Louisiana Law Review

Volume 45 | Number 2
Developments in the Law, 1983-1984: A Symposium
November 1984

Workers' Compensation

H. Alston Johnson

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LEGISLATIVE DEVELOPMENTS

It was a slow year in the legislature in the field of workers' compensation. Depending upon one's point of view, that is great news or terrible news. Only two changes to the act were passed. The first was a minor change in the Worker's Compensation Advisory Council.[1] The second was of somewhat more importance, and deserves more extended comment.

Section 1102 of the act had been amended in Act 1 of the First Extraordinary Session of 1983 to impose some drastic remedies upon the completion of a settlement with an alleged tortfeasor. The first segment of the amendments concerned the consequences for an employee who settled with the tortfeasor without the employer's consent. No changes were made in 1984 in that language in section 1102(B).

However, the provisions of section 1102(C) relative to the consequences for an alleged tortfeasor who settled an employee's action without the employer's consent were amended during this past session. Prior to amendment, if the tortfeasor did not obtain the approval of the employer or his carrier, and if the employee had not "bought back" his rights through the reimbursement procedure outlined in section 1102(B), then the alleged tortfeasor was required to make that reimbursement. The language of the section appeared to make the reimbursement due without an opportunity to defend on the merits, and the reimbursement even included the penalties and attorney's fees that might have been earned by the employer's own dilatory tactics. On those and other grounds, the amended sub-section had been the subject of criticism in this *Review*.[2]

The amendments during this past session correct some of those problems, but not all. An introductory clause to amended Louisiana Revised Statutes 23:1294 seems to indicate that the sub-section applies only to settlements when litigation is pending. "The provisions apply when a suit has been filed against a third-party defendant in which the employer or his insurer has intervened." Thus the suggestion made last year in this *Review* that a negotiated settlement prior to suit would circumvent the sub-section seems to have been accurate.

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1. La. R.S. 23:1294 (Supp. 1984), as amended by 1984 La. Acts, No. 573, § 1.

2. See Johnson, Bound in Shallows and Miseries: The 1983 Amendments to the Workers' Compensation Statute, 44 La. L. Rev. 669, 669-701 (1984).

The fundamental concept of the sub-section was retained, requiring that the tortfeasor or his insurer reimburse the compensation carrier in the event of an unapproved settlement after the initiation of litigation. However, the requirement that penalties and attorney's fees also be reimbursed has been deleted, and properly so.

New provisions have been asserted imposing sanctions on an employer or carrier which unreasonably refuses to approve a proffered settlement. If the refusal to settle is held to be unreasonable, there are two consequences. First, the credit to which the carrier or employer is entitled against future compensation will be reduced by fifty per cent of that portion of a subsequent judgment against the third-party defendant which is in excess of the tendered settlement. Second, the employee is entitled to a reasonable attorney's fee from the employer or carrier, calculated from the amount in excess of the settlement offer. Refusal to accept a settlement which is greater than the discounted value of future compensation and medical benefits is *prima facie* unreasonable under the statute.[3]

These amendments seem to have struck a much better balance in the tripartite relationship among employer/compensation carrier, employee, and tortfeasor/liability insurer, but it remains to be seen how they will work out in practice. Unfortunately, the amended provision retains the phrase "third party defendant" to describe the tortfeasor, when that term will almost certainly not be procedurally correct in all cases: In fact, the sub-section envisions that the tortfeasor will be the defendant in the main demand brought by the employee and that the carrier or the employer will have intervened by an incidental demand. "Third person" would probably be preferable.

JURISPRUDENCE

International Act Exception

Along with the defense of immunity of the principal discussed below, the intentional act exception continues to be the hottest topic in workers' compensation. And as with the executive-officer loophole which preceded it (the death of which gave rise to the intentional act exception), these cases are essentially the story of attempted circumvention of the act. Judicial interpretations of the exception have prompted reactions in this forum on several previous occasions,[4] and the decisions of this term have proved to be no exception in that regard.

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3. If the employee has sued multiple third parties, the provisions apply to a third party or parties who actually make a settlement offer.

4. See Johnson, Developments in the Law, 1982-1983—Workers' Compensation, 44 La. L. Rev. 583, 588-90 (1984); Johnson, Developments in the Law, 1981-1982—Workers' Compensation, 43 La. L. Rev. 613, 626-29 (1983).

Following the supreme court's decision several years ago in *Citizen v. Daigle*,[5] most intermediate appellate decisions have exercised a commendably narrow reading of the exception,[6] though there have continued to be some disturbing exceptions.[7]

In a pair of cases decided on the same day during this term, the supreme court took up the problem again, with dubious results. In brief opinions in *Mayer v. Valentine Sugars, Inc.*[8] and *Fallo v. Tuboscope Inspection*,[9] Justice Dennis attempted to clarify the scope of the intentional act exclusion. In *Mayer*, the trial court had sustained the employer's exception of no cause of action because of the conclusory manner in which the claimant alleged the element of intent. The claimant merely alleged that the employer's officers knew to a substantial certainty that their acts in violation of safety regulations would cause an explosion, injuring him. Similar allegations in other cases had resulted in similar rulings.[10] But the court of appeal reversed,[11] partially basing its opinion on Article 856 of the Code of Civil Procedure, which permits "malice, intent, knowledge, and other condition of mind" to be pleaded generally.

In light of that provision, the supreme court affirmed the court of appeal's decision, saying that a general allegation of malice or intent to do harm would be sufficient in this context to survive an exception of no cause of action. The court appeared to indicate that summary judgment rather than a peremptory exception is the appropriate vehicle to determine this issue, and added "out of caution" that the burden of proof in prosecuting an intentional tort exception remained unchanged. The claimant must still prove that the alleged tortfeasor "either (1) consciously desired the physical results of his act or (2) knew that that result was substantially certain to follow from that conduct."[12]

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5. 418 So. 2d 598 (La. 1982).

6. Lamaire v. Younger Transp., Inc., 443 So. 2d 662 (La. App. 1st Cir. 1983); Darville v. Texaco, 442 So. 2d 1246 (La. App. 5th Cir. 1983), rev'd, 447 So. 2d 473 (La. 1984), reconsideration of grant of cert. denied, 448 So. 2d 1302 (La. 1984); Mize v. Beker Indus. Corp., 436 So. 2d 1333 (La. App. 5th Cir.), cert. denied, 440 So. 2d 761 (La. 1983); Maddie v. Plastic Supply & Fabrication, 434 So. 2d 158 (La. App. 5th Cir.), cert. denied, 435 So. 2d 445 (La. 1983); Vidrine v. Stewart & Landry, Inc., 424 So. 2d 1274 (La. App. 3d Cir. 1982); Wright v. Liberty Mut. Ins. Co., 424 So. 2d 360 (La. App. 2d Cir. 1982); Boudreaux v. Verret, 422 So. 2d 1167 (La. App. 3d Cir. 1982); Buckbee ex rel. Buckbee v. AWECO, Inc., 418 So. 2d 698 (La. App. 3d Cir.), cert. denied, 422 So. 2d 166 (La. 1982).

7. Mayer v. Valentine Sugars, Inc., 430 So. 2d 1068 (La. App. 4th Cir. 1983) (exception of no cause of action overruled), aff'd, 444 So. 2d 618 (La. 1984). See also Jones v. Thomas, 426 So. 2d 609 (La. 1983) (holding that employer is vicariously liable in tort for intentional tort committed by one employee upon another).

8. 444 So. 2d 618 (La. 1984), aff'g 430 So. 2d 1068 (La. App. 4th Cir. 1983).

9. 444 So. 2d 621 (La. 1984).

10. See cases cited supra note 6.

11. Mayer v. Valentine Sugars, Inc., 430 So. 2d 1068 (La. App. 4th Cir. 1983), aff'd, 444 So. 2d 618 (La. 1984).

12. 444 So. 2d at 621.

In *Fallo*, summary judgment was the vehicle used, and the appellate court reversed a summary judgment in the employer's favor.[13] By doing so, the intermediate appellate court admitted the possibility of recovery by an employee when the injury was caused by the act of a co-employee which he "should have known" would produce the harmful consequences. The supreme court termed this holding "clear error," restating the requisites it had enunciated in *Mayer*.

This slight change of signals at the supreme court level was promptly followed by one appellate court[14]—though others seemed unaware of it or not moved by it in the cases before them, even though all of these latter cases were disposed of by summary judgment rather than by peremptory exception.[15]

It may be that the court's intent in *Mayer* was simply to indicate that disposition of claims under the intentional act exception should rarely, if ever, be made by the peremptory exception device, and that summary judgment is a much more appropriate vehicle for that purpose. If so, there is perhaps little reason to quarrel with that result, though inevitably employers and carriers will find it more expedient to dispose of such claims even though they are clearly without merit.

But, to the extent that the court may have meant in *Mayer* to indicate some softening of the requirements for success on the merits in an intentional-act case,[16] some respectful criticism may be in order. The language of the intentional-act exception is already rather broad when compared to that of some other states.[17] Louisiana chose complete

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13. Fallo v. Tuboscope Inspection, 435 So. 2d 1033 (La. App. 5th Cir. 1983), rev'd, 444 So. 2d 621 (La. 1984).

14. Fabre v. Kaiser Aluminum & Chem. Corp., 446 So. 2d 476 (La. App. 4th Cir. 1984) (The court declined to approve sustaining of exception of no cause of action; claimant alleged contraction of lung cancer from toxic materials, and that defendants knowingly concealed information and intentionally deprived him of necessary protective equipment even though knowing "full well" that claimant's injuries were "certain" to follow.). See also Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759 (5th Cir. 1984) (The motion to dismiss for failure to state a claim was granted by the trial court but was reversed by the appellate court, which indicated that summary judgment would be a more appropriate vehicle.).

15. Walker v. Grantham, 449 So. 2d 12 (La. App. 1st Cir.), cert. denied, 450 So. 2d 966 (La. 1984) (summary judgment affirmed; court said term "substantially certain" might be restated as "virtually sure" or "nearly inevitable"); Manning v. Better Way Coatings, Inc., 448 So. 2d 227 (La. App. 1st Cir.), cert. denied, 450 So. 2d 966 (La. 1984) (summary judgment affirmed); McDonald v. Reeves Transp. Co., 448 So. 2d 217 (La. App. 1st Cir. 1984) (summary judgment affirmed; chain being used to tow disabled truck broke).

16. Could this be the court's conscious or subconscious reaction to the pro-employer cast to the act after the 1983 amendments? The writer predicted such a reaction as a possibility, see Johnson, supra note 2, at 681 n.41.

17. In California, for example, an employee may bring a tort action in this factual context only when his injury or death is "proximately caused by a willful physical assault by the employer." Such language would appear to limit tort claims to instances of conduct

escape from the Act as a remedy for commission of an intentional act rather than some percentage increase in compensation. Judicial broadening of the concept will do serious damage to the exclusivity of the act, and will put Louisiana back in the unfortunate situation in which it found itself in with the executive-officer suits. Such a result is to be avoided assiduously.

The view on the merits taken in *Babin v. Edwards*[18] is much preferable. The claimants were working in a shipyard welding together steel plates that may or may not have been adequately secured for the welding process. Claimants had alleged that their supervisors knew of the danger in working near the allegedly inadequately secured plates and that they were ordered by their supervisors to work there in spite of that knowledge. There was also some evidence of previous run-ins between the claimants and the supervisors and inferences of malevolent intent might have been drawn from those earlier incidents. A trial on the merits had resulted in a large judgment in the claimants' favor.

The appellate court reversed and dismissed. Citing the two-part statement in *Mayer* and *Fallo* as its guide, the court attempted to clarify the confusion surrounding the "substantially certain" portion of the test. The court held that this formulation is not an additional exception, but merely a method of proving an intentional act.[19] The court said:

> In sum, in order to avoid the exclusive remedy of worker's compensation, a defendant must act with an *intent* to injure the plaintiff. This intent can be shown either by proving the defendant acted with a desire to harm plaintiff or by proving that defendant acted with knowledge of facts that from his act plaintiff's injury was substantially certain to result. *Fallo*, 444 So. 2d at 622. "Substantially certain" is not an alternative to "intentional act". It is a method of proving that the act was intentional. *Fallo* makes it clear that this is the correct interpretation of La. R.S. 23:1032.

Applying that standard, the court held that the claimants had not established either that the officers subjectively desired the harmful consequences or that they knew to a virtual certainty that such consequences would follow their conduct. Thus a reversal of the trial court award was required.

Clearly, the final chapter on this subject has yet to be written. One is entitled to hope, however, that the sensible view of the matter taken

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by an individual (human) employer, not by a co-employee for whom a corporate employer has vicarious liability, as was held in Jones v. Thomas, 426 So. 2d 609 (La. 1983).

18. 456 So. 2d 659 (La. App. 1st Cir. 1984).

19. The court quoted the earlier, but certainly not novel, formulation of this standard of proof contained in Johnson, Developments in the Law, 1980-1981—Workers' Compensation, 42 La. L. Rev. 620, 630 (1982).

in *Babin* will prove influential when the supreme court next addresses the problem.

Judicial Uneasiness With Immunity of Principal

Some of the decisions during this term seem to indicate a certain judicial uneasiness with the immunity of a principal, especially in light of its applicability to a principal which has no realistic risk of ever having to pay compensation or even having to purchase insurance to protect it against that possibility. The uneasiness is demonstrated in cases discussing the breadth of the notion of the "trade, business, or occupation" of the principal.

Certainly the prime example is the opinion on re-hearing in *Lewis v. Exxon Corp.*[20] Both the trial court and the appellate court[21] had determined that Exxon was the statutory employer of the claimant, who was actually employed by H. E. Wiese, Inc., on a construction project at the Exxon facility. In its original opinion, the supreme court had agreed with these two courts, apparently on the basis that the work project on which the claimant was injured should be considered a renovation project rather than new construction in light of the fact that a minor portion of the total cost was new capital investment. On rehearing, the court took a different view, reversing the two lower courts. It determined that Exxon was not a principal, and therefore did not enjoy tort immunity.

The supreme court emphasized the history of the Exxon plant in Baton Rouge, and noted that twenty years ago, Exxon had decided to get out of the construction business. It had made only one exception to that policy (in 1970, following a fire), and the court regarded that as an extraordinary situation. The court observed that: (1) no regular Exxon employees were engaged in the project in which the claimant was injured; (2) Exxon had not used its own employees in a project of this type in 20 years; and (3) Exxon could not have performed the work that the claimant's employer was doing and still maintained the normal operations of its chemical plant with its then current staff.

The supreme court thus returned to its theme in the decision in *Thompson v. South Central Bell Telephone Co.*[22] of carefully scrutinizing the assertion of the alleged principal that it "could" have done the work with its own people. The result in *Lewis* was foreshadowed in *Thompson* for those who cared to look.

The majority opinion on rehearing also contains the statement that "whenever a principal contracts to perform work for another—even if it is the first and only time that the principal plans to engage in such

20. 441 So. 2d 192 (La. 1983)
21. Lewis v. Exxon, 417 So. 2d 1292 (La. App. 1st Cir. 1982).
22. 411 So. 2d 26 (La. 1982).

a project—he is, for the purposes of injuries resulting from that project, engaged in that trade, business or occupation."[23] Several appellate courts had similarly expressed themselves.[24] Concurring in the result, Justice Dennis objected to the statement as *dicta* and as a "debatable proposition."[25]

Decisions of the intermediate courts demonstrate some of the uneasiness[26] as do the federal decisions,[27] though there are certainly still instances of a traditionally broad reading of the immunity provision.[28] Other forums have not been free of the discussion, with movement both on the state legislative front[29] and at the level of the United States Supreme Court with reference to the Longshoremen's and Harbor Workers' Compensation Act.[30]

It would not be surprising to see the subject become the focus of increasing discussion and scrutiny in the very near future. In light of the contractual arrangements now existing in many fields of employment in which the issue of the immunity of the principal would be presented, there is serious doubt that the broad reach of the immunity is as fair as it may have seemed to be when the immunity was granted—first by judicial decision and later by legislative codification.

Gradual Mental Stress

Taquino v. Sears, Roebuck & Co.[31] is an interesting decision which

23. 441 So. 2d at 198.

24. See Wells v. Louisiana Dep't of Highways, 450 So. 2d 1027 (La. App. 1st Cir. 1984); Richard v. Weill Constr. Co., 446 So. 2d 943 (La. App. 3d Cir. 1983), cert. denied, 449 So. 2d 1356 (La. 1984); Barnhill v. American Well Serv. & Salvage, Inc., 432 So. 2d 917 (La. App. 3d Cir. 1983).

25. 441 So. 2d at 200.

26. See Boudreaux v. Exxon, 441 So. 2d 79 (La. App. 3d Cir. 1983).

27. See Chavers v. Exxon, 716 F.2d 315 (5th Cir. 1983).

28. Certain v. Equitable Equip. Co., 453 So. 2d 292 (La. App. 4th Cir. 1984); Butler v. Home Ins. Co., 448 So. 2d 801 (La. App. 2d Cir. 1984); Dusenbery v. McMoran Exploration Co., 433 So. 2d 268 (La. App. 1st Cir. 1983).

29. See La. H.B. No. 871 (1984), which was reported with amendments by committee in the house of origin but did not progress further, would have removed the immunity of a principal when the immediate employer of a person had "lawfully secured the payment of worker's compensation benefits to his employers or is covered by worker's compensation insurance . . . while the work to be undertaken is in progress and the injury is sustained. . . ." In such an instance the principal (though not his officers, directors, or employees) would be considered a "third party" susceptible of being sued in tort.

30. This movement, however, appears to have been in the opposite direction. Interpreting a section which, by its literal terms, might not have extended to an entity defined as a principal by the Louisiana statute, the Supreme Court in Washington Metro. Area Transit Auth. v. Johnson, 104 S. Ct. 2827 (1984), granted immunity to a contractor which had voluntarily provided workers' compensation coverage to employees of subcontractors though not statutorily bound to do so.

31. 438 So. 2d 625 (La. App. 4th Cir.), cert. denied, 443 So. 2d 597 (La. 1983).

may reflect judicial movement toward acceptance of the concept of gradual mental stress without specific physical origin. The claimant had been a salesman for Sears, Roebuck over a thirty-year period with only a short gap of two years in the early 1960's. His petition claimed that he was disabled from mental causes due to his transfer from one Sears store to another, a reduction in commissions and base pay, and an "inordinate amount of pressure" from his superiors. The trial court sustained an exception of no cause of action without assigning reasons.

The appellate court treated the case as one of first impression, and accurately observed that the rationale of the decision in *Ferguson v. HDE, Inc.*[32] had broadened the concept of accident substantially, perhaps to a point sufficient to encompass the assertion made by the claimant. The court also noted the recent rejection of a mental disability claim in *Franklin v. Complete Auto Transit Co.*,[33] but expressed its disagreement with the reasoning in that decision (which had focused upon whether mental disability could possibly be classified as an accident under the act).

The court did not observe that in *Ferguson* the mental stress (reaction to paycheck thought to be erroneously low) and the physical manifestation (stroke) were only moments apart, nor that the mental/physical sequence of events made the occurrence of the disabling incident very easy to pinpoint. It also did not cite the decision in *McDonald v. International Paper Co.*,[34] a more recent extension of *Ferguson* to a mental/physical sequence in which the fatal heart attack followed approximately two weeks of stress. Observations about these two decisions might have highlighted the distinction between those types of decisions and the matter at hand in *Taquino*, and would have enabled the court to see more clearly the pitfalls of the road upon which it was embarking.

The *Taquino* decision may start Louisiana upon the path of the most puzzling type of claim: the so-called gradual mental trauma/gradual mentally disabling consequence case. We are somewhat familiar with the physical trauma/mental disability[35]cases, and with the acute mental trauma/mental disability cases.[36] Except through the experiences of other jurisdictions, we are not familiar with the gradual mental disability cases.[37]

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32. 260 La. 409, 270 So. 2d 867 (1972).

33. 397 So. 2d 60 (La. App. 2d Cir. 1981). In *Franklin*, however, there was evidence of physical trauma preceding the alleged mental disability. In *Taquino*, there was no indication of physical trauma with mental consequences, which arguably makes the case even more tenuous than *Franklin*.

34. 406 So. 2d 582 (La. 1981).

35. See 1 W. Malone & A. Johnson, Workers' Compensation Law and Practice § 235, at 511-13, in 13 Louisiana Civil Law Treatise (2d ed. 1980).

36. See id.; see also supra text accompanying notes 12-14.

37. See Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960). The *Carter* decision and a few others like it are cited by the court in *Taquino*.

Having said all of that, there is absolutely nothing wrong with the court's disposition of the case as it stood. An exception of no cause of action, especially without reasons assigned therefore, is a drastic means of resolution of a controversy of this nature. The opinion does not reflect the period of time over which the gradual mental stresses nor the gradual mental disability may have occurred. The shorter that period of time may have been, the easier it would be for the judiciary to make a comfortable judgment about the causal relationship which must be demonstrated between employment and disabling incident. Conversely, if the period of time which elapsed was rather long, the sources of stress become quite diffuse and the accuracy of a judicial determination of causation becomes concomitantly more difficult.[38]

It may have been, and so it seems from the opinion, that the appellate court was reacting primarily to the inference in the sustaining of the exception that an emotional injury absent some accompanying physical injury could never qualify as an accident under the act. On that point, the court's refusal to approve the sustaining of the peremptory exception seems entirely correct. These comments are intended as a plea for caution, should this matter return or a similar one arise. Identification of the causes for the stress and the disability will be very difficult, and we should be prepared to devote a considerable amount of judicial and scholarly attention to developing a scheme to help us resolve such inquiries.

Determination of Post-Injury Wages

The decision in *Lafleur v. Hartford Insurance Co.*[39] reveals a flaw in the legislation that escaped detection at the time of enactment, though once the factual situation which it contemplates appears it seems perfectly obvious that the problem should have been dealt with. It was generally conceded by the employer that the claimant had been injured on the job and was entitled to some compensation (subject to the weekly maximum amount of $148.00). The employer disputed the extent of the disability, but the appellate court upheld the trial court's determination that benefits were due on the basis of permanent partial disability.

That decision brought the court to the real core of the dispute. Under the statute as it then read, the employer was required to pay two thirds of the difference between the pre-injury and post-injury wage of the employee. Specifically, the language identified the pertinent amounts as the prior wage and "any lesser wages which the injured employee actually earns in any week thereafter . . . ."[40] Trouble was, the claimant had opened a small restaurant with his wife after his injury, and was

38. See Malone & Johnson, supra note 35, § 217 (Supp. 1984).
39. 449 So. 2d 725 (La. App. 3d Cir. 1984).
40. La. R.S. 23:1221(3) (1975), as it read prior to the 1983 amendments.

not receiving a weekly wage at all. At best, the net profits of the business could be determined on an annual basis.

The restaurant business was apparently a community asset owned by the claimant and his wife. However, the insurance carrier contended that the claimant's post-injury earnings should be calculated on the basis of the entirety of the profits derived from the business without deduction of the wife's one-half interest. The court correctly observed that if his wife had not worked in the business with him, the claimant would have had to take a partner or hire an employee, and the remuneration paid to such a partner or employee would clearly have been deducted from the claimant's remuneration. Thus the accurate calculation of the claimant's post-injury "wages" would be his one half of the profits. The court also rejected the contention that certain other payments to the claimant should be considered compensation, since it concluded that the evidence established that these payments were merely reimbursement for various expenses he incurred.[41]

This left the court to grapple with the problem of converting the annual profit into a "weekly wage," and with the procedural problem of the manner in which the carrier was to ascertain from week to week what its appropriate payment would be. Predictably, the court indicated that a division of the yearly profit by 52 would be an equitable fashion of determining the "weekly wage" for these purposes.[42] On a more practical level, the court strongly suggested the parties might amicably agree to a procedure under which monthly profits in the business would be calculated and monthly checks issued. The claimant had indicated in brief that such an arrangement would be acceptable.

The court's solution is certainly acceptable and fair, and finds some support in the changes made in the partial disability section (now supplemental earnings benefits) after the 1983 amendments. The calculation of post-injury wages is now to be made on a monthly basis, although the change was probably not made because of the problems presented in a case like *Lafleur*.[43] The difficulties encountered by the court in devising some scheme for month-to-month supervision of the appropriate amount point up the importance of having an administrative scheme outside the judicial process. This would be an appropriate function for the office of the Director to assume.

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41. The claimant used a van to transport certain commodities, and was reimbursed for those expenses. There were also certain expenditures for group insurance, but the carrier had not presented sufficient evidence for the court to determine that these should be considered a part of the claimant's compensation.

42. See La. R.S. 23:1021(11) (1984) and La. R.S. 23:1021(10) (1984), which use such a calculation to reach a weekly wage from an annual salary.

43. See Malone & Johnson, supra note 35, § 275, at 78 n.69.40 (Supp. 1984), suggesting that one of the reasons may have been a slight reduction of benefits in some cases.

CASES PRIOR TO 1983 AMENDMENTS WHICH WOULD RESULT IN NO RECOVERY IF AMENDMENTS APPLICABLE

It was suggested in an earlier article in this *Review*[44] that the amendments made in 1983 to the scheduled loss benefit section would result in a denial of benefits in certain cases in which an award of benefits would have been permitted under the pre-1983 provisions. The amendments require that any disability rating to a member must be greater than 50%. Amendments to section 1221(4)(p) relative to impairment of physical function eliminated any award for such loss of function of the back.

Cases applying the law as it reads after the 1983 amendments have not yet appeared, but in a series of decisions during this term, the above prediction proved accurate. Since these cases arose prior to the amendments, benefits were appropriately awarded. But had they arisen after the amendments became effective, benefits would have been denied either on the basis that the loss of function was to the back or on the basis that the impairment of the member under the schedule was less than fifty per cent.[45]

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44. See Johnson, Bound in Shallows and Miseries: The 1983 Amendments to the Workers' Compensation Statute, 44 La. L. Rev. 669 (1984).

45. See Keller v. Kaiser Aluminum & Chem. Corp., 453 So. 2d 266 (La. App. 5th Cir. 1984) (injury in 1978; 30% disability of knee); Woodard v. George Cole Chevrolet, Inc., 444 So. 2d 1367 (La. App. 2d Cir. 1984) (back injury resulting in 15% impairment to the body as a whole; award under schedule; injury in 1980); Hayward v. Commercial Union Ins. Co., 441 So. 2d 35 (La. App. 2d Cir. 1983) (10% impairment of thumb, 20% of index finger, and 5% of hand as a whole; benefits accordingly; injury in 1981); Martin v. Emerson Elec. Co., 437 So. 2d 910 (La. App. 2d Cir. 1983) (The claimant suffered low back injuries in 1980; he received partial disability benefits until released to return to work; if unable to prove partial disability, a future claimant similarly situated would receive no benefits.); Parks v. Louisiana Health Care Assn., 436 So. 2d 693 (La. App. 3d Cir.), cert. denied, 441 So. 2d 1220 (La. 1983) (involving 40% impairment of finger and 6% of hand; injury in 1981; schedule loss to finger which was awarded would not be awardable after 1983 amendments).

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Required by 39 U.S.C. 3685)

1. TITLE OF PUBLICATION	1A. PUBLICATION NO.	2. DATE OF FILING
Louisiana Law Review	0 0 2 4 6 8 5 9	9-25-84
3. FREQUENCY OF ISSUE	3A. NO. OF ISSUES PUBLISHED ANNUALLY	3B. ANNUAL SUBSCRIPTION PRICE
Bi-monthly	6	$30.00

4. COMPLETE MAILING ADDRESS OF KNOWN OFFICE OF PUBLICATION *(Street, City, County, State and ZIP Code) (Not printers)*

Louisiana State University; Paul M. Hebert Law Center; Baton Rouge, LA 70803-1012

5. COMPLETE MAILING ADDRESS OF THE HEADQUARTERS OF GENERAL BUSINESS OFFICES OF THE PUBLISHER *(Not printer)*

Same as above

6. FULL NAMES AND COMPLETE MAILING ADDRESS OF PUBLISHER, EDITOR, AND MANAGING EDITOR *(This item MUST NOT be blank)*

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Louisiana State University; Paul M. Hebert Law Center; Baton Rouge, LA 70803-1012

EDITOR *(Name and Complete Mailing Address)*

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