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# Workers' Compensation

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## LEGISLATIVE DEVELOPMENTS

For the most part, the legislative changes in the Workers' Compensation Act during the 1985 Regular Session were minor. Specifically, various enactments of the session include:

— returning the reimbursement provisions under the Second Injury Fund to their pre-1983 status of reimbursing for all disability payments beyond the first one hundred and four weeks;[1]

— adding permanent hearing loss due solely to a single traumatic accident to those events for which specific permanent partial disability benefits may be awarded;[2]

— clarifying that only those defined as "employees of the state" (as opposed to employees of political subdivisions) are entitled to a compensation remedy against the state;[3]

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1. 1985 La. Acts No. 697, amending La. R.S. 23:1377 and 23:1378 (1985). There must have been some dissatisfaction with the change effected by the 1983 amendments, which had attempted to limit reimbursement to total and permanent disability benefits and to sixty percent of supplemental earnings benefits and permanent partial disability benefits. The 1983 amendment was flawed technically and, if read literally did not clearly provide a reimbursement scheme at all. The 1985 amendments return the provisions to their pre-1983 reading, offering reimbursement for "disability" payments after two years of payments have been made.

2. 1985 La. Acts No. 945, amending La. R.S. 23:1221(4)(p) (1985). The amendment is to the "catch-all" provision covering disfigurement and certain losses of physical function in the absence of disability. The provision had been severely limited in the 1983 amendments, but even in its pre-1983 version, the provision had not specifically covered hearing loss. The provision was broad enough, however,at that time to be interpreted to cover such loss.

3. 1985 La. Acts No. 954 (effective July 23, 1985), adding La. R.S. 23:1034(D) (1986). This is no doubt another verse in the continuing saga of compensation for "public employees" as opposed to "public officials." See Murchison, Developments in the Law, 1982-1983—Local Govermnent Law, 44 La. L. Rev. 373, 407-410 (1983). The current enactment also specifies that the fact that the state supplies supplemental pay to certain employees of political subdivisions does not make those persons employees of the state for compensation purposes "in whole or in part or in any way."

— specifying that no compensation is due a member of the National Guard unless the injury or death occurs during active duty during a state of declared emergency, and that benefits are to be calculated on the larger of his civilian or military weekly wage;[4] and

— establishing a rebuttable presumption that a claim filed with the Director was timely filed if received by mail on the first legal day following the expiration of the due date.[5]

There were also a few minor amendments of a housekeeping[6] or procedural[7] nature.

Several of the legislative changes require more extended comment, however. Most of the changes are the product of the interest of Senator Sydney Nelson of Shreveport in achieving fairness in the compensation statutes, and some of them are in turn based upon earlier observations about the 1983 amendments in this forum.[8]

*Permanent Partial Disability Awards*

The 1983 amendments had re-named the "schedule loss" provisions "permanent partial disability benefits" and had significantly limited their availability by specifying that unless a loss of function exceeded fifty percent under a specified medical rating system, there could be no award.[9] Because the rating system in question rarely accords a rating of greater

4. 1985 La. Acts No. 973 (effective July 23, 1985), amending La. R.S. 23:1211(C) (1985).

5. 1985 La. Acts No. 884, amending La. R.S. 23:1209 (1985). The enactment was one of two that affected 23:1209, the other being 1985 La. Acts No. 926. The two acts do not conflict substantively, and it is assumed that the Law Institute will simply consolidate them into a single section 1209.

6. La. R.S. 23:1225(B) (1985), relative to offsetting benefits, was clarified with respect to receipt of unemployment compensation benefits in 1985 La. Acts No. 926 (effective January 1, 1986). La. R.S. 23:1201 (1985), relative to the time and place for payment of weekly benefits, was amended to make it applicable to insurers as well as employers and to delete the reference to "resulting loss of income" in the portion of the statute describing knowledge of the injury or death. 1985 La. Acts No. 926.

7. 1985 La. Acts No. 926 amends La. R.S. 23:1310.1 (1985) to make the Director's recommendation on a claim admissible in a subsequent proceeding rather than inadmissible but does not accord the recommendation a presumption of correctness as to the facts or the law. The Act amends R.S. 23:1312 (1985) to add the domicile of a dependent in a death case as a proper venue in actions against the state. And finally, the Act amends La. R.S. 23:1319 (1985) to remove the limitation of taking depositions to the time period after receiving the recommendation of the Director; such depositions may be taken at any time to preserve testimony.

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

9. La. R.S. 23:1221 (4)(1985).

than fifty percent of the loss, the net effect was to eliminate potential permanent partial disability benefits in almost all cases.

This limitation was overly severe, and Act 926 of the 1985 Regular Session scaled it back to a standard of "greater than twenty-five percent" loss of function before benefits could be paid.[10] The amendment also refers to the latest edition of the rating system to be used to determine the percentage loss of function.[11]

*Calculation of Supplemental Earnings Benefits*

In a compromise effort, the 1983 amendments had fixed the method of calculating supplemental earnings benefits in a rather cumbersome formula: seventy-four percent of the difference between ninety percent of the pre-injury monthly wage and the amount of monthly wage the worker is able to earn after the injury.[12] The worker who was able to earn ninety percent or more of his pre-injury monthly wage would be entitled to no supplemental earnings benefits.

The 1985 amendments to the applicable section retain the latter feature of the formula. A worker who earns or is able to earn ninety percent or more of his pre-injury monthly wage is not entitled to any supplemental earnings benefits.[13] However, if a worker falls below that level in his post-injury earnings or ability to earn, he is entitled to two-thirds of the difference between his pre-injury monthly wage and his post-injury monthly wage.[14] This is, in fact, the pre-1983 formula (then called permanent partial disability benefits), though with the overlay of the ceiling on benefits once the worker reaches the ninety percent-of-prior-wage level.

The most recent amendments are a decided improvement over the state of the law after the 1983 amendments, if for no other reason than that the mathematical calculation is easier. However, the retention of the ninety percent-of-prior-wage ceiling leaves a curious anomaly. A worker who was earning $1,000.00 per month prior to his injury and $900.00 a month after his injury is entitled to no supplemental earnings benefits, and his aggregate post-injury income is $900.00. A worker who earns $850.00 post-injury falls below the ninety percent level and is entitled to two-thirds of the difference between $1,000.00 and $850.00, or a benefit of $100.00. His net post-injury income is then $950.00—

10. La. R.S. 23:1221 (4)(q)(1985), as amended by 1985 La. Acts No. 926. See generally, Johnson, supra note 8, at 681-84.

11. La. R.S. 23:1211(4)(q)(1985), as amended by 1985 La. Acts No. 926.

12. La. R.S. 23:1221(3)(a)(1985), as amended by 1983 La. Acts, Ex. Sess., No. 1.

13. La. R.S. 23:1221(3)(a)(1986), as amended by 1985 La. Acts No. 926.

14. Id.

$850.00 in earned wages and $100.00 in supplemental earnings benefits.[15] The mathematical hypotheticals could be continued, but the point is made. Down to a certain post-injury wage level, the worker who falls below the ninety percent level will fare better in the aggregate than the worker who barely reaches the ninety percent level. There is no apparent reason for the difference, unless the interest of the employer in paying nothing to certain workers is greater than his interest in paying certain other workers (those just below the ninety percent level) amounts that will bring them over the critical ninety percent figure.[16]

It is likely that the two sides of the equation for the employer or carrier will come out just about even. The amounts that the employer or carrier saves in not paying benefits at all to the ninety-percent-or-better employees will probably be paid out to the eighty to eighty-five percent wage level employees. It would probably be better to return to the pre-1983 formula which worked well in practice and was very familiar to claimants and carriers.

*Benefits for Part-Time Workers*

One of the least-discussed but most significant of the 1983 changes was a shift in legislative philosophy with regard to part-time workers. Prior to 1983, the jurisprudence had established that even though an employee was working part-time for a given employer his compensation if injured in that employment would be based upon a forty-hour work week.[17] In other words, the worker's earning capacity rather than his actual wage level was protected.

The 1983 amendments overruled that jurisprudential principle and replaced it with a scheme under which an employee who knowingly accepted a position classified by the employer as a part-time position could only expect benefits based on the actual number of hours worked in that position, if he were injured while in that employment.[18] This change was criticized because it exposed the part-time worker to a loss

15. His net post-injury income is *not* two-thirds of the difference between ninety percent of the prior wage and the present wage or ability to earn, which would in fact have significantly lowered the amount of the benefits.

16. It is not beyond the realm of possibility that a worker would choose a post-injury wage level of just under ninety percent of his prior wage because his aggregate "take-home" pay would be greater than it would be if he were at ninety percent of his prior wage. This amount would also be slightly ameliorated by the fact that the compensation-benefit portion would not be subject to income taxation.

17. Constant v. State, 272 So. 2d 675 (La. 1973); Fontenot v. Kinder, 377 So. 2d 554 (La. App. 3d Cir. 1979); Alexander v. Reed, 350 So. 2d 179 (La. App. 1st Cir. 1977).

18. La. R.S. 23:1021(10)(a)(ii)-(iii) (1985).

of full earning capacity when full-time workers were not similarly exposed.[19]

The 1985 amendments attempt to find a middle ground between the two extremes. New section 1261 in the Act provides that when an employee is employed in "successive" employments, the employer in whose employ he is injured owes him applicable compensation. Section 1261 also provides that the benefits will be based either on the average weekly hours which the employee works in all of his employment or on forty hours, whichever is *less*.[20] This will benefit the "part-time" worker who is actually working forty hours or more in two or more employments. It will concomitantly limit the worker who is truly "part-time," working in a less than forty-hour position and holding no other job, to protection of the earning capacity that he is choosing to use at that time.

This solution will not protect all workers, whatever their actual choice of working hours, as the prior jurisprudential position would have; but as a compromise, the solution seems much fairer than the state of the law after the 1983 amendments.

*Compromise with Tortfeasor*

The 1983 amendments had imposed severe sanctions on the employee and on an alleged tortfeasor who might settle the employee's tort claim without giving adequate protection to the reimbursement claim of the employer or the carrier for compensation paid. Specifically, section 1102 was amended to provide that an employee who settles with a tortfeasor without written approval from the employer or the insurer forfeits any right to future compensation beyond the amount that he recovers from the settlement.[21] He may preserve the right to future compensation by giving notice of the institution of his suit to either the employer or the insurer and by then securing their approval for a proposed compromise.[22]

If the employee fails to discharge that responsibility, he still has the right to "buy back" his future compensation. To do so, the 1983 amendments require that the employee pay to the employer or to the insurer "the total amount of compensation benefits, medical benefits, attorney's fees and penalties, previously paid to or on behalf of the employee . . . ," subject to a ceiling of fifty percent of the compromise amount. The requirement that the employee repay any attorney's fees

19. Johnson, supra note 8, at 701-03.

20. La. R.S. 23:1261(1985), added by 1985 La. Acts No. 926.

21. La. R.S. 23:1102(B), as amended by 1983 La. Acts Ex. Sess., No. 1.

22. La. R.S. 23:1102(A)-(B) (1985). 1985 La. Acts No. 926 adds a similar provision with respect to securing the written approval of the compromise by an employer which is self-insured, in whole or in part.

and penalties which he might have received was criticized because it seemed to reward the employer or carrier which had so delayed payment of the original compensation claim that it had been assessed penalties and attorney's fees.[23]

Act 926 of 1985 deletes the requirement that the employee include repayment of penalties and attorney's fees in his "buy-back" of compensation rights, thus eliminating the objectionable aspect of the provision which had effectively forced the employee to return the statutory penalty for unreasonable delay to the employer or carrier. The employee need only repay the amount of weekly and medical benefits which he had received or which had been paid on his behalf.[24]

*Prescription with Respect to Medical Expenses*

The decision during this term in *Lester v. Southern Casualty Insurance Co.*,[25] discussed in a later portion of this symposium article, caused a considerable stir and produced a prompt legislative overruling in Act 926 of 1985. In fact, it is quite possible that the opinion—quite unfavorable to employers and carriers—gave life to Senator Nelson's bill which it might not otherwise have had. A modification of *Lester* gave employers a reason to legislate with respect to the compensation statutes and may have given them reason to compromise on other issues as well.

The *Lester* opinion held that the only prescriptive period applicable to claims for medical expenses is the Civil Code's general ten-year prescriptive period applicable to all personal actions which do not have specific prescriptive periods.[26] Amendments to section 1209 by Acts 926 of 1985 choose a shorter prescriptive period and generally parallel the rules respective to claims for supplemental earnings benefits.

Where no payments of any kind have been made for medical expenses, the right to make a claim for such payments prescribes "one year after the accident."[27] When any payments have been made, the claim prescribes "three years from the time of making the last payment of medical benefits."[28] The symmetry with claims for supplemental earnings benefits is helpful, and the three-year period seems to be a good compromise between the shorter period established by the cases prior to *Lester* and the excessive period decreed by *Lester*.

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23. Johnson, supra note 8, at 696-701.
24. La. R.S.23:1102(B) (1986), as amended by 1985 La. Acts No. 926.
25. 466 So. 2d 25 (La. 1985).
26. Former La. Civ. Code art. 3544 (1870), now art. 3499 (1984).
27. La. R.S. 23:1209(B) as amended by 1985 La. Acts No. 926.
28. La. R.S. 23:1209(B) (1986), added by 1985 La. Acts No. 926.

*Introduction of Comparative Negligence Into Employer Reimbursement Scheme*

It was only a matter of time before the useful and flexible concept of comparative negligence found its way into the fringes of the Compensation Act. It has been observed elsewhere that contributory negligence and its all-or-nothing philosophy served fitfully, at best, as a way of adjusting differences between a tortfeasor and an employer seeking reimbursement for compensation paid when his employment enterprise shared responsibility for the loss.[29] The Louisiana cases had arrived at the explicable but nonetheless inconsistent position that an employer was barred from recovering from a tortfeasor any compensation paid to a negligent employee[30] but could recover completely any compensation paid when a co-employee shared responsibility with the tortfeasor for the injury.[31]

Amendments wrought by Act 931 of 1985 interject comparative negligence into this dispute to adjust the equation. As amended, section 1101(B) now provides that the recovery of the carrier or the employer on the reimbursement claim "shall be identical in percentage" to the recovery of the claimant against the tortfeasor. When the recovery of the claimant is "decreased as a result of comparative negligence," the recovery of the employer or carrier "shall be reduced by the same percentage."[32]

This change seems fair and, actually, only brings the law applicable to employer or carrier reimbursement into symmetry with the law applicable to the injured employee's claim, which is clearly subject to reduction under comparative negligence rules if the tortfeasor can provide that the injured employee's fault contributed to his injury. The net effect of the change is to place some of the responsibility for compensation on the employment enterprise when both the injured employee and the tortfeasor were at fault.

There is no change, however, in the other parts of the puzzle. An employer or a carrier will still be entitled to undiminished reimbursement when neither the injured employee nor any other person in the employment enterprise shares the fault for the injury. However, an employer or a carrier is entitled to undiminished reimbursement if an employee other than the injured employee shares fault with the tortfeasor (for

29. W. Malone & A. Johnson, Workers' Compensation Law and Practice § 371, in 14 Louisiana Civil Law Treatise 191-206 (2d ed. 1980).

30. See, e.g., Aetna Cas. & Surety Co. v. Reed, 355 So. 2d 952 (La. App. 3d Cir.), cert. denied, 356 So. 2d 1001 (La. 1977), which now must be regarded as modified by 1985 La. Acts No. 931.

31. Vidrine v. Michigan Millers Mut. Ins. Co., 263 La. 300, 268 So. 2d 233 (1972).

32. La. R.S. 23:1101(B) (1986), as amended by 1985 La. Acts No. 931.

example, when the injured employee is a passenger in a vehicle being driven negligently by a co-employee).[33] This is not necessarily a good result, particularly since there is very little difference in the effort the employer would have to exert to encourage either employee to behave in a safe manner. The amendment is a step in the right direction, and it is likely that the same principle will soon be extended to the instance of reimbursement when it is a co-employee rather than the injured claimant who shares fault with the tortfeasor.

There is a hiatus in the enactment which might be remedied either by judicial interpretation or by a subsequent amendment. The recent change refers only to the effect of the claimant's negligence on the employer's reimbursement claim. It does not address the rare but possible situation in which the employer himself might be personally negligent or of other fault. Presumably, there is no longer any foundation for the jurisprudential rule that the reimbursement of such an employer would be wholly barred. More likely, the same reduction on the basis of comparative negligence specifically made applicable to the claimant's tort recovery ought to be applicable to such an employer's reimbursement claim.[34]

### JURISPRUDENCE

Those who felt that the generally pro-employer slant given to the Act by the 1983 amendments was impervious to judicial erosion may have been only partially correct. The evidence shows that in some instances the judiciary has the desire and the ingenuity to balance the scales of the compromise between employer and employee in ways that might not have been anticipated. It is historically demonstrable that the judiciary consistently attempts to strike a fair balance by making a pro-employer act less so and making a pro-employee act fairer to employer interests. Louisiana judges have followed this pattern since the inception of the Act, and it was probably shortsighted of the 1983 drafters to think that they had totally eliminated such a possibility.

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33. This was in fact the situation in *Vidrine*, 263 La. 300, 268 So. 2d 233 (1972). See discussion supra, text accompanying note 26.

34. There were other rumblings in the area during this term, though not precisely on the same point. In dicta in Cambre v. Tassin Amphibious Equipment Corp., 464 So. 2d 878 (La. App. 4th Cir.), cert. denied, 240 So. 2d 903 (La. 1985), the court observed that the rule of Lejeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 3d Cir.), cert. denied, 290 So. 2d 903 (La. 1974), that a tortfeasor could not seek contribution from an employer for loss caused concurrently by the tortfeasor and an employee, might not have survived the enactment of comparative negligence. The court suggested that comparative negligence might be used to permit a reduced recovery in such an instance but did not reach the question because it held that the case was not governed by Louisiana compensation law.

It was predicted earlier in this forum that judges might find ways of tinkering with the Act at its fringes rather than at its core, the latter having been the primary area modified by the 1983 amendments.[35] There are indications that this process is under way, although the evidence does not yet preponderate on one side or the other.

Certainly the employer community can be pleased that the judiciary is apparently not going to authorize recovery of loss of consortium by designated beneficiaries for a work-related injury.[36] This seems a proper result, although there was the potential for judicial reaction to "even up" the sides.

However, there are less than encouraging indications from some other quarters. For instance, the number of cases in this term in which a claim based on an intentional tort was disposed of on a peremptory exception or a motion for summary judgment[37] was greatly outweighed by the number of decisions in which the defendant had to go deeper into the litigation to attempt to extricate itself.[38] Dicta in *Cambre v. Tassin Amphibious Equipment Corp.*[39] suggests that the adoption of comparative negligence may prompt a change in the rule that a tortfeasor

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35. Johnson, supra note 8.

36. See Theriot v. Damson Drilling Corp., 471 So. 2d 757 (La. App. 3d Cir.), cert. denied, 472 So. 2d 907 (La. 1985), in which the appellate court held that the claim for loss of consortium by a spouse for a work-related injury was also barred by the exclusivity provisions of the Act.

37. Brown v. Ebasco Services, Inc., 461 So. 2d 443 (La. App 5th Cir. 1984), rev'd on other grounds, 462 So. 2d 1235 (La. 1985) (incantation of *Mayer* and "magic words" like intent or intentional insufficient to survive motion for summary judgment); Hamm v. Precision Rebuilders, Inc., 470 So. 2d 308 (La. App. 5th Cir. 1985) (summary judgment affirmed).

38. Williams v. Ingredient Technology Corp., 470 So. 2d 283 (La. App. 5th Cir. 1985) (summary judgment inappropriate in factual situation of supervisor overriding employee's objections to particilar instruction); Ewert v. Georgia Cas. & Surety Co., 468 So. 2d 13 (La. App. 3d Cir.), cert. denied, 472 So. 2d 920 (La. 1985) (sixteen-year-old suffered fatal injury in logging operations; *Mayer* specifically cited as reason why exception of no cause of action should not have been sustained); Yousufali v. Southland Corp., 467 So. 2d 191 (La. App. 3d Cir. 1985) (convenience-store clerk alleged intentional failure to provide adequate security after he was struck by robber; *Mayer* cited as basis for reversing the sustaining of exception of no cause of action); Goodman v. Dixie Mach. Welding & Metal Works, 467 So. 2d 61 (La. App. 4th Cir. 1985) (alleged intentional exposure to lung irritants; exception of no cause of action sustained at trial court level and reversed on appeal); McCormick v. E. I. DuPont de Nemours, 464 So. 2d 826 (La. App. 5th Cir.), cert. denied, 466 So. 2d 1294 (La. 1985) (explosion and fire; insufficient basis for summary judgment in employer's favor); O'Neill v. Johns-Manville Corp., 463 So. 2d 671 (La. App. 4th Cir. 1985) (asbestosis; exception of no cause of action reversed); Cupp v. Federated Rural Elec. Ins. Co., 459 So. 2d 1337 (La. App. 3d Cir. 1984) (death while working on electrical line; exception of no cause of action and summary judgment decided adversely to defendant on appeal).

39. 464 So. 2d 878 (La. App. 4th Cir.), cert. denied, 466 So. 2d 1302 (La. 1985). The court ultimately determined that the case was not controlled by Louisiana law.

may not seek contribution or indemnity against an employer whose enterprise bore some of the responsibility for the injury suffered by an employee.[40] Should this be the case, the way will be open for an employer or its liability carrier to bear a part of the tort damage payable to the injured employee in his tort action. Such a result would be a significant erosion of the underlying rationale and should be regarded with concern by the employer community.

Moreover, the decision in *Adams v. Denny's, Inc.*,[41] discussed later in this symposium, may revive the rationale of *Boyer v. Crescent Paper Box Factory, Inc.*,[42] that if an injury is work-related but not compensable under the Act, the injury is actionable in tort. The decision may be more limited than that, but it at least raises that possibility. The decision in *Lester v. Southern Casualty Co.*,[43] though legislatively overruled shortly thereafter, that claims for medical expenses are subject only to a ten-year prescriptive period, is also an indication of continuing judicial liberality in interpreting the Act.

These developments have not occurred in a vacuum. The judiciary can read the Act as well as anyone and can reach its own decisions with respect to its cant after the 1983 amendments. The lesson to be learned is that there is very little to be gained by a one-sided Act, whether the imbalance is legislatively or judicially created. The closer to the middle that we strike the balance, the fewer the opportunities there will be for legislators or judges to feel the need to tinker with the system.

*Cause of Action for Wrongful Death of Fetus*

The Louisiana Supreme Court's decision in 1981 in *Danos v. St. Pierre*,[44] holding that parents have a right to recover for the wrongful death of their unborn child, had a predictable impact on the Compensation Act during this term. In *Adams v. Denny's, Inc.*,[45] a waitress had fallen during her work, and the incident allegedly led to the death of her unborn child. She and her husband sued the employer in tort for the wrongful death of the fetus, and she also sought compensation for her own injuries. A partial summary judgment had been rendered by the trial court with respect to the former claim, but the appellate court reversed.

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40. Lejeune v. Highlands Ins. Co., 287 So. 2d 531 (La. App. 3d Cir.), cert. denied, 290 So. 2d 903 (La. 1974), is usually cited for that proposition.

41. 464 So. 2d 876 (La. App. 4th Cir.), cert. denied, 467 So. 2d 530 (La. 1985).

42. 143 La. 368, 78 So. 596 (1918).

43. 466 So. 2d 25 (La. 1985).

44. 402 So. 2d 633 (La. 1981).

45. 464 So. 2d 876 (La. App. 4th Cir.), cert. denied, 467 So. 2d 530 (La. 1985).

A number of years ago, a similar claim for the wrongful death of a fetus was rejected, at least partially on the ground that Louisiana law did not recognize such a cause of action.[46] Once the cause of action was recognized in general tort law, it was only a matter of time until fate would again bring such a case to the judicial system. The defendant cited the earlier case, but the court obviously felt that, in light of *Danos,* a different result was required. The court reasoned that if the employee had brought her two-month-old child to the work place and the infant had been killed by the negligence of the employer, there would be no serious contention that the employer could not be liable to the parents for the wrongful death of the child. If *Danos* stands for the proposition that the parents have the same interest in the fetus as they do in a living child, then the court's reasoning is difficult to dispute.

Perhaps there is no compelling reason to be critical of the decision on the facts presented. The only disturbing aspect of the decision is its future import. Does the decision indicate that there will be a revival of the concept that was first recognized in *Boyer v. Crescent Paper Box Factory, Inc.*[47] that if the Act does not actually accord the employee a remedy for a loss suffered through a work-related incident, the employee may then sue in tort? Properly understood, the mother's cause of action is for loss to an *employee*, not to the non-employee child. It is not a difficult logical process to move from this type of loss (largely emotional) for which the Act does not afford a remedy to other kinds of loss for which there is no recovery under the Act, although the injury-causing "event" is work-related.[48] If the larger principle is indeed what underlies the court's decision, we may confidently expect to see more of the *Adams* rationale in the future.

*Prescription on Claims for Medical Expenses*

The supreme court unleashed a bombshell—perhaps the only one of the term—in its decision in *Lester v. Southern Casualty Co.*[49] The claimant had suffered the loss of his left foot and a part of his left leg in a work-related accident in 1970. He was fitted with an artificial limb and received the then-maximum 500 weeks of weekly benefits, the last one being paid in 1980. Substantial medical expenses were also paid, and the last such payment was made on January 25, 1980.

During the period from August, 1981 to October, 1982, the claimant incurred additional medical expenses which were primarily related to the

46. Bergeron v. New Amsterdam Cas. Co., 243 La. 108, 141 So. 2d 832 (1962).

47. 143 La. 368, 78 So. 596 (1918). The decision produced the language which now appears as La. R.S. 23:1221(4)(p) (1986), affording a remedy for non-disabling disfigurement or loss of physical function.

48. See W. Malone & A. Johnson, supra note 24, § 365 at 157-61.

49. 466 So. 2d 25 (La. 1985).

artificial limb. In late 1982, the carrier denied payment for those expenses, and suit was instituted on December 22, 1982. Both lower courts felt that the claim for the additional medical expenses was prescribed, having been instituted more than a year after the last medical payment.[50] The supreme court granted a writ and reversed.

The lower courts had followed earlier jurisprudence in applying the same prescriptive period to medical-expense claims that was applied to weekly benefit claims because the Act itself was silent on the specific issue of medical-expense claims.[51] Obviously uncomfortable with the result of the facts before it,[52] the supreme court overruled its own precedent[53] on the issue and held that absent a clear statement in the Act as to time period, the claim could be governed only by the general ten-year prescription of the Civil Code with respect to personal actions.

Justice Lemmon concurred, but reasoned that the one-year prescriptive period in the Act previously applied to medical expenses should be interpreted to begin to run only when the expense was actually incurred. He concluded that the employer's liability for both weekly benefits and medical expenses was already established and that the prescriptive period should simply be applied when that liability was actually called into question.

Neither the majority opinion nor the concurrence was the final word on the subject. The chosen period was too long, and the legislature promptly remedied the situation by enacting a specific prescriptive period in the Act for medical expenses. The legislature chose a scheme that was virtually identical to that for supplemental earnings benefits. If no payments have been made, the claim for medical expenses prescribes one year from the accident. If payments have been made, the claim prescribes three years from the date of the last payment.[54]

*Retaliatory Discharge Cases*

Louisiana has had a retaliatory discharge provision in its Compensation Act for only five years.[55] Thus, it is understandable that there have been few judicial interpretations. But there have been enough decisions to permit an outline of judicial reaction to the provision and to provoke some very brief comments here.

The retaliatory discharge provision prohibits the denial of employment or the discharge from employment of an employee on the ground

50. See Lester v. Southern Cas. Ins. Co., 458 So. 2d 654 (La. App. 3d Cir. 1984).

51. See W. Malone & A. Johnson, supra note 24, § 384 at 257.

52. The court observed that if it adhered to its earlier decisions, some medical expenses might have prescribed before the injured employee had a right to assert a claim for them.

53. Brown v. Travelers Ins. Co., 247 La. 7, 169 So. 2d 540 (1964).

54. 1985 La. Acts No. 926, amending La. R.S. 23:1209 (1985).

55. 1980 La. Acts No. 704, adding La. R.S. 23:1361 (1985).

that he has asserted a claim for compensation. It is an attempt to strengthen the remedies accorded to an employee by imposing an additional sanction on the employer if he should retaliate against an employee who seeks those remedies. If the claimant proves a retaliatory discharge, he is entitled to recover a "civil penalty," which is the equivalent to one year's earnings in the position sought but denied or from which he was discharged. He is also entitled to reasonable attorney's fees.

In the first decision interpreting this provision, the third circuit court of appeal held that a worker discharged for filing a claim under the FELA was entitled to the state law remedy for retaliatory discharge.[56] Shortly thereafter, the fourth circuit held that a classified civil service employee had to exhaust his administrative remedies before he was entitled to bring the action outlined by section 1361.[57] Another decision supplied a prescriptive period which had not been supplied by the legislature—the general one-year tort prescription.[58]

With these jurisdictional and procedural skirmishes out of the way, subsequent cases turned to a delineation of the provision's substance. Cases of recovery and denial of recovery are approximately even, as might be expected in an area which will of necessity be very fact-oriented. The two instances of denial of recovery center on plaintiff's failure to discharge the burden of proving the causal connection between his dismissal and the filing of the compensation claim and on the court's belief that the dismissal was due to the claimant's failure to return to work after his injury.[59] In the decisions in which the employee has been successful, the court has had to reach the question of the measure of recovery. In *Turner v. Winn Dixie Louisiana, Inc.*,[60] the employee was awarded his full year's earnings even though the evidence showed that he had been employed elsewhere during that year. He also received $5,000.00 in attorney's fees. In *Collier v. Pellerin Milnor Corp.*,[61] the court included within the calculation of a full year's earnings a profit-sharing bonus to which the employee would have been entitled, but the court could not decide the issue of employer-paid insurance premiums on the basis of the record before it. The employee also received $2,500.00 in attorney's fees.

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56. Wiley v. Missouri Pac. R.R., 430 So. 2d 1015 (La. App. 3d Cir. 1982), cert. denied, 431 So. 2d 1055 (La. 1983).

57. Hillard v. Housing Authority, 436 So. 2d 685 (La. App. 4th Cir. 1983).

58. Arvie v. Century Tel. Enters., Inc., 452 So. 2d 392 (La. App. 3d Cir. 1984).

59. Moore v. McDermott, Inc., 469 So. 2d 1207 (La. App. 1st Cir. 1985); Vollenweider v. New Orleans Public Serv., Inc., 466 So. 2d 804 (La. App. 4th Cir.), cert. denied, 468 So. 2d 577 (La. 1985).

60. 474 So. 2d 966 (La. App. 5th Cir. 1985).

61. 463 So. 2d 47 (La. App. 5th Cir. 1985).

In the only case to reach the supreme court, recovery was granted, with the observation that the appellate court should be very wary of replacing the trial judge's determination on the issue (which had been favorable to the plaintiff) with its own.[62]

No case has squarely decided the issue of whether the statutory civil penalty is the claimant's exclusive remedy, but there is a strong inference from these various decisions that this is the case. If the Legislature has seen fit to grant a specific remedy for a specific evil, it is difficult to argue that it also meant that the aggrieved claimant could seek additional amounts (mental distress or punitive damages, for example). There will, no doubt, be additional decisions forthcoming on this issue and others yet unresolved in the area of retaliatory discharge.

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62. Ducote v. J. A. Jones Constr. Co., 471 So. 2d 704, 706 (La. 1985).