Public Law: Workmen's Compensation

H. Alston Johnson III
WORKMEN'S COMPENSATION

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As is usually the case, the 1977-78 term encompassed a number of appellate decisions in the field of workmen's compensation appropriate for brief comment without extended discussion, and a few which require more detailed commentary. It was held during this term that a person called for service as a juror and injured during that service was not entitled to compensation from the parish,1 thus treating jurors receiving modest compensation for their service in a fashion similar to others receiving modest compensation but not actually employees, such as prison inmates.2

When a contract of employment is found, however, the reach of coverage remains fairly pervasive. A construction employee injured while assisting a damsel in distress was held entitled to compensation, either on the basis that the assistance was incidental to employment or that, if a deviation, the deviation had ended and he was returning to his employment.3 An independent contractor engaged under an oral contract to replace two light bulbs over a tennis court and injured while doing so was also held entitled to compensation.4

A question of the proper allocation of compensation between two insurers was resolved by a case in which the injured person was an undercover agent engaged to detect employee

* Professor of Law, Louisiana State University.

1. Jeansonne v. Parish of East Baton Rouge, 354 So. 2d 619 (La. App. 1st Cir. 1977), cert. denied, 356 So. 2d 436 (La. 1978) (no contract of employment; statute requires that the parish and the juror "perform as they do").


3. Quinney v. Maryland Cas. Co., 347 So. 2d 921 (La. App. 3d Cir. 1977) (plaintiff at work on construction project in shopping center; motorist stuck in hole in parking lot; plaintiff injured while helping extricate her car, or upon returning from that endeavor).

4. Alexander v. Reed, 350 So. 2d 179 (La. App. 1st Cir.), cert. denied, 350 So. 2d 1206 (La. 1977) (unclear as to what other responsibilities plaintiff may have had, but he was engaged to install the two light bulbs at five dollars apiece, and compensation was calculated upon that wage rate).
theft.\textsuperscript{5} Since he was paid by the detective agency which originally employed him and the employer for whom he worked on an assembly line to detect such theft, the compensation was allocated between the two according to the percentage of his wage borne by each.

\textit{Henderson v. Travelers Insurance Co.}\textsuperscript{4} is a matter of considerably greater importance, but requires only brief comment because it is the subject of a student note in this Review.\textsuperscript{7} The \textit{Henderson} decision accomplishes a result long expected in the compensation field: awarding of benefits upon the death of the employee to a concubine. In a number of cases in recent years, death benefits under the Act have been accorded to illegitimate children of the deceased,\textsuperscript{8} the “in-laws” of the deceased,\textsuperscript{9} and even the nephew of the deceased’s concubine\textsuperscript{9} as “other dependent members of the family,”\textsuperscript{11} so long as they were in fact dependent upon the deceased and formed a part of his “household.” The sole exclusion from this category was the concubine herself.

The factual situation in \textit{Henderson} made the extension relatively easy. The court noted that the deceased died with no surviving wife, child or other dependent, and thus there was no question of infringement upon the rights of other claimants. Moreover, the claimant had lived for eleven years in what was described as a “stable, loving relationship” with the deceased. Under the circumstances, the court thought that \textit{Humphreys v. Marquette Casualty Co.}\textsuperscript{12} ought to be overruled and the concubine permitted to recover benefits.

The decision leaves some unanswered questions, discussed more thoroughly in the student note. Despite the discussion in terms of a concubine, the decision certainly must apply to male as well as female claimants. But what sort of relationship will

\begin{itemize}
\item \textsuperscript{5} Continental Ins. Co. v. Fireman’s Fund Ins. Co., 350 So. 2d 183 (La. App. 4th Cir. 1977).
\item \textsuperscript{6} 354 So. 2d 1031 (La. 1978).
\item \textsuperscript{7} Note, 39 LA. L. REV. 269 (1978).
\item \textsuperscript{8} Caddo Contracting Co. v. Johnson, 222 La. 796, 64 So. 2d 177 (1953).
\item \textsuperscript{10} Patin v. T. L. James & Co., 218 La. 949, 51 So. 2d 586 (1951).
\item \textsuperscript{11} LA. R.S. 23:1232(8) (1950).
\item \textsuperscript{12} 235 La. 355, 103 So. 2d 886 (1958).
\end{itemize}
qualify the claimant as a "Henderson concubine or paramour"? And what evidence will be necessary to establish that relationship, recognizing that the person with the best evidence is also in a self-serving position in coming forward with it? What will be the outcome when the concubine or paramour is claiming benefits which will infringe upon those to be accorded, for example, to a legal spouse? If we conclude that we cannot discriminate between a legal spouse and an "illegal" one as to workmen's compensation benefits, must we reach the same conclusion, for example, as to a wrongful death claim?

The present Act is simply not written in terms which would countenance the resolution of these and other questions. The proper solution is legislative action, rather than the vagaries of the judicial process, which is not suited to accomplishing whatever changes may be desirable on a case-by-case basis.

The New Disability Provisions

Undoubtedly the most discussed portion of the major amendments to the Act in 1975 is the revision of the disability provisions. A considerable amount of energy has been exerted on speculating how the courts will react to the new definition of disability, and whether the literal reading of the section will be respected or rather will be enlarged by judicial interpreta-

13. See LA. R.S. 23:1232(1), (2), and (3) (1950) for example, which accord a certain percentage of the deceased's wages as benefits to "the widow or widower" alone or in conjunction with children. If there is a widow, for example, and a "Henderson concubine," what disposition is to be made of the benefits? The real question is, shall the concubine be treated as a surviving spouse? And if not, on what basis shall the discrimination between the two be made?

14. We have previously encountered difficulties in a similar series of decisions. In Levy v. Louisiana, 391 U.S. 68 (1968), it was held that Louisiana could not deny to an illegitimate child of a deceased the right to sue for wrongful death when it would grant the same right to a legitimate child. Thereafter, in Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972), it was held that Louisiana could not relegate illegitimates asserting a right to workmen's compensation benefits to the "other dependent members of the family" category, thus preferring legitimate children, perhaps to the exhaustion of benefits. If it should be held that the widow is to be preferred to the concubine in the same manner, and if that ruling should not survive constitutional attack, it is not improbable that the way would be open for a claim that Louisiana's wrongful death provisions must not discriminate between the legal spouse and the "illegal" spouse.
tion. Early returns are now available on the question, and the results thus far are interesting and deserve extended comment.

The story of the interpretation of the former disability provisions is well-known and needs only a summary here. The former provisions dealt with three different types of disability: (1) total disability, whether temporary or permanent, "to do work of any reasonable character"; (2) partial disability "to do work of any reasonable character"; and (3) a specific schedule of compensation for injuries not producing disability falling under the other two categories. Judicial interpretation of this section, for reasons excellently enunciated by Professor Emeritus Wex Malone elsewhere, was such that total disability would be found if the claimant could not return to the same employment in which he was engaged at the time of injury, or could return to it but only to work in substantial pain. The literal requirement that the injured employee be in a position such that he could not work at all, in any reasonable employment, before he could be classified as totally disabled, was simply not followed.

The only apparent concession offered to employers in the 1975 amendments to the Act was the restructuring of the disability section so as to reflect a different rationale and probably to strengthen somewhat the requirements necessary to find a claimant totally disabled. As to total disability, it was provided that only a claimant unable to "engage in any gainful occupation for wages" would be considered totally disabled. If the claimant can engage in any gainful occupation for wages, "whether or not the same or a similar occupation as that in which the employee was customarily engaged when injured and


whether or not an occupation for which the employee, at the
time of injury, was particularly fitted by reason of education,
training, and experience," he does not fit the statutory defini-
tion of a totally disabled employee.\textsuperscript{18}

The category of partial disability was amended to reflect an entirely new standard: if the injury prevents the employee from performing the same duties he was customarily engaged in at the time of injury, or duties of a similar character for which he is suited by education, training, and experience, then he is partially disabled and entitled to weekly benefits, but subject to a maximum of 450 weeks.\textsuperscript{19} Moreover, the measure of compensation is the difference between what the employee was making at the time of injury and any amount which he "actually earns" in any week thereafter in any gainful occupation for wages.\textsuperscript{20}

The intent of the new partial disability section must have been to include those kinds of cases which had been treated as total disability under interpretations of the previous Act. Formerly, if the claimant could not return to the same or similar work, he was entitled to an award of total disability. Now, if he cannot return to such work, he is entitled only to an award of partial disability, and then only for a maximum number of weeks and only to the extent that he "actually earns" less than he was earning at the time of his injury.

But whatever may be the intent of the new partial disability section, this does not necessarily give us guidance on the new total disability section, which contains a concept new to the Louisiana Act: inability to engage in any gainful occupation for wages. What shall this mean?

The more cynical among us may simply feel that the

\textsuperscript{18} \textit{La. R.S. 23:1221(1), (2) (Supp. 1968), as amended by 1975 La. Acts, No. 583.}


\textsuperscript{20} It has been noted that a phrase such as "any lesser wages which the injured employee actually earns or is capable of earning in any week thereafter" might have been preferable, to avoid the possibility that a partially disabled person capable of working would not be rewarded with the maximum possible compensation for refusing to do so. See \textit{The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Workmen's Compensation}, 38 \textit{La. L. Rev.} 483, 488 (1978). \textit{La. R.S. 23:1221(3) (Supp. 1968)}, as it appeared prior to its amendment by 1975 La. Acts, No. 583, contained the phrase "able to earn."
phrase is not radically different from the former “inability to do work of any reasonable character” and predict that the section is destined to be interpreted just as the former section was construed. However, there is an obstacle to this interpretation which was not present in the former provision. In this instance, the legislature has specifically provided for the case of the claimant who is prevented by his injury from returning to the same work; he is to be considered partially disabled. The previous disability section did not provide for such a case, leaving it to the judiciary to determine whether such a factual situation should be deemed to be “inability to do work of any reasonable character.”

The new section requires that the court interpret the phrase “inability to engage in any gainful occupation for wages.” In some of the early interpretations, it has been held that a claimant who could return to a gainful occupation, but could do so only by working in substantial pain, is to be considered totally disabled.\(^2\) There is certainly nothing inconsistent with the new section in such a conclusion. Nothing in the section states that the employee is not disabled if he can engage in any gainful occupation for wages, whether in pain or not. And the social policy carried out in the Act is such that we could not in good conscience conclude that an employee could be considered as capable of working when he could only do so in substantial pain. Under the circumstances, it seems fair to predict that the so-called “working in pain” jurisprudence will continue to be viable under the new definition. But given that there is no limit on the number of weeks of benefits which may be paid under total disability and thus that fairly substantial amounts are involved, and given that re-opening an award is possible but rare, considerable care should be exercised by the judiciary in assessing whether a claimant will in fact be working in substantial pain if he returns to work.\(^2\)


A much more difficult case than the “working in pain” case is that presented in Ashworth v. Elton Pickering, Inc.\textsuperscript{23} The plaintiff suffered a heart injury during his work as a log cutter;\textsuperscript{24} when he attempted to return to that work, he suffered recurring symptoms of his previous heart problem and ceased that employment. He was said to be “illiterate” and without “other work experience.” The primary question for resolution was whether he was totally or only partially disabled.

There was no dispute that plaintiff had not returned to his former employment, except for the brief period indicated; the medical evidence was that he should not do so. But there was also medical evidence that he would be able to perform certain light work without pain or harm to his health. As he had no previous experience at, or any particular education or training for, any other occupation, the court held that plaintiff was totally disabled. The majority was of the opinion that one had to take account of the “realistic earning capacity” of the disabled worker, and could not view the matter from a “solely medical” perspective.\textsuperscript{25}

The majority reached this conclusion by asserting that the definition of partial disability was that a person unable to perform his usual occupation, but able to perform another for which he is fitted by education, training or experience, should be considered partially disabled.\textsuperscript{26} It would follow, according to

\textsuperscript{23} 361 So. 2d 940, 945 (La. App. 3d Cir.), cert. denied, 362 So. 2d 1119 (La. 1978) (Watson, J., concurred in the result but would have remanded for taking of further evidence. Culpepper and Domengeaux, JJ., dissented in part and concurred in part).

\textsuperscript{24} There was some dispute on this point in the trial court since the injury was diagnosed as an aspect of congestive heart failure. But the appellate court found no reversible error in the trial court’s conclusion that an accident and injury had occurred and was causally connected to plaintiff's disability.

\textsuperscript{25} The court added: “Conversely, we believe that the legislature intended that where an employee would become fit for any gainful occupation only by a reasonable degree of further education, training, or experience, the extreme lack of education, training or experience would be relevant to our analysis.” 361 So. 2d at 944.

\textsuperscript{26} This is not a completely accurate rephrasing of the statutory language and may have unwittingly led the majority into a strained interpretation. Section 1211(3)\textsuperscript{361} provides that compensation shall be paid “for injury producing partial disability . . . to perform the duties in which he was customarily engaged when injured or duties of the same or similar character, nature, or description for which he was fitted by education, training, or experience . . . .” La. R.S. 23:1221(3) (Supp. 1968), as amended by
this reasoning, that a claimant such as plaintiff could not be partially disabled. But the court held that it would be "illogical" to conclude that he was injured during his employment and yet not award any compensation. Thus, in the court's opinion he had to be considered totally disabled because he had "no reasonable ability to engage in any gainful occupation, in his physical condition." The claimant's lack of education, training and experience was mentioned, but the court based its holding upon his physical condition, despite the medical evidence that certain light work was possible.

Without quarrelling for the moment with the result, it should be said that the opinion takes unnecessary liberty with the statutory language. The amended statute is relatively simple. A worker is totally disabled if he cannot engage in any gainful occupation for wages. He is partially disabled if he can engage in a gainful occupation for wages. The addition to each definition of the language "whether or not" the occupation is the same as the one he was accustomed to, or is trained for, was probably only intended to clarify the fact that the former jurisprudential rules on disability were to be applied exclusively to partial disability cases. It is ironic that this surplusage could be used to contradict the apparent legislative intent.

This is not to say that the decision in Ashworth is erroneous in its result, but the reasoning should follow a different line. Since the matter is still open for further delineation, some thought ought to be given to the proper interpretation of engaging in "any gainful occupation for wages." It seems that the Ashworth factual situation would be an appropriate one for the application of the so-called "odd lot" doctrine.

1975 La. Acts, No. 583. A person such as plaintiff, who could not perform the same duties nor similar ones for which he was trained and educated, should probably be considered partially disabled, at least until he is able to demonstrate that he falls in the "odd-lot" category. Unfortunately, the Act contains no provision for rehabilitating or even re-educating an injured employee so that he can perform another task in the economy. The majority must have been aware of that fact and, under the circumstances, granted a total disability award. Such a strained interpretation of section 1221(3) may someday work an injustice in a case in which an injured employee can return to some employment though not the same employment, even though not presently trained for that employment; such a person, barring classification as an "odd-lot" worker, should probably be termed partially disabled.

27. 361 So. 2d at 944.
Simply stated, this doctrine is that a claimant may be considered totally disabled if, after his injury, he is considered an "odd lot" in the competitive labor market, i.e., that he may be capable of holding various jobs from time to time, but that the kind of work he may perform is so limited in quality, dependability or quantity that a reasonably stable market for that work does not exist. The phrase itself may have originated in an English case in which the writing judge opined that "if . . . the capacities for work left to him fit him only for special uses, and do not, so to speak, make his powers of labor a merchantable article in some of the well-known lines of the labor market," then the claimant "if I might be allowed to use an undignified phrase" is an "odd lot in the labor market . . . ."

The concept was borrowed for use in the United States and has become a fixture of the jurisprudence in a number of states, including Florida, Oregon, Minnesota, Nebraska


30. Among the earliest cases is Jordan v. Decorative Co., 230 N.Y. 522, 525, 130 N.E. 634, 635-36 (1921), in which Judge Cardozo phrased it thusly:

He [the plaintiff] was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the "odd-lot" man, . . . the "nondescript in the labor market . . . ." Work, if he gets it, is likely to be casual and intermittent . . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and the halt.

31. Abbenante v. United Parcel Service, Inc., 241 So. 2d 1 (Fla. 1970); Millender v. City of Carrabelle, 174 So. 2d 740 (Fla. 1965); Reed v. Sherry Frontenac Hotel, 150 So. 2d 225 (Fla. 1963); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596 (Fla. 1960).

and a number of others. In these states, the statutory definition of total disability is not unlike that recently chosen by the Louisiana legislature, but the feeling has been that the statutory language could not be taken so literally as to require the claimant to be "absolutely helpless or physically broken and wrecked for all purposes except merely to live."

The "odd lot" doctrine has some fairly well-defined elements which bear consideration. The burden of proof remains with the claimant to show the ordinary circumstances of compensability: that there was an injury or occupational disease arising out of and in the course of employment. But to this he should add, in an "odd lot" case, that the result is such that he must be considered in the category of odd-lot workers. To do so, he should present evidence of the extent of his physical impairment, his mental capacity, his education, his training, his age and any other factor which tends to prove that he would be considered at a substantial disadvantage in competing with others for any recognized calling in the labor market. If he


33. Castle v. City of Stillwater, 235 Minn. 502, 51 N.W.2d 370 (1952) (police chief suffering spine injury impairing use of right hand and coordination of arms and causing "peg-legged" type of walk, 69 years of age with eighth-grade education; did a little work of a gardening nature for short periods of time; held totally disabled); Lee v. Minneapolis St. Ry. Co., 230 Minn. 315, 41 N.W.2d 433 (1950).

34. Dietz v. State, 157 Neb. 324, 59 N.W.2d 587 (1953) (prison guard struck by escaped inmate on head with heavy iron resulting in headaches, nervousness, inability to concentrate, anxiety, tension, tics or twitches, and spasms of muscles with intermittent pain, numbness of extremities, dizziness and convulsions; performed light security work which only required him to sit and guard personal property; held totally disabled).

35. See the discussion in A. Larson, supra note 28, at §57.50 et. seq.; National Fuel Co. v. Arnold, 121 Colo. 220, 214 P.2d 784 (1950); Anderson v. Whitaker, 247 S.W.2d 980 (Ky. 1952).

36. Port Everglades Terminal Co. v. Canty, 120 So.2d 596, 600 (Fla. 1960). The Florida statute in question defined disability as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." Fla. Stat. §440.02(9). See also International Minerals & Chem. Corp. v. Tucker, 55 So. 2d 720, 722 (Fla. 1951).

37. There is no reason for the "odd-lot" doctrine to be regarded as having made any change in this requirement. The claimant must still show that the incident is covered under the Act. The question of the extent of his injury and disability is a separate matter, and it is only to this question that the "odd-lot" doctrine has application.
convinces the court of this fact, he has presented a prima facie case for classification in the odd-lot category. If the employer or insurer is to escape a conclusion of total disability, it would ordinarily be required to present evidence that some form of suitable work is regularly continuously available to the claimant, most probably limited to availability in the general area of his residence. Such evidence might be adduced by testimony of a vocational employment counselor or other expert in vocational rehabilitation. It might be adduced, in an appropriate case, by testimony that the employer would be willing to re-hire the employee for designated employment.

Further refinements are, of course, available. If the employee's physical condition, age, experience and training are

38. Consider, for example, the kinds of evidence presented in: Abbenante v. United Parcel Service, Inc., 241 So. 2d 1 (Fla. 1970) (40-year-old claimant suffered from crippling in some limbs after injury, occasional blackouts and amnesia; adjudicated permanently disabled for social security purposes; had been employed by Goodwill Industries but released after four days because he could not do the work); Millender v. City of Carrabelle, 174 So. 2d 740 (Fla. 1965) (43-year-old claimant with back and leg injury; previously employed at heavy labor; fifth-grade education; previous employer refused re-employment; rehabilitation nurse testified that she was unable to find employment for him in place of residence); Reed v. Sherry Frontenac Hotel, 150 So. 2d 225 (Fla. 1963) (30-year-old woman suffered amputation of hand; sixth-grade education; intelligence quotient of high-grade moron; work experience limited to work as maid or laundress; testimony that she could not understand how to operate a power sewing machine, which had been one possible employment for her); Port Everglades Terminal Co. v. Canty, 120 So. 2d 596 (Fla. 1960) (back injury; ninth-grade education; previous employment at manual labor; sought employment at numerous places but was unable to hold any one job for more than a week or two); Swanson v. Westport Lumber Co., 4 Or. App. 417, 479 P.2d 1005 (1971) (63-year-old; back injury; evidence proffered to effect that claimant could be employed as security guard, but when witness was asked hypothetical question detailing claimant's physical impairment, he answered that he had no openings in his business at the time for such a person).


40. See Millender v. City of Carrabelle, 174 So. 2d 740, 742 (Fla. 1965). This seems particularly important. It is obviously of no great value, even given the theory of mobility of labor, to say to an injured claimant in Louisiana that a job which he could perform is available in Phoenix, Arizona. There is no indication that the legislature intended transplantation of employees as a solution to the Louisiana employment accident problem.


42. It is obvious that this may be a delicate matter. An employer who vigorously asserts that the claimant can perform designated tasks available in the economy is very likely to be asked whether he himself has a job for the claimant.
not such that one would be inclined to conclude that he was an "odd lot" in the labor market, it might be appropriate to require evidence as to his desire to work and motivation to gain full-time employment. In other words, one needs to be convinced that he has in fact tried unsuccefully to obtain employment. When his condition and the other factors are such that one can reasonably conclude that there is no steady employment for him in the market, evidence of motivation is perhaps unnecessary.

It may be observed that Louisiana has not previously recognized such a doctrine. It has not previously had any need of it. The judicial interpretation of the former definition of disability was such that a person was in effect classified as an "odd lot" in the labor market if he could not return to the same job; evidence of other available employment was simply not relevant to the question. Injured claimants thus had an interpretation much preferable to the "odd lot" doctrine.

It is not a coincidence that the persons most likely to fall in an "odd lot" category are the persons most in need of the benefits available under compensation, i.e., persons of little education and limited training and experience, perhaps advanced in age, as to whom there is no evidence that their skills are regularly usable in the labor market. The plaintiff in Ashworth might arguably fall in this category, though consideration should be given to the medical evidence that he could do some light work. This should be supplemented by evidence of the actual availability of such work in the vicinity.

It may be argued, particularly by those on the defense side, that this concept is not specifically authorized by the amended section and seems to run counter to its tenor. This hardly seems to be a pragmatic position. In the first place, the statute requires that a person be able "to engage in any gainful occupation for wages" in order to be excluded from the total disability provision. The legislature could have chosen a phrase such as "unable to obtain employment" or "unable to hold a job," but did not do so. It is not implausible to argue that "engaging" in a gainful occupation conveys the meaning of fairly steady,

available employment, not a series of pick-up jobs where the employee may be the last hired and the first fired.

In the second place, an argument that the section should be interpreted literally eventually ends in the conclusion that only the absolutely helpless and broken claimant, completely incapable of holding a job of any nature for even the shortest period of time, is entitled to a total disability award. Anyone who believes that this conclusion will be judicially accepted ignores the lesson of the last thirty years of decisions under the former disability provisions.

Finally, acceptance of a doctrine at least similar to the "odd lot" theory allows considerable flexibility on both sides to determine fairly whether the injured employee has the prospect of steady employment in the labor market. If he does, then society should not be burdened with a permanent disability award in his favor. If he does not, he should not be placed by society in a deprived state on the basis of a very literal interpretation of the Act.

A word of caution is in order. To a great extent, the 1975 amendments alter the character of the Act. While certainly no one covered by its provisions will become a millionaire, the removal of the maximum number of weeks of payments and the tying of the maximum amount to the average weekly wage mean that substantial amounts of money are involved. In light of that, an award based on the "odd lot" doctrine should not be cavalierly made. Plaintiff should be made to demonstrate, with appropriate evidence, that he falls in that category; defendant should be made to demonstrate that such is not the case, based on evidence of the availability of employment to a person of plaintiff's impaired capabilities. The "odd lot" doctrine permits this determination to be made.

Coverage of the Independent Contractor Engaged in "Manual Labor"

In Lushute v. Diesi, the supreme court undertook to de-
fine the limits of coverage for independent contractors engaged in manual labor in carrying out their contracts, and in doing so may have subjected the Act to a doubtful interpretation which could lead to unjust results. Lushute was a self-employed plumber, electrician and general handyman who over a period of thirty years had repaired various sorts of mechanical equipment at defendant’s restaurant. He was said to have a number of clients, perhaps 250, and was paid by the hour for the work that he performed. He was called to defendant’s restaurant about once or twice a month and was engaged in repairing an air conditioning unit there when he fell through the ceiling and died of injuries suffered in the fall. The trial court awarded compensation against both the individual defendant and the corporation (restaurant), and the appellate court affirmed as to the corporation.46

The supreme court held that Lushute was an independent contractor engaged in manual labor at the time of his death, but denied compensation on the basis that the work he was performing was not “an integral part of his principal’s trade, business or occupation.”47 This is a somewhat startling conclusion, given that the only portion of the Act in which coverage is extended to independent contractors makes no such requirement. That portion—Revised Statutes 23:1021(6)—simply states:

“Independent contractor” means any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished, and are expressly excluded from . . . this chapter unless a substantial part of the work time of an independent contractor is spent in manual labor by him carrying out the terms of the contract, in which case the independent contractor is expressly covered by . . . this Chapter.

47. 354 So. 2d at 183. The appellate court had, in its decision, raised this issue but had concluded that air conditioning repair, in the case of a restaurant in the South in the 1970’s, was an integral part of the restaurant business.
In reaching its conclusion, the majority referred first to the provisions of the original act, 48 now found in section 1061, which specified that the employees of a "contractor" could seek compensation from the person ("the principal") with whom their employer had contracted, if the work being executed was a part of the principal's trade, business or occupation. Then the court noted a 1926 amendment which made no substantial change in that section but added a new section specifying that "a person rendering service for another . . . (other than as an independent contractor, which is expressly excluded hereunder) is presumed to be an employee . . . ." 4 The same statute then defined "independent contractor" as section 1021(6) does now. Finally, the majority noted the 1948 amendment which specifically extended coverage to certain independent contractors engaged in manual labor. 50 From this review, the majority concluded that the legislature meant to define independent contractor by combining the definition it had given in 1926 and the one given in another portion of the Act in 1914 to "contractor." This led to the holding that only an independent contractor otherwise qualified under the Act who performed work which was a part of the trade, business or occupation of the principal was covered under the Act.

It is believed that the majority's understanding of the history of these amendments is faulty. The original act was made applicable to certain employees and contained no definition of, or even reference to, an independent contractor. No doubt it was thought that no definition was needed. This proved to be wishful thinking. The supreme court was almost immediately faced with making a distinction and made several false starts 51 before settling into a somewhat vaguely defined "control" test, tempered with an inquiry into the "grade and status" of the injured claimant. 52

49. 1926 La. Acts, No. 85, §3(8).
The 1926 amendment, as we have seen, largely codified the jurisprudential rule in force at that time. This amendment, while potentially an improvement because it excluded from coverage an independent contractor (as defined) who rendered service “other than manual labor,” turned out to be troublesome.

The principal difficulty was the reference to “service other than manual labor.” Was it intended that a person who was by every other indicia an independent contractor, but was engaged in manual labor, would on that account become an employee entitled to compensation? The jurisprudence wrestled with that question for years, eventually reaching a fitful, negative answer in Allgood v. Loeb.54

Subsequent to the Allgood decision, and very likely in an attempt to overrule it legislatively, the 1948 Act amended the definition, which appears without change today as section 1021(6). This amendment, as we have seen, does not create an employment relationship. It simply entitles a qualified contractor to an employee’s benefits under the Act, under the same conditions. Those conditions are contained in section 1035: that the individual be injured while performing services arising out of and incidental to his employment in the course of his

53. Hatten v. Haynes, 175 La. 743, 144 So. 483 (1932); Clements v. Luby Oil Co., 170 La. 910, 129 So. 526 (1930) (fact of manual labor is only one consideration in determining whether status is that of employee or independent contractor); Rodgers v. City of Hammond, 178 So. 732 (La. App. 1st Cir. 1938); Harris v. Louisiana Oil Refining Corp., 137 So. 598 (La. App. 2d Cir. 1931); Myers v. Newport Co., 135 So. 767 (La. App. 1st Cir. 1931); Cobb v. Long Bell Lumber Co., 134 So. 310 (La. App. 1st Cir. 1931).

54. 210 La. 594, 27 So. 2d 380 (1946). It is interesting to note that Allgood was actually a tort case, brought by an injured individual who was met by the defense that since he engaged in manual labor in carrying out a contract with the defendant, he was covered by the Act and his remedy was exclusively in workmen’s compensation. The court’s opinion rejected that argument, and in doing so announced the principle that the fact that “the contract contemplates the performance of manual labor, and the fact that the plaintiff actually engaged in manual labor in carrying out the contract, would not transform the plaintiff into an employee if his status in all other respects was that of an independent contractor.” Id. at 604, 27 So. 2d at 383. It is not unlikely that the legislative overruling of Allgood was actually more an effort to curb tort actions than it was to extend compensation to certain independent contractors.

employer's trade, business or occupation. There is no statutory requirement that those services be "a part" of the employer's business.

In choosing the compensation scheme and protecting the compromise underlying it, the legislature initially attempted to assure that persons who were not employees should not receive compensation for work-related injuries. One device to assure that result was to exclude "independent contractors" from the Act. The obvious difficulty with such a distinction was that it very often was hard to determine whether an injured individual was an employee or an independent contractor. A closely allied problem was the invitation such a distinction offered to disguise employees as independent contractors so as to avoid liability under the Act. Such efforts were in fact made, and they led to the 1948 amendment which attempted to remedy that problem. Its focus on "manual labor" was an effective, if somewhat blunt, solution to this recurring problem. By choosing this solution, Louisiana chose to base the decision about whether to grant compensation coverage not on the distinction between an employee and an independent contractor, with its knotty "right to control" problem, but rather upon whether the injured individual was engaged in manual labor, even if he might

56. "The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business or occupation ..." La. R.S. 23:1035 (Supp. 1975 & 1976).

57. In fact, it is clear that the genuine employee is entitled to a more liberal test on the question of coverage as to his employer than is the employee of a contractor with reference to the principal. The former need merely show that his services when injured arose out of and were "incidental to his employment in the course of" the employer's business, while the latter must show that the work he was engaged in was "a part" of the principal's business. To demonstrate the difference, one might consider Ludlow v. American Bank & Trust Co., 339 So. 2d 478 (La. App. 2d Cir. 1976). Ludlow was a service station operator who reconditioned repossessed automobiles for the defendant in order to enhance their resale value. In the event that one of Ludlow's employees had been injured during such work, compensation would be awarded against the bank only if it were shown that automobile repairing were a part of the bank's trade, business or occupation—a doubtful conclusion. If the same test applied to Ludlow himself, compensation would also probably be denied. But, as the Ludlow decision noted, the working independent contractor need only show that he was injured in the course of the bank's trade, business or occupation, the more liberal test applicable to the bank's own employees. It may be that some would prefer a different resolution of this situation, but it is hard to deny that the Act does make this distinction.
technically be classified as an independent contractor.

At this time, this seemed a direct manner of solving most of the problems. It is, however, a treatment only of the symptom and not the disease. Those who appear not to be employees and yet spend a substantial amount of their time in manual labor carrying out a contract very often are not in a financial position to hire someone else to do that job. They either do not have the expertise, or in some cases the motivation, to manage the work of others with its attendant responsibilities and costs. Yet in performing the manual labor themselves, they do not have the bargaining power to pass on the costs of their own injuries to the person with whom they have contracted.

In fine, such persons simply are not running a business organization separate and independent from that of the person with whom they have contracted. They thus lack one of the essential elements of any efficient compensation system: a device to spread the risk of injury and dilute the costs of those risks in that fashion.58

Treating the disease rather than the symptom, a few jurisdictions have begun to resolve the question of compensation coverage by asking whether the injured individual (who appears to be an independent contractor and arguably is not covered) is in fact running an enterprise separate from that run by his principal. If he is, then certainly it is fair to ask that enterprise rather than the principal’s enterprise to bear the cost of injury to such an individual. If he is not, it is probably unfair to place upon him the cost of injury which the compensation system was intended to place upon someone else.

The Louisiana Act does not contain any specific reference to such a distinction, and perhaps some legislative modification would be desirable. But when one examines the traditional tests employed to distinguish the independent contractor from the employee, it becomes apparent that these criteria are in fact indicia of the presence or absence of an independent business enterprise. Some of the criteria often given are services on a lump sum basis, control of method of doing the work, effect of employing helpers, effect of supplying equipment, and the

specialized nature of the work. There are recent indications that the court should look more to the claimant’s “independence in business” or lack of it to assist in answering the question of coverage.

The “independent business” approach to distinguishing among compensation claims by supposed independent contractors will not always be an easy standard to apply. One important element suggested by a noted authority is the degree of independence enjoyed by the individual in relation to a particular employer. If the worker does not advertise to the public an independent business enterprise, and in fact does most of the work for a particular employer, albeit under a “contract,” he may very well be treated as an employee for compensation purposes. An additional important element in detecting the presence of an independent enterprise is whether the work being performed by the independent contractor is a part of the alleged employer’s business.

It is likely that these two elements—recurring, almost exclusive, service to one employer and work which is a part of the employer’s business—will coincide in most cases in which either is present. This simply reflects the facts of business. A task

61. A. Larson, supra note 28, at § 45.31.
62. Consider the decision in Vizena v. Travelers, 238 So. 2d 238 (La. App. 3d Cir.), cert. denied, 256 La. 885, 239 So. 2d 542 (1970). The deceased welder “maintained his own welding shop” and owned his own equipment. He was said to be “not employed fulltime by anyone,” but instead accepted various welding jobs at a fixed amount per hour. The testimony indicated, however, that he was engaged by the defendant to do welding “at the latter’s plant on an average of 12 or 13 times per year.” The battleground in the case was whether the deceased spent a substantial part of the work time in manual labor; there was considerable discussion about his being a “skilled craftsman” who did not engage in manual labor. This was argued, it is true, by the plaintiffs in the context of seeking a tort instead of a workmen’s compensation recovery. But the issue could just as easily have been resolved in the same way by focusing on whether his was an independent business enterprise, rather than whether he was a “skilled craftsman” or not.
which recurs frequently and without which a business could not function efficiently\(^\text{64}\) is probably one which is more economically performed by employees or employee-like persons. But if compensation costs could be shifted onto those who perform the work, then it would be more economical to contract the work to others. It is precisely this type of shifting which produced the present problem and has probably produced the present solution in some jurisdictions of looking to the issue of "independent business enterprise."

Seen in this light, the majority's concern in \textit{Lushute} about whether the deceased's work was "a part" of the restaurant's business is in fact one of a number of elements properly considered to determine whether he was engaged in an independent business enterprise and thus excluded from coverage. Making this one element an absolute requisite, however, is to miss the primary objective underlying this section of the Act. An individual not engaged in an independent enterprise, yet not doing work which may be considered "a part" of the business as opposed to being "incidental" to the business, will be denied compensation under this decision while an employee would be granted compensation.\(^\text{65}\) This is contrary to the letter and the spirit of the Act; once the court concluded that Lushute was an independent contractor and was engaged in manual labor in carrying out the contract, then he should have been accorded an employee's rights under the Act.

None of this is to say that the result in \textit{Lushute} is incorrect. There is ample evidence to support the conclusion that Lushute was engaged in an independent business enterprise of his own. He had 250 clients; he had been in business for himself for a number of years; he only called upon this particular defendant once or twice a month. It would have been helpful to know whether he advertised as a separate business entity and per-

\(^{64}\) Maintenance and minor repair tasks are probably the most common such tasks. Perhaps the air conditioning repair under consideration in \textit{Lushute} was such a task. Of course, if the evidence showed that the restaurant were a small operation which chose to have its air conditioning serviced by independent operators in that business rather than by its own employees, a proper conclusion of exclusion of coverage could be reached even though the task might "more efficiently" have been accomplished by employees.

\(^{65}\) See note 57, supra.
haps to know the amount of income derived from this client as a percentage of his total income. It may well have been that his was an independent business enterprise which could appropriately be made to bear the cost of work-related injury.

But the reasoning process of grafting onto the section specifically granting coverage for certain independent contractors the language of another section with an entirely different purpose (section 1061, reaching the evil of avoidance of compensation responsibility by principals by making them responsible to the employees of a contractor if "a part" of the principal's business is being carried out by that contractor) should not be approved. These are two different problems, dealt with by the Act in differing ways, and should likewise be separated in their jurisprudential treatment.

The writer does not overlook the fact that in the days of minimal benefits, an "independent contractor" would more often seek to be excluded from coverage than to be included, in order to be permitted to proceed in tort. Whether the court had this in mind in its restrictive definition of a covered independent contractor, and whether the same view should prevail now that benefits have been increased and are unlimited in duration, is merely speculation. But such a restrictive definition seems of little solace to the claimant or his survivors when no viable tort suit is in the offing. Limited benefits for work-related injuries even when no tort suit is available was, after all, one of the objectives of the compensation system.