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WORKMEN'S COMPENSATION

Wex S. Malone*

COVERAGE—HAZARDOUS BUSINESS

More than a half century ago, in 1914, our legislature became an early subscriber to the then newfangled workmen's compensation scheme that was just catching the fancy of social reformers. In fact, Louisiana and Texas were the first states in the South to adopt statutes of this kind. Workmen's compensation had been declared invalid under the equal protection clause only two years earlier by the highly prestigious Court of Errors and Appeals in New York.¹ For this reason those states which ventured into workmen's compensation during this early period did so hesitantly and only after the lawmakers had limited the areas within which the new statutes would apply so that constitutional problems hopefully would be avoided. In Louisiana (and in several other states during the same period) the idea of restricting workmen's compensation to hazardous businesses suggested a sustainable basis for classification in the expected event that the acts would be challenged in the courts. Accordingly, private employers were covered under the statute only if they were engaged in some hazardous business.² The lack of any compelling social or economic basis to support a limitation of this kind is betrayed by the fact that the legislature afforded general coverage for all employees of the state itself and its political subdivisions without reference to whether the operations in which they were engaged were or were not hazardous.

Three years later the United States Supreme Court put to rest all doubt concerning the constitutionality of workmen's compensation schemes, including even those statutes which were wholly unrestricted in their coverage of businesses.³ It might be expected that the disappearance of constitutional objection would have promptly induced the Louisiana Legislature to amend the new statute so as to remove all hazardous business limitations. This, however, was not done, and the compensation measure today remains subject to about the same limits as in 1914. The only concession of the legislature was a provision in

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1. *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911).

2. La. R.S. 23:1035 (1950).

3. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

1958 to the effect that workmen's compensation insurers are denied the right to interpose the non-hazardous character of the insured's business as a defense to a compensation claim.⁴ This was a major step forward in view of the fact that most Louisiana employers carry insurance protection. At the same time, however, the amendment serves in a sense to highlight the sheer artificiality of the restriction.

Faced with a limitation that was poorly grounded in policy but which, if literally applied, could severely cripple the compensation scheme, the courts managed over the years to spawn a series of interpretations of the restriction to hazardous businesses which had the effect of working a significant enlargement of coverage. The elaborate body of jurisprudence that evolved in this state to deal with the qualification of hazardousness has been described elsewhere,⁵ and it is sufficient here merely to observe that any business whose employees are required to work in proximity to *machinery* and *electricity* are likely to fall within the coverage of the compensation scheme.⁶ The possibilities for expanding coverage through this device were unlimited. What supermarket, for instance, lacks a mechanized meat slicer or at least an electric cash register? Where is the office without an electric adding machine or typewriter; where is the boarding house whose floors are not swept by a vacuum cleaner? Add to these the myriad uses of automobiles (machines) in the conduct of every business, and it can be seen that in this way coverage can be expanded virtually without limit. But dependence upon such artifices is certain to spawn awkward and unrealistic decisions. Of these there have been many. For instance, a beauty parlor operator on a luxury liner enjoyed compensation when the motion of the vessel caused her to roll off the chaise lounge on deck where she was enjoying the sun. Her job, said the court, was hazardous because the vessel itself was a machine!⁷ But at the same time a manual worker who sustained a rupture while hoisting a heavy load onto a truck belonging, not to his employer, but to his employer's customer, was denied compensation benefits because the employer's busi-

4. LA. R.S. 23:1166 (Supp. 1958).

5. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE §§ 91-103 (1951).

6. *Id.* § 97.

7. *Rosenquist v. New Amsterdam Cas. Co.*, 78 So.2d 225 (La. App. Or. Cir. 1955).

ness did not meet the requirement of being hazardous.⁸ All this, understandably, has been a source of dispute within the courts.

The most recent illustration of differences among the judges concerning the proper approach is *Fontenot v. J. Weingarten, Inc.*⁹ The claimant, a clerk in a grocery store, sustained an injury through strain while preparing a display of canned goods—work which was conceded to be non-hazardous according to previous decisions. The same clerk, however, frequently operated an electric cash register and conveyor counter (a moving belt upon which customers deposit their goods while checking out). The issue before the supreme court was whether such innocuous machines and gadgets as those suggested above serve to bring under the statute businesses which are otherwise non-hazardous. This was a matter upon which the courts of appeal had differed for more than a decade.¹⁰ The majority opinion by Chief Justice McCaleb gave an affirmative answer. The opinion observed that there is no basis in the statute for distinguishing between various kinds of electrical and mechanical apparatus in terms of the respective degree of danger involved in each instance. It is noteworthy that the opinion noted specifically that the claimant “regularly and frequently” came into contact with the machines in question. This observation indicated that the court is not yet prepared to disturb the limitation imposed by it thirty years ago in *Brownfield v. Southern Amusement Co.*¹¹ to the effect that a claimant injured while doing non-hazardous work must be prepared to show that his hazardous duties in proximity to machinery constitute a substantial part of his work routine.

Throughout the opinion there are indications that the court may be inclined in an appropriate case to reconsider its basic approach to the entire hazardous business limitation as it appears in the statute. The majority opinion, although conceding that there is jurisprudence to the effect that a grocery store is not a hazardous business, continued, “but we are not so certain

8. *Fields v. General Cas. Co. of America*, 36 So.2d 843 (La. App. 1st Cir. 1948). See also *Hammer v. Lazarone*, 87 So.2d 765 (La. App. 2d Cir. 1956) (busboy in drive-in restaurant denied compensation).

9. 259 La. 217, 249 So.2d 886 (1971).

10. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE §§ 97 & 101 (1951, Supp. 1964).

11. 196 La. 74, 193 So. 656 (1940).

that that jurisprudence is any longer applicable to the expanded 'supermarket' chain-store type of operation."¹²

Even more indicative of the court's readiness to reconsider the entire matter is the special concurring opinion of Justice Barham. He indicates a dissatisfaction with the accepted practice of resorting to "hazardous features," and advocates instead a straightforward determination by the court whether or not the work done by the employee in the particular case is hazardous in fact. "Heavy lifting, climbing, exposure to excessive heat, and numerous other duties should be declared to be hazardous work or hazardous features of employment in a non-hazardous trade."¹³

The tenuous character of the hazardous business limitation as recognized by the courts invites complications in other areas as well. For more than a quarter of a century the Louisiana supreme court has adhered to the position that the proprietor of a non-hazardous business does not subject himself to compensation liability by reason of the fact that he directs an employee to repair or otherwise alter the premises upon which the business is conducted. The commonly announced reason for this exclusion is that repair and alteration are not parts of the trade and/or business of the employer.¹⁴ It follows that repairs on premises held by the employer for rental purposes or as security for loans to customers do not constitute work covered by the statute, and this is true even in face of the fact that repair operations of this kind are clearly of a hazardous character. In striking contrast is repair or improvement work done on structures owned and operated by the proprietor who is engaged in a business that in some way can be characterized independently as hazardous. Thus, fortunate indeed is the handyman who repairs his employer's motion picture theater, which houses an electric projector,¹⁵ or his cattle yard or his undertaking parlor (businesses that use motor trucks or motor propelled hearses),¹⁶ for he shall have compensation if injured, while the repair man

12. *Fontenot v. Weingarten, Inc.*, 259 La. 217, 223, 249 So.2d 886, 888 (1971).

13. *Id.* at 239, 249 So.2d at 889.

14. W. MALONE, *LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE* § 102 (1951).

15. *Speed v. Page*, 222 La. 529, 62 So.2d 824 (1952).

16. *Gallien v. Judge*, 28 So.2d 101 (La. App. 1st Cir. 1946); *Hecker v. Betz*, 172 So. 816 (La. App. Or. Cir. 1937).

who meets with an accident while doing work on premises maintained for rental by a landlord is not so fortunate, and must pay his own accident costs because the renting of property is not a hazardous occupation. This strange position was reaffirmed last year in *Doss v. American Ventures, Inc.*¹⁷ The disastrous effect for the worker, however, was avoided by excluding the facts of the controversy from the proposition announced above. The defendant had been the owner of rental premises which had been virtually destroyed by Hurricane Betsy. He had undertaken to rebuild the structure on his own account, using only specialty sub-contractors. One of these was the plaintiff, a painter, who was injured while at work on this job. Relying upon the fact that the rebuilding of the structure was a sizeable enterprise, the court concluded that the owner of the destroyed building had undertaken to engage in construction as a business. This was true even though this single reconstruction was the only enterprise in which he engaged.¹⁸

COMPENSATION AWARD FOR LOSS OF AN EYE

The variety of the bases upon which a compensation award may be supported under the Louisiana statute is well illustrated by the instance of the accidental loss of an eye. Even the partial loss of the vision of one eye alone can result in an award of total disability if this handicap prevents the worker from performing the duties of his former occupation.¹⁹ On the other hand, the loss of an eye which does not result in any disability whatsoever may nevertheless serve as the basis for an award of compensation for one hundred weeks under the schedule of specific losses.²⁰ As one court has expressed the matter, the schedule "is not strictly compensatory, but is in the nature of a tort remedy for a personal injury not affecting earning capacity or ability to work."²¹ Again, the same schedule concludes with an omnibus provision for serious permanent disfigurement "about the face or head."²²

17. 261 La. 920, 261 So.2d 615 (1972).

18. *Cf. Locken v. Department of Labor & Indus.*, 58 Wash. 2d 534, 364 P.2d 232 (1961) (single land clearing operation for few days duration constitutes a business); *In re Karos*, 34 Wyo. 357, 243 P. 593 (1926) (professional plasterer undertook to transport a house for another on a single occasion, held engaged in business of moving).

19. *Knispel v. Gulf States Util. Co.*, 174 La. 401, 141 So. 9 (1932).

20. LA. R.S. 23:1221(4)(1) (1950).

21. *Wilson v. Union Indem. Co.*, 150 So. 309, 312 (La. App. Or. Cir. 1933).

22. LA. R.S. 23:1221(4)(p) (1950).

The several coverage provisions above were all before the court recently in a situation involving a worker who, even prior to the accident in question, was possessed of only bare "motion vision" at best.²³ (He could see motion of an object 14 to 16 inches away from his eye but could not identify the object.) The accidental injury for which he now seeks compensation produced complete blindness in that eye, and it was thereafter necessary to remove it and substitute an artificial orb. The worker had returned to his job, and his initial claim for total disability was abandoned. The question before the court was whether the loss of a virtually useless eye could be regarded as one that falls within the schedule of specific losses. The opinion suggested that coverage for the loss of an eye could be afforded even though the organ was conceded to be utterly useless previously. This conclusion appears to be consonant with the accepted approach on specific losses in Louisiana. However, the award of compensation for one hundred weeks was not rested on this provision alone. The loss was considered a disfigurement even though previous to the accident most of the iris or colored portion of the eye had become white due to the presence of scar tissue. The substitution of an artificial orb at least presented a wholly different type of esthetic offensiveness from that which attended the earlier condition.

STATE AND LOCAL TAXATION

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AD VALOREM TAXES

The field of ad valorem taxes accounted directly for four cases in the court term and indirectly for another. In the latter category¹ Act 155 of 1970, establishing three tax assessors for Jefferson Parish, was held violative of Louisiana Constitution article XIV, § 9, which provides for a *tax assessor* to be elected by each parish. The court in a rather interesting and to some extent droll discussion of the meaning of "a" as "one," or "at least one" or "any" concluded that on the basis of the totality of the Constitution, "a" in this instance meant "one" and affirmed the

23. *Landry v. Liberty Mut. Ins. Co.*, 258 La. 649, 247 So.2d 564 (1971).

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1. *Chehardy v. Democratic Executive Comm.*, 259 La. 45, 249 So.2d 196 (1971).