. The opinion observed that "there is enough difference in the plaintiff's present duties to take him out of the 'same employer, same duty, same rate of pay' rule."  

The Supreme Court affirmed the denial of credit to Lindsey's employer. The opinion, however, interpreted the Mottet decision as laying down a test of earned wage versus unearned wage, rather than a test of whether the work performed after accident was the same as that performed theretofore or was different.

"The basic test supported by the jurisprudence of this state is whether the wages paid subsequent to the injury are actually earned. If they are not earned, they are presumed to be in lieu of compensation."  

The position in the Lindsey decision was reaffirmed by the Supreme Court in Madison v. American Sugar Refining Co.  

43. 243 La. 408, 144 So. 2d 377 (1962). "The fact that the services performed after the injury are similar, or dissimilar, to the services performed before may be relevant to the question of whether the wages are actually earned, but it is not decisive of it." Id. at 415, 144 So. 2d at 380. The Lindsey and Madison decisions were followed in Gaudet v. Hartford Accident & Indemnity Co., 143 So. 2d 252 (La. App. 4th Cir. 1962). Cf. Ardoin v. Southern Farm Bureau, 150 So. 2d 792 (La. App. 3d Cir. 1963). But cf. Gisevius v. Jackson Brewing Co., 152 So. 2d 231 (La. App. 4th Cir. 1963).
In this latter case a common laborer, who suffered a disabling back injury, was given lighter duties at virtually the same wage. Credit was denied the employer.

Presumably the rule of the Lindsey and Madison cases applies both where a worker continues to earn the same wage by performing the same duties with pain and suffering and where he discharges lighter duties. The employer is entitled to credit only when it is shown that the handicap under which the employee labors following the accident prevents him from “earning” the wage he receives. We can only conjecture as to whether or not the new position will serve to discourage employers from retaining handicapped workers on their payrolls. It should be observed, however, that the new position is preferable to the approach adopted earlier in the Mottet case which appeared to make the employer’s right to credit depend upon a seemingly irrelevant determination as to whether the work performed after accident was different in character from that which had been done theretofore. There is nothing in the Lindsey and Madison decisions to suggest whether the employer would be entitled to any credit in cases where the wage after accident is partially earned and partially unearned. In such cases the task of determining how much credit should be allowed the employer (for the “unearned” portion) would be virtually impossible from an administrative viewpoint. Presumably the employer will not be entitled to credit for wage payments unless the wage was paid as a reward for virtually “token” service or it was paid under an express understanding that it was in lieu of compensation. The answer here must await clarification in later decisions.

A further difficulty that would be faced in any attempt to credit the employer with an “unearned” portion arises from the fact that since the decision in Carlino v. United States Fidelity & Guaranty Co., forty-three years ago, the employer has never under any circumstances been allowed credit except when it is shown that the weekly wage payments equalled or exceeded the maximum allowable weekly compensation. Unless, therefore, the “unearned” portion were fixed at thirty-five dollars or more, the employer’s claim for credit presumably could not be recognized.

44. 196 La. 400, 197 So. 228 (1940).
45. See MALONE, LOUISIANA WORKMEN’S COMPENSATION LAW & PRACTICE § 402, at 518, 519 (1951).