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## Public Law: Workmen's Compensation

H. Alston Johnson III

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## WORKMEN'S COMPENSATION

H. Alston Johnson III\*

## LEGISLATIVE CHANGES

It is admittedly unusual to begin an article on the decisions of the Louisiana appellate courts concerning workmen's compensation with legislative changes in the field, but some reference to these changes is necessary to put the current jurisprudence in proper perspective. Major changes in the workmen's compensation act were wrought by Act 583 of 1975, effective September 1, 1975; further changes occurred during the 1976 legislative session. An exhaustive treatment of these changes must await the appearance of a second edition of *Louisiana Workmen's Compensation Law and Practice*, now in preparation by Boyd Professor Emeritus Wex Malone and the writer. However, a summary statement of them will demonstrate that some of the decisions discussed in this symposium are likely to be decided in a different fashion when next presented.

The major changes contained in Act 583 of 1975 are as follows:

- (1) The definition of total and permanent disability was changed in order to classify as disabled only an employee who can no longer "engage in any gainful occupation for wages." A person who could engage in a gainful occupation for wages is not classified as totally and permanently disabled, even though his new occupation is not the same or similar to his old occupation and even though he was not particularly fitted for his new occupation by education, training and experience, at the time of his injury.<sup>1</sup>
- (2) The definition of permanent partial disability was changed so that a person unable to perform the same or similar duties in which he was customarily engaged at the time of injury is deemed permanently partially disabled, and benefits are payable according to the difference between the wages he earned prior to his injury and those which he actually earns in any week thereafter, up to a statutory maximum number of weeks.<sup>2</sup>

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\* Associate Professor of Law, Louisiana State University.

1. LA. R.S. 23:1221(2) (Supp. 1975), as amended by La. Acts 1975, No. 583, § 9.

2. LA. R.S. 23:1221(3) (Supp. 1975), as amended by La. Acts 1975, No. 583, § 9.

The maximum number of weeks such payments may be made when the injury occurred prior to September 1, 1976 is 400 weeks; prior to September 1, 1977, 425 weeks; and thereafter, 450 weeks.

- (3) Distinction between hazardous and non-hazardous employment, with the latter escaping coverage under the statute, was eliminated. Coverage is now mandatory, extended to "every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation."<sup>3</sup>
- (4) The previous 500-week maximum limit on total and permanent disability weekly payments, and on death benefits, was eliminated. The payments are now limited only by the period of disability, or dependency, respectively.<sup>4</sup>
- (5) The listing of occupational diseases was replaced with a general definition of occupational disease.<sup>5</sup>
- (6) Provisions for application of the Louisiana statute to injuries outside the state were added.<sup>6</sup>
- (7) The statutory maximum and minimum amounts payable were increased on a staged basis, and will eventually be tied to the "average weekly wage" figure calculated periodically by the Division of Employment Security.<sup>7</sup>

There were other minor amendments.<sup>8</sup>

The major legislative change of the 1976 session was contained in Act 147, which amended Sections 1032 and 1101 of the statute to make the employee's compensation remedy exclusive as against his employer, any principal under Section 1061, or any officer, director, stockholder, partner

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3. LA. R.S. 23:1035 (Supp. 1975), *as amended* by La. Acts 1975, No. 583, § 3. Sections 1036 and 1039-43 of Title 23 relating to election of coverage and its effects were repealed by La. Acts 1975, No. 583, § 15.

4. LA. R.S. 23:1221(2) (Supp. 1975), *as amended* by La. Acts 1975, No. 583, § 9; LA. R.S. 23:1231 (Supp. 1975), *as amended* by La. Acts 1975, No. 583, § 10.

5. LA. R.S. 23:1031.1 (Supp. 1975), *as amended* by La. Acts 1975, No. 583, § 2 and La. Acts 1975, No. 644, §§ 1,2.

6. LA. R.S. 23:1035.1 (Supp. 1975), *added* by La. Acts 1975, No. 583, § 4.

7. LA. R.S. 23:1202 (Supp. 1975), *as amended* by La. Acts 1975, No. 583, § 5.

8. The following sections of Title 23 were also amended by La. Acts 1975, No. 583: 1021 (re-define wages); 1203 (make medical benefits unlimited in amount); 1209 (include provision on prescription in partial disability cases); 1210 (increase burial expense payment from \$1,000 to \$1,500); 1233 (two years' compensation benefits payable in lump sum to surviving spouse upon remarriage; re-define age limits for minor dependents); 1236 (reflect deletion of maximum number of weeks of payments of death benefits); 1251 (re-define persons conclusively presumed dependent to include higher age limits for minors in educational institutions) and 1255 (eliminate distinctions between widow and widower for purposes of compensation payments). *See Comment, 1975 Amendments to the Louisiana Workmen's Compensation Act*, 36 LA. L. REV. 1018 (1976).

or employee of his employer or a principal.<sup>9</sup> The intention is to eliminate employee actions in tort against such persons, particularly the increasing number of "executive officer" suits which have been brought in recent years. Act 147 permits an action in tort against the named persons, however, for intentional harms.<sup>10</sup>

These changes make it unnecessary to discuss in great detail two cases decided during the past term that otherwise might have been of considerable importance. *Cooley v. Slocum*,<sup>11</sup> overruling earlier jurisprudence,<sup>12</sup> held that a partner was a "third person" under the compensation act and was not immune from a tort suit brought by an injured employee of the partnership. This decision brought the treatment of partners into line with the treatment of executive officers of the corporation which employed the injured employee,<sup>13</sup> permitting an action against either of them on the basis of individual negligence. It is presumed that the effect of Act 147 of 1976 will be to overrule legislatively *Cooley v. Slocum*, except as to intentional acts.

The second case, *Robbins v. Caraway-Rhodes Veterinary Hospital*,<sup>14</sup> involved an injury incurred by an assistant to veterinarians operating an animal hospital, when he was lifting a heavy dog. The court acknowledged that the employee's injury occurred in a non-hazardous portion of his duties, but cited the well-established principle that such an injury would be covered if the general employment was hazardous.<sup>15</sup> The employee argued that his employment exposed him to extraordinary risks of being bitten or scratched by animals, or of contracting rabies, and that under the last paragraph of LA. R.S. 23:1035 as it then read,<sup>16</sup> his employment should be characterized as hazardous and covered by the compensation act.

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9. The act was effective October 1, 1976.

10. Language permitting actions in tort against the persons named for "intentional or deliberate" acts was changed by deleting the words "or deliberate" by a Senate floor amendment. OFFICIAL JOURNAL OF THE LOUISIANA SENATE, July 12, 1976, p. 1243.

11. 326 So.2d 491 (La. 1976).

12. *Obiol v. Industrial Outdoor Displays*, 288 So.2d 425 (La. App. 4th Cir. 1974); *Bersuder v. New Orleans Pub. Serv., Inc.*, 273 So.2d 46 (La. App. 4th Cir. 1973); *Cockerham v. Consolidated Underwriters*, 262 So.2d 119 (La. App. 2d Cir.), *cert. denied*, 262 La. 315, 263 So.2d 49 (1972).

13. *See, e.g.*, *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

14. 315 So.2d 688 (La. 1975).

15. *Fontenot v. J. Weingarten, Inc.*, 259 La. 217, 249 So.2d 886 (1971); W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 101 (1951) [hereinafter cited as MALONE].

16. La. R.S. 23:1035(3) (1950): "If there be or arise any hazardous trade, business, or occupation or work other than those hereinabove enumerated, it shall come under the provisions of this Chapter. . . ."

The supreme court, agreeing with the trial court and reversing the court of appeal's decision,<sup>17</sup> held that any employment in which the employees are exposed to a risk appreciably greater than the risks attendant upon everyday living or a risk involving greater possibility of injury than in the average occupation must be classified as hazardous.<sup>18</sup> The decision is notable because it marks the final step in the demolition of the legislative distinction between hazardous and non-hazardous employment, which probably entered in the act in the first place as a result of unfounded constitutional worries.<sup>19</sup> The language used in *Robbins* makes it clear that the deletion of the distinction by Act 583 of 1975 works no major change in the law at all, but merely recognizes and codifies jurisprudential developments since the inception of the act.<sup>20</sup>

#### INJURY BY ACCIDENT AND EMPLOYMENT RELATIONSHIP

As usual, there were a series of cases dealing with the meaning of the phrase, "injury by accident."<sup>21</sup> Following earlier jurisprudence, the courts had no difficulty classifying a heart attack,<sup>22</sup> an aneurysm<sup>23</sup> and a stroke<sup>24</sup> as injuries by accident. In these cases, greater discussion centered around whether the injury was "caused by the employment."<sup>25</sup> In *Francis v. Gerlach Meat Company*,<sup>26</sup> the employee was found unconscious on the floor near the meat pattie machine at which she worked. She died shortly thereafter. She had a history of high blood pressure, which was quite high when she was admitted to the hospital after her collapse. An aneurysm was

17. *Robbins v. Caraway-Rhodes Veterinary Hosp.* 299 So.2d 446 (La. App. 2d Cir. 1974).

18. 315 So.2d at 692.

19. See MALONE at § 91 *et seq.*

20. *Id.*; *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Workmen's Compensation*, 33 LA. L. REV. 284 (1973).

21. LA. R.S. 23:1031 (1950): "If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereinafter designated. . . ."

22. *Roussel v. Colonial Sugars Co.*, 318 So.2d 37 (La. 1975); *Barnes v. City of New Orleans*, 322 So.2d 821 (La. App. 4th Cir. 1975), *cert. denied*, 325 So.2d 584 (La. 1976) ("on the facts found by the Courts below, there is no error in their judgment.")

23. *Francis v. Gerlach Meat Co.*, 319 So.2d 534 (La. App. 2d Cir.), *cert. denied*, 322 So.2d 776 (La. 1975) ("no error of law").

24. *LeLeux v. Lumbermen's Mut. Ins. Co.*, 318 So.2d 15 (La. 1975).

25. See *Roussel v. Colonial Sugars Co.*, 318 So.2d 37, 39 (La. 1975). The phrase presumably is shorthand for an accident arising out of and in the course of employment.

26. 319 So.2d 534 (La. App. 2d Cir.), *cert. denied*, 322 So.2d 776 (La. 1975) ("no error of law").

diagnosed as the cause of death. The appellate court affirmed the trial court's finding that her employment was the cause of the aneurysm, stressing a doctor's testimony that "working for somebody else is a stress and strain" which might have caused the injury.

In *Roussel v. Colonial Sugars Company*,<sup>27</sup> the employee, a machinist, had a history of high blood pressure and had been involved in some rather strenuous but otherwise normal activities during the morning hours. At 2:00 p.m., at his work place, he suffered a heart attack and died instantly. The diagnosis indicated arteriosclerosis as a partial cause. The supreme court reinstated the ruling of the district court that the death was employment-related. It correctly noted that it is not necessary to demonstrate that the accident was caused by extraordinary activities of the employee; it need only be shown that the death resulting from accidental injury was caused by usual and customary actions, exertions or other factors directly connected with the employment. The same reasoning was used by the supreme court in extending coverage to a stroke suffered by a truck driver who was found near his truck, which was being filled for its fifth load of the day.<sup>28</sup>

*Barnes v. City of New Orleans*<sup>29</sup> presented a somewhat closer case. The employee's job was clerical, centered in an air-conditioned office. On the morning of his death, he had been engaged in nothing other than his ordinary duties, but suffered chest pains shortly before noon. He was taken home by a fellow employee and died of a heart attack during that night at home. The employee had a chronic arteriosclerotic condition, and the court approved the trial court's finding that "something occurred on the job," whether it was the actual infarction or a preliminary development of it. That was sufficient to characterize the accident and injury as one which arose out of and occurred in the course of his employment.

Although some discussion of "accident" and its meaning took place in these cases, the real battle was joined on the issue of sufficient relationship with the employment, *i.e.*, whether the injury was by accident "arising out of and in the course of his employment." This is a provision unchanged by the 1975 and 1976 amendments, and has a familiar meaning. It seems increasingly established that the two criteria are interdependent,<sup>30</sup> and that

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27. 318 So.2d 37 (La. 1975).

28. *LeLeux v. Lumbermen's Mut. Ins. Co.*, 318 So.2d 15 (La. 1975).

29. 322 So.2d 821 (La. App. 4th Cir. 1975), *cert. denied*, 325 So.2d 584 (La. 1976).

30. *Lisonbee v. Chicago Mill and Lumber Co.*, 278 So.2d 5 (La. 1973); *Blake v. Fidelity & Cas. Co.*, 169 So.2d 608 (La. App. 2d Cir. 1964). See MALONE at § 192; Malone, *The Limits of Coverage in Workmen's Compensation—The Dual Requirement Reappraised*, 51 N. CAR. L. REV. 705 (1973).

virtually any risk which occurs squarely in the course of employment is likely to be held to have arisen out of the employment.<sup>31</sup>

In three of the four cases mentioned, the employee suffered the "accident" while squarely in the course of employment: at the meat pattie machine, near the truck being loaded, in the factory. This no doubt was a factor in permitting the rather easy conclusion by the court that the accident and injury had arisen out of the employment. In the fourth case, a problem could have arisen because the death occurred at home during the hours between midnight and 7:00 a.m., a place and time outside the course of employment. It is significant that the court emphasized the pains which the employee first felt shortly before noon at his desk, a place and time well within the course of employment. This "accident" in the course of employment subsequently produced death, and that fulfilled necessary requirements for coverage.

#### PERSONS COVERED

Plaintiff, a "beneficiary" in a Salvation Army work therapy program, was injured while riding in a Salvation Army truck which was being used to pick up discarded items.<sup>32</sup> Plaintiff filed a tort suit against both the other driver involved and the Salvation Army, and claimed in the alternative workmen's compensation benefits against the Salvation Army and its compensation insurer. The evidence showed that plaintiff was not paid a wage in the ordinary sense but rather was given food, clothing, shelter and a small weekly allowance based upon need rather than work performed. The trial court granted a summary judgment to the Salvation Army on the tort claim on the ground that plaintiff was an employee at the time and his exclusive remedy was in workmen's compensation. The appellate court reversed, concluding that plaintiff was not an employee and therefore could proceed in tort. Superficially, this was a victory for the plaintiff, permitting him to proceed in tort. But presumably, the result is to bar him from any compensation remedy and base any recovery on the vagaries of a tort claim.

The compensation statutes contain no definition of employee or of employment. There was a provision at the time of the decision,<sup>33</sup> now repealed,<sup>34</sup> providing that every contract between an employer and an employee engaged in a trade, business or occupation determined to be

31. MALONE at § 192. See *Harvey v. Caddo De Soto Cotton Oil Co.*, 199 La. 720, 6 So.2d 747 (1942).

32. *McBeth v. Salvation Army*, 314 So.2d 468 (La. App. 4th Cir.), *cert. denied*, 320 So.2d 905 (La. 1975).

33. LA. R.S. 23:1039 (1950).

34. Section 1039 was repealed by La. Acts 1975, No. 583, § 15.

hazardous would be deemed to fall under the workmen's compensation statute. There is also a provision that a person rendering service for another in any covered trade, business or occupation is presumed to be an employee.<sup>35</sup> The court's conclusion was that the plaintiff was not rendering service for the Salvation Army;<sup>36</sup> to the contrary, the Salvation Army was rendering service to him. The benefit, if any, accrued to him and not to the Salvation Army.

It is possible that the court's real concern was not whether the plaintiff should be classified as an employee, but whether the Salvation Army was the type of entity which ought to be deemed covered by the workmen's compensation statutes. The act contains no exemption for non-profit organizations,<sup>37</sup> and the jurisprudence has extended coverage of the act to such organizations, at least as to salaried employees.<sup>38</sup> *McBeth* presented a more difficult case, since not only was the alleged employer a non-profit organization but the plaintiff was also not a salaried employee by any reasonable definition.

The court saw the issue as *res nova* in Louisiana, and it is one on which courts elsewhere have divided. Some jurisdictions specifically exclude non-profit organizations from the coverage of their compensation statutes.<sup>39</sup>

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35. LA. R.S. 23:1044 (1950).

36. 314 So.2d at 472.

37. La. Acts 1976, No. 295, § 1 added Section 1046 to the Act to read as follows: "The provisions of this Chapter are inapplicable to uncompensated officers and uncompensated members of the board of directors of bona fide, nonprofit veterans and other bona fide, nonprofit organizations which are charitable, educational, religious, social, civic or fraternal in nature including, but not limited to, the Young Men's Christian Association, the Young Women's Christian Association and all scouting associations of the United States." It does not seem that this provision would have applied to the plaintiff in *McBeth*, since he was neither an officer nor a member of the board of directors. See also the second paragraph of La. R.S. 23:1044 (Supp. 1958), which provides: "Every executive officer elected or appointed and empowered in accordance with the charter and by-laws of a corporation, other than a charitable, religious, educational or other non-profit corporation or an official of the state or other political subdivision thereof or of any incorporated public board or commission, shall be an employee of such corporation under this Chapter."

38. *Meyers v. Southwest Region Conference Ass'n*, 230 La. 310, 88 So.2d 381 (1956). In *Meyers*, the court specifically considered the argument that since the religious institution in question did not market a product, workmen's compensation should not be applicable. The court reasoned that in both the case of a profit-oriented business and a religious institution, the costs of injuries are ultimately passed on to the public. In the first instance, the cost is passed on to those who purchase the product or service; in the second instance, to those who support the charity or religious institution. *Id.* at 317, 88 So.2d at 383 n.2.

39. A. LARSON, WORKMEN'S COMPENSATION § 50.40 (1972) [hereinafter cited as LARSON].

Among those who do not, it appears that a majority have concluded that an employee of such an organization is entitled to coverage.<sup>40</sup>

But the *McBeth* case is made more difficult because the plaintiff was not an ordinary employee but a "beneficiary" or participant in the therapy program. The court of appeal may have felt that its decision was best from the point of view of the plaintiff, since it did not limit recovery to workmen's compensation. But its decision eliminates any possibility of workmen's compensation for plaintiff; and the certainty of such a recovery if he is classified as an employee might be preferable to the mere possibility of a larger tort recovery.

It should be remembered that the court's opinion will also be authoritative in those cases in which no tort recovery is available or where the success of a tort suit is highly questionable. On balance, the conclusion that plaintiff was not an employee might not be correct. It would seem that plaintiff was rendering a service for the Salvation Army at the time of his injury. Although the case does not specify what plaintiff was doing, it appears that he was assisting in collecting the discarded items which would be refurbished and sold by the Salvation Army to fund its activities and support its beneficiaries. If plaintiff and others cannot perform this function, or will not, then others must be hired to do it. If others hired and salaried to do the work were injured in the way that plaintiff was injured there would be little doubt that they would be entitled to compensation benefits from the Salvation Army. It seems unusual to permit an organization to escape both the payment of wages and the responsibility of compensation for work-related injury by choosing to press its "beneficiaries" into service rather than hiring persons to perform the services necessary to carry out the aims of the organization.

Clearly, the plaintiff's injury will require treatment by someone, at some expense. There are good policy reasons for having this expense borne by the Salvation Army, which benefits from his service, rather than by the public at large in the form of medical services supported by general tax revenues.<sup>41</sup>

If non-profit organizations such as the Salvation Army are deserving of a special exemption from the workmen's compensation statutes because it is more economical for them to utilize "beneficiaries" in this way, it would

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40. *Id.*

41. The fact that the Salvation Army had purchased compensation insurance, while not crucial in deciding the question of whether the plaintiff was an employee, is an indication that a common risk-spreading device was available and was in fact being used, even by this non-profit organization.

seem more appropriate to establish that exemption legislatively than by saying that a person such as the plaintiff is not "rendering service" for the Salvation Army.

RIGHTS OF EMPLOYER OR COMPENSATION CARRIER  
TO PROCEEDS OF SETTLEMENT BY EMPLOYEE  
OF THIRD PARTY SUIT

The Louisiana compensation statutes permit an injured employee to claim damages against third persons who may be responsible for his injuries, and permit the employer to intervene in such suits to obtain reimbursement for the amounts expended by him to pay compensation benefits. The employer is also permitted to bring a separate suit for reimbursement.<sup>42</sup>

Section 1103 provides that if either the employer or the employee becomes a party plaintiff, by original suit or by intervention, any damages awarded by the judgment shall be apportioned so that the claim of the employer is paid in priority to the claim of the employee.

The policy behind these provisions, common to many states,<sup>43</sup> is to shift the loss suffered by the employee and the employer to the wrongdoer, and to foreclose any possible double recovery by the employee.<sup>44</sup> When a pending suit proceeds to a final judgment, it is well settled that the amount of the award must be apportioned according to the statutory provisions, and that no award is made to the employee unless there is an excess available after satisfaction of the benefits paid or payable by the employer.<sup>45</sup>

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42. LA. R.S. 23:1101-03 (1950).

43. LARSON at § 74.10.

44. *Id.* at § 71.20: "This is fair to everyone concerned: the employer, who, in a fault sense, is neutral, comes out even; the third person pays exactly the damages he would normally pay, which is correct, since to reduce his burden because of the relation between the employer and the employee would be a windfall to him which he has done nothing to deserve; and the employee gets a fuller reimbursement for actual damages sustained than is possible under the compensation system alone."

45. LA. R.S. 23:1103 (Supp. 1958). "In the event that the employer or the employee or his dependent becomes party plaintiff in a suit against a third person, as provided in R.S. 23:1102, and damages are recovered, such damages shall be so apportioned in the judgment that the claim of the employer for the compensation actually paid shall take precedence over that of the injured employee or his dependent; and if the damages are not sufficient or are sufficient only to reimburse the employer for the compensation which he has actually paid, such damages shall be assessed solely in his favor; but if the damages are more than sufficient to so reimburse the employer, the excess shall be assessed in favor of the injured employee or his dependent, and upon payment thereof to the employee or his dependent, the liability of the employer for compensation shall cease for such part of the compensa-

A problem arises if the employee properly notifies the employer of his suit, the employer fails to intervene, and the employee eventually compromises the claim with the third party. In several earlier cases, the courts of appeal had determined that the employer is entitled to a credit in a subsequent compensation suit for amounts received in compromise of a tort suit by the employee, even without intervention.<sup>46</sup> This has the effect of reimbursing the employer from the proceeds of the compromise.

More recently, both the courts of appeal and the supreme court have indicated a different feeling toward the issue. In *Crabtree v. Bethlehem Steel Corporation*,<sup>47</sup> decedent's widow had been paid some \$10,000 in compensation payments and had filed suit against third-party tortfeasors for additional damages. That suit was terminated by a compromise agreement in which the widow received \$15,000. The compensation carrier promptly terminated compensation payments, claiming that the amount received in the compromise more than satisfied the maximum amount which it might have had to pay to the widow and its compensation liability to her was satisfied. The widow successfully sued in the district court for the remaining compensation benefits, but the appellate court reversed.<sup>48</sup> The supreme court, on original hearing, affirmed the appellate court; but on rehearing, the court reversed itself and held that the widow was entitled to the benefits.

The court's opinion centers around its distinction between a judgment, which is the terminology used in the pertinent statute, and a compromise. Authority for the employer or the carrier to share in the proceeds of a judgment is not authority, said the court, for sharing in the proceeds of a compromise. The rights of the employer or carrier are protected by the portion of Section 1103 which provides that the rights of the employer are not affected by a compromise between the employee and a third person.

There was evidence in *Crabtree* that the widow had been informed that the settlement amount was "free and clear" of the employer's claim for reimbursement of compensation paid.<sup>49</sup> The court also seemed impressed by the fact that the employer had been notified of the pending tort suit, and

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tion due, computed at six per cent per annum, and shall be satisfied by such payment.

No compromise with such third person by either the employer or the injured employee or his dependent shall be binding upon or affect the rights of the others unless assented to by him."

46. *Ford v. Kurtz*, 46 So.2d 357 (La. App. 1st Cir 1950); *Smith v. McDonough*, 29 So.2d 818 (La. App. Orl. Cir. 1947), *cert. denied*, July 3, 1947 (unreported). *But see* *Richmond v. Employers' Liab. Assurance Corp.*, 31 So.2d 442 (La. App. 1st Cir. 1947), which was distinguished in *Ford*.

47. 284 So.2d 545 (La. 1973).

48. 258 So.2d 199 (La. App. 4th Cir. 1972).

49. 284 So.2d at 555.

failed to intervene. On that ground, the court distinguished several of the earlier appellate decisions.<sup>50</sup> The decision in *Compton v. North River Insurance Company*<sup>51</sup> by the First Circuit Court of Appeal parallels that of the supreme court in *Crabtree* on similar facts.

During this term, the supreme court was faced with the analogous situation in which the employee notifies the employer or the carrier of the pending tort suit, and there is an intervention. If the employee then compromises the claim against the tortfeasor, may the employer or carrier share in the proceeds of the compromise, or annul it? In *Verbois v. Howard*,<sup>52</sup> the supreme court held, consistently with *Crabtree* that the carrier has no right to annul a compromise entered into under such circumstances by the employee.

In *Verbois*, the employee filed a tort suit against third persons alleged to be responsible for his injuries, and the compensation carrier intervened seeking reimbursement for compensation paid to the employee. When the employee compromised his claim against the third persons for \$10,000 and dismissed his suit, the carrier successfully set aside the compromise in the district court. Granting supervisory writs, the supreme court reversed the order setting aside the compromise, reasoning that the compromise did not affect the rights of the carrier as against the third persons. That intervention could be tried separately. Again, the court emphasized that the statute providing for apportionment of the award used the word "judgment," not compromise.

A similar conclusion was reached by the First Circuit Court of Appeal in *Roberson v. Fontenot Petroleum Co.*<sup>53</sup> The injured employee was receiving compensation benefits when he filed a tort suit against third persons; notice was given to the compensation carrier of the suit, and the carrier intervened. The tort suit was eventually settled for some \$62,500 in a conference in chambers attended by counsel for the employee, the carrier and the defendants in the tort suit. Some time thereafter, the carrier terminated compensation benefits, arguing that Section 1103 relieved it of

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50. *Ford v. Kurtz*, 46 So.2d 357 (La. App. 1st Cir. 1950) (employee filed suit and compromised it without notice to the employer); *Smith v. McDonough*, 29 So.2d 818 (La. App. Or. Cir. 1947), *cert. denied*, July 3, 1947 (unreported). The court also distinguished *Booth v. Travelers Ins. Co.*, 217 So.2d 483 (La. App. 1st Cir. 1968) (employer's insurer did not intervene in tort suit because it was denying any liability at all for workmen's compensation) and *Geter v. Travelers Ins. Co.*, 79 So.2d 120 (La. App. 1st Cir. 1955) (judgment, not compromise involved).

51. 281 So.2d 848 (La. App. 1st Cir.), *cert. denied*, 284 So.2d 336 (1973).

52. 322 So.2d 110 (La. 1975).

53. 322 So.2d 287 (La. App. 1st Cir. 1975), *cert. denied*, 325 So.2d 277 (La. 1976) ("no error of law").

any further obligation to pay because of the amount received by the employee in the tort settlement. The employee filed suit to have the compensation benefits recommenced, and both the district court and the appellate court agreed that they should be recommenced.

There are several obvious results of these recent decisions. First, employers will be encouraged to intervene in pending tort litigation, and settlements in such litigation will also be encouraged.<sup>54</sup> The supreme court seems to be particularly interested in having the employer or carrier participate on the side of the employee in tort litigation under Sections 1101 through 1103,<sup>55</sup> perhaps with the idea that this will even up the struggle somewhat.

No great harm is done by exempting the amount received in compromise from any reimbursement claims by the employer or carrier, *as long as it is clear to the alleged tortfeasor that this is the case*. Obviously, counsel for the alleged tortfeasor must carefully consider the amount tendered in settlement in light of the current jurisprudential rule that no portion of a previous compensation award will automatically be satisfied thereby. However, there is difference of opinion on the issue,<sup>56</sup> and specific legislation might be advisable.<sup>57</sup>

These decisions do not appear to change the situation in which the employer or carrier does not intervene in the tort suit because it denies any compensation liability at all. If the employee compromises the tort claim for an amount well in excess of any possible compensation claim, he may not then proceed in compensation against the employer, even absent any intervention by the employer in the tort suit.<sup>58</sup> To permit a compensation

54. See Note, 48 TUL. L. REV. 763, 769-70 (1974).

55. This interest is reflected in a decision by the Third Circuit Court of Appeal and a denial of writ application by the supreme court in *Broussard, Broussard & Moresi, Ltd. v. State Auto & Cas. Underwriters Co.*, 287 So.2d 544 (La. App. 3d Cir. 1973), *cert. denied*, 290 So.2d 331 (La. 1974), which involved a claim by the employee's attorneys for certain fees allegedly earned by them in pressing the employee's tort claim to judgment. The carrier apparently intervened, but did not actively pursue its claim. The employee's attorneys took the case on a 33 1/3% contingency, and after the intervenor received some \$7,300 of the \$13,000 judgment, that fee was considerably smaller than it could have been. The appellate court held that the employee's attorneys stated a cause of action for an additional fee.

56. See MALONE at § 368.

57. California, for example, has provided specifically that proceeds of a compromise are subject to reimbursement claims by the employer or the carrier. CAL. LABOR CODE § 3860 (Deering).

58. *Booth v. Travelers Ins. Co.*, 217 So.2d 483 (La. App. 1st Cir. 1968); *Geter v. Travelers Ins. Co.*, 79 So.2d 120 (La. App. 1st Cir. 1955).

claim under those circumstances would clearly provide double recovery for the employee.

CONSIDERATION OF LAY TESTIMONY ON DISABILITY WHEN  
THERE IS NO CONFLICT IN MEDICAL TESTIMONY

Perhaps one of the best established "rules" of evidence in workmen's compensation cases was "clarified and modified" during this past term in *Tantillo v. Liberty Mutual Insurance Co.*<sup>59</sup> In *Tantillo*, medical evidence consisting of the depositions of three doctors who had examined the employee was admitted at the trial. No doctor testified at the trial. Apparently, the only trial testimony was that of the employee and his son, who largely corroborated the father's testimony.

The trial judge had granted an award based upon total and permanent disability after an evaluation of the "medical testimony in the light of the testimony of the lay witnesses." The appellate court reversed, citing the well-established appellate rule that "if there is no conflict of the medical testimony, then the lay testimony should not be considered by the court."<sup>60</sup>

The opinion of the supreme court reveals its disagreement with such a flat exclusionary rule and its preference that the totality of the evidence, medical and lay, be examined by the trial court in reaching its conclusion on the issue of disability. It seems clear that great weight is still to be given to uncontradicted medical evidence, "almost to the point of exclusion of other evidence," when the question involved is a complex scientific one.<sup>61</sup> But disability, the court says, is a "hybrid quasi-medical concept in which are commingled in many complex combinations the inability to perform, and the inability to get suitable work."<sup>62</sup> Accordingly, the appropriate rule on the admissibility of lay evidence in this context is:

Lay evidence must be weighed with consideration for the medical fact to be established, of the conclusiveness and validity of the medical

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59. 315 So.2d 743 (La. 1975).

60. 303 So.2d 916 (La. App. 1st Cir. 1974), *citing* *Square v. Liberty Mut. Ins. Co.*, 270 So.2d 335 (La. App. 1st Cir. 1972), *cert. denied*, 273 So.2d 41 (La. 1973). To some extent, the foundation of this rule might have been in LA. R.S. 23:1317 (1950), which provides in pertinent part: "The court shall not be bound by technical rules of evidence or procedure other than as herein provided, but all findings of fact must be based upon competent evidence, and all compensation payments provided for in this Chapter, shall mean and be defined to be for only such injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself. . . ."

61. 315 So.2d at 748.

62. The court cites with approval this language from 3 LARSON at § 79.53.

evidence and the materiality, relevance and reliability of the particular lay evidence, according to its focus, foundation and its source.<sup>63</sup>

The supreme court overruled by name ten cases holding an opposite viewpoint on the evidentiary question, and could have overruled numerous others.<sup>64</sup> As a general proposition, it seems desirable to eliminate a flat exclusionary rule such as the one at issue in *Tantillo*. Particularly is this true in states such as Louisiana in which workmen's compensation cases are not tried before juries.<sup>65</sup> A trial judge is perfectly capable of hearing all competent evidence and according to it such weight as he thinks it deserves, whether it be expert or lay. He is also authorized to exclude competent evidence if he feels that its probative value is outweighed by other factors.<sup>66</sup> The question should not be one of admissibility but of weight.

At the same time, there are some disturbing aspects about the opinion. The court delineates between what it calls "medical evidence" and "medical opinion."<sup>67</sup> But medical evidence is a generic term which includes medical opinion. The context indicates that "medical facts" should be distinguished from "medical opinion." The purpose of the expert, in this case a physician, is to consider a set of facts thought to involve complexities beyond the ability of the ordinary fact-finder,<sup>68</sup> and offer an opinion on the ultimate issue to be proved.<sup>69</sup> It is correct to say, as the court does in *Tantillo*, that a finding on the issue of disability must be made by the judge, and he cannot delegate this function to anyone, including the medical witnesses. But this does not mean, as some may read the opinion, that "medical opinion," since based upon "facts" related to the physician by the patient himself, is somehow of equal probative value with those "facts." The emphasis in the opinion is clearly upon the duty of the trial judge to weigh the evidence in light of all pertinent circumstances without assigning in advance the equality or inequality of its probative value.

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63. 315 So.2d at 749.

64. See, e.g., *Williams v. Hall*, 150 So.2d 349 (La. App. 1st Cir. 1963); *Butler v. American Ins. Co.*, 138 So. 2d 862 (La. App. 4th Cir. 1962); *Prothro v. Lumbermen's Mut. Cas. Co.*, 121 So.2d 848 (La. App. 2d Cir. 1960). The supreme court would almost certainly have taken a similar view on *Ennis v. Plant Serv. Constr. Co.*, 316 So.2d 168 (La. App. 4th Cir. 1975), a case decided two weeks after *Tantillo* and contrary to its holding, but the plaintiff's application for a writ of certiorari was denied as not timely filed. 320 So.2d 560 (La. 1975).

65. LA. CODE CIV. P. art. 1733(3).

66. See FED. R. EVID. 403; C. MCCORMICK, EVIDENCE § 185 at 438 (Cleary ed. 1972).

67. 315 So.2d at 747.

68. See FED. R. EVID. 702.

69. See *id.* art. 704.

There is one other danger in this commendable decision. The conclusion announced by the court clearly applies only to cases in which the ultimate issue is disability. There is, however, the possibility that the reasoning of the court might be applied to other questions on which it would have much less validity. It would not seem appropriate, for example, to determine an issue of causal connection between an injury and resulting disability on lay testimony alone when the medical testimony negatives any such connection. On this type of issue, the expertise which the physician brings to the controversy is critical; lay evidence is ordinarily unable to establish, for example, whether a back strain caused cancer of the liver.<sup>70</sup> Hopefully, this is the type of issue the court had in mind when it recommended that great weight, almost to the exclusion of other evidence, be given to "uncontradicted medical evidence which is directed toward a complex scientific question."<sup>71</sup>

#### "SURVIVAL" OF EMPLOYEE'S CLAIM

An employee was injured November 16, 1973, allegedly within the course of and arising out of hazardous employment. He was killed on May 4, 1974 in a totally unrelated accident. He had never filed suit for the employment injuries. His parents, alleging he was not survived by a wife, children or dependents, brought suit against the employer to collect the accrued disability benefits and medical expenses due the employee at his death, based upon a claim of total and permanent disability.

Had the employee filed suit before his death, there would have been little doubt under Louisiana jurisprudence that the appropriate representative of his estate could have been substituted in the pending litigation, and an award for benefits accrued up until the time of his death could have been made.<sup>72</sup> But death prior to filing suit made *Turner v. Southern Wheel and Rim Service, Inc.*<sup>73</sup> a slightly different case in the eyes of both the trial court and the court of appeal. The trial court sustained exceptions of no right of action, no cause of action, and lack of procedural capacity on the ground

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70. *Drakulich v. Industrial Comm'n*, 137 Ohio 82, 27 N.E.2d 932 (1940), cited in A. LARSON, *WORKMEN'S COMPENSATION* (Desk Edition), § 79.50 n.46 (1972).

71. 315 So.2d at 748.

72. *Wascom v. Miller*, 101 So.2d 744 (La. App. 1st Cir. 1958); *Warning v. Royal Indem. Co.* 75 So.2d 242 (La. App. Orl. Cir. 1954); *Herbert v. Fifteen Oil Co.*, 46 So.2d 328 (La. App. 1st Cir. 1950); *Richardson v. American Employers' Ins. Co.*, 31 So.2d 527 (La. App. 1st Cir. 1947). See also *Warren v. Globe Indem. Co.*, 216 La. 107, 43 So.2d 234 (1949) (suit by dependent for death benefits under compensation act does not abate upon claimant's death).

73. 332 So.2d 770 (La. 1976).

that the employee's right to bring the action abated at his death; the appellate court affirmed, reasoning that the obligation to pay the benefits was "strictly personal" and abated at death.<sup>74</sup>

The supreme court properly reversed, holding that the obligation of the employer to pay disability benefits accrued up to death and medical expenses incurred was heritable.<sup>75</sup> The fact that the employee had not filed suit made no difference, since article 426 of the Code of Civil Procedure applies equally to heritable actions filed and those not yet filed.<sup>76</sup> There is no reason to conclude that the employer should be relieved of the obligation to bear employment related losses, which otherwise fall upon the family of the deceased, merely because of the untimely death of the employee.

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74. 322 So.2d 810 (La. App. 4th Cir. 1975).

75. See La. Civ. Code arts. 1997, 1999. The court's opinion is limited to the disability payments which would have been payable up to the time of death, and the medical expenses actually incurred. Plaintiffs made no effort to collect any amounts beyond the date of death, and it is presumed that there is no change in the rule that any right to recover disability payments accruing after his death abates. MALONE at § 301.

76. LA. CODE CIV. P. art. 426: "An action to enforce an obligation is the property of the obligee which on his death is transmitted with his estate to his heirs, universal legatees, or legatees under a universal title. . . .

"These rules also apply to a right to enforce an obligation when no action thereon was commenced prior to the obligee's death."