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Legislative Developments

Unlike the legislative sessions of 1985 and 1986, and contrary to the usual expectations for the last session in a given legislature's term of office, the 1987 Regular Session of the Louisiana Legislature produced some significant changes in the Workers' Compensation Act (the "Act"). Some of these changes require extended comment in this space.

A series of acts dealing with medical treatment and expenses is likely to make the biggest impact on the practical administration of compensation claims. Act 492[1] places some reasonable limitations on both the employer and the employee with respect to medical examinations. It retains the requirement, in section 1121 of the Act, that the claimant submit himself to medical examinations as reasonably necessary, but specifies that the carrier shall not require the employee to be examined by more than one specialist in a field without the employee's consent. On the other side, however, the amendment codifies the principle that the employee has the right to select one treating physician in each specialty, but requires that he obtain the employer's consent to change specialists after that initial choice. If a court determines that the employer has withheld that consent arbitrarily, the employer is subject to attorney's fees related to the dispute and any additional medical expenses caused by the refusal.

Act 493[2] likewise places some limits on the reimbursement due for certain medical procedures. A health care provider may not incur more than an aggregate of $1,000.00 in "nonemergency diagnostic testing or treatment" without the mutual consent of the employer or carrier and the employee.[3] If the provider does so, the obligation to pay the fee is not enforceable against the employer or the carrier. Fees incurred for emergency treatment are not affected by the limitation, but the provider bears the burden of proving that the treatment was indeed of an emergency nature. As with the provisions on change of specialist in Act 492, the employer or carrier is subject to an award of attorney's fees related to the dispute as well as any additional medical expenses caused by a

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1. 1987 La. Acts No. 492.
2. 1987 La. Acts No. 493.
3. Id.

refusal to agree to treatment if that refusal is found by a court to have been arbitrary.

A health care provider which has treated the employee at any time is required under Act 494[4] to release medical information and records to the employee, employer or carrier (or their representatives) concerning the alleged compensable injury. The records are to be held confidential by the employer or insurer, with an exception for their use before the Director[5] or in court.

Problems which have been caused by the failure of claimants to attach a certificate of rejection of the Director's recommendation in a given claim to their district court petition are addressed in Act 291.[6] If there is a dispute between the employer and the employee, either may seek the recommendation of the Director and must do so prior to filing a law suit.[7] The original petition must contain a copy of a "certificate of rejection" from the Director, certifying that his recommendation was rejected by one of the parties.[8] If the certificate is not attached, the petition is subject to dismissal as premature.[9]

In many instances, petitions have not been accompanied by the required certificate. This has occurred either due to ignorance of the statutory requirement or because the certificate was not physically available within the time limitations required for filing the petition. Act 291 attempts to solve the problem by providing that the suit is not premature if the certificate is presented "at or prior to" the time of the hearing on an exception of prematurity.[10]

This establishes a rather peculiar procedure. If the certificate is not attached initially, the opposing party (usually the carrier or employer) by answering without interposing the plea will waive the exception of prematurity. If the exception is interposed, however, the prematurity problem may be cured by the presentation of the certificate at the hearing. Thus, a petition, though premature when brought, becomes ripe when heard. The only case in which an action would be premature under the revised standard would, in all likelihood, be a case in which the Director's office has never been consulted at all.

Act 396[11] contains a small, but nonetheless potentially significant, change in the calculation of an average weekly wage for a person earning

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4. 1987 La. Acts No. 494.

5. Director of the Office of Worker's Compensation Administration (hereinafter "Director").

6. 1987 La. Acts No. 291.

7. La. R.S. 23:1310 (1985); La. R.S. 23:1311 (1985).

8. La. R.S. 23:1311(C) (1985).

9. La. R.S. 23:1314(B) (1985).

10. 1987 La. Acts No. 291.

11. 1987 La. Acts No. 396.

his wages on a monthly basis. Prior to the amendment, the calculation was made by dividing his monthly salary by four. If a person earned $1,600.00 per month, his average weekly wage for purposes of determining weekly benefits would be $400.00 per week under such a calculation. After this amendment, the calculation is to be made by first multiplying the monthly salary by twelve and then dividing the resulting amount by fifty-two. The same hypothetical employee under the new calculation would be earning an average weekly wage of $369.23.

The remaining legislative acts affecting workers' compensation do not require textual discussion and are confined to the margin.[12]

JURISPRUDENCE

Deputy Sheriffs Revisited

Faithful readers of this column are quite aware of the judicial and legislative tug-of-war during recent years over the status of deputy sheriffs and their entitlement to workers' compensation benefits.[13] Though pages could be written to remind readers of the background, it suffices to note that the core of the disagreement centers around the question of whether a deputy sheriff is a "public official," and thus is excluded from coverage as a non-employee, or a public employee entitled to the same coverage as other employees. If one classifies deputies as public employees entitled to coverage, an important accessory issue arises: Should the local sheriff or the state itself pay for the coverage?

Gradually, through the process of judicial and legislative refinement, it appears to have been established, and properly so, that deputy sheriffs

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12. 1987 La. Acts No. 266 amends La. R.S. 23:1181 (1985) to increase, from $25,000.00 to $100,000.00, the amount of Louisiana immovable property which a foreign employer liable for Louisiana workers' compensation benefits must own in order to be self-insured without securing liability insurance or posting the requisite statutory bond. 1987 La. Acts No. 290 amends La. R.S. 23:1203(C) (1985) to specify that, if an employee uses his own vehicle to obtain necessary medical care, the appropriate mileage rate for his reimbursement is that rate established by the state for reimbursement of state employees using their own vehicles on state business. 1987 La. Acts No. 633 enacts La. R.S. 23:1203.1 authorizing the state to fix a fee schedule for medical services payable in state self-insured workers' compensation matters. One is entitled to wonder whether the principle of fee schedules in such matters will prove contagious to workers' compensation claims against private employers.

13. A convenient summary of the developments over recent years is contained in Johnson, Developments in the Law, 1980-1981—Workers' Compensation, 42 La. L. Rev. 620, 645-46 (1981). Even after that discussion, the battle raged in the legislature and the courts. See 1981 La. Special Sess. Acts No. 25 (codified as La. R.S. 23:1034 (1985)); Brodnax v. Cappel, 425 So. 2d 232 (La. App. 3d Cir. 1982), overruled in Kahl v. Baudoin, 449 So. 2d 1334 (La. 1984); and finally 1985 La. Acts No. 954, adding La. R.S. 23:1034(D) (1985 and Supp. 1987).

should be treated as employees rather than officials—despite the fact that the Act "defines" them as public officials. The obvious intent of the definition is not to suggest that deputy sheriffs are really officials rather than employees. Rather, it must be that the state does not want to be liable for the expense of their compensation coverage. As employees, they are entitled to a compensation remedy from someone, either the state or a local political subdivision. The precise assignment of the cost of the compensation is a detail which for the moment appears to have been fixed against local political subdivisions.

Inclusion of deputy sheriffs in local government coverage and payment of that cost by local political subdivisions, however, has been left by the legislature to the discretion of the local authorities. As the Bard has it, thereby hangs a tale. In *Parker v. Cappel*,[14] the inclusion of some deputies and the exclusion of others, either by statute or by choice of local authorities, was upheld against constitutional attack. A deputy suffered a stroke and died four days later. His widow sued for compensation benefits, alleging that his death occurred in the course of and arose out of his employment. She sued the local sheriff, whose parish did not provide workers' compensation coverage for its deputies, and later added the state by amendment. Both the sheriff and the parish filed exceptions of no cause of action, but the trial court overruled both, holding the pertinent portions of the Act unconstitutional.

The widow argued that, since the Act specifically provides coverage for the deputies of the Orleans Parish Criminal Sheriff[15] but leaves coverage for other deputies to local discretion, it denies equal protection of the law to deputy sheriffs in other parishes. The Louisiana Supreme Court rejected the argument, finding that the legislation furthers an appropriate state interest. It identified differences between the Orleans Parish Criminal Sheriff and other sheriffs in the state, and found a suitable foundation for the distinction made in the statute.

The court's decision helps to advance the eventual solution to the problem somewhat, but the facts did not afford the opportunity to provide a complete solution. As the court noted, it was loath to rewrite the legislation judicially. The opinion left little doubt that the court believed that deputies should not be made to bear their work-related accident costs on their own, a view which is whole-heartedly supported here.[16] The present statute is troublesome because if literally read it

14. 500 So. 2d 771 (La. 1987).

15. La. R.S. 23:1034(A) (1985). The statute does not specify who is to bear the expense of the coverage, but one may glean from other parts of the section the conclusion that it is unlikely that these deputies would be regarded as employees of the state.

16. "We leave the Legislature to address the criticism. Absent that response, the parishes may provide their own workers' compensation to sheriff's deputies, whose salaries probably ill-afford coverage for work-related injuries." *Parker*, 500 So. 2d at 776.

"defines" deputies as "public officers and officials" of their local parishes, but then authorizes workers' compensation coverage for them (at local expense, of course).

There is a direct and simple solution. These and other workers who are in fact not public officers or officials in the workers' compensation context should be referred to and defined as employees; their coverage should be mandatory as with other employees; and the cost of that coverage should be squarely assigned to someone, whether it be the state or the local political subdivision. The work-related accident costs of deputy sheriffs is too important an issue to be the subject of a political football game.

Heart Attacks and Strokes

During this term, the Louisiana Supreme Court returned to some ground that it had successfully tilled several years ago. Difficult ground it is, too. There are very few physical incidents that present more troublesome causation problems than heart attacks, strokes and other vascular accidents. Almost every jurisdiction encounters difficulty in assigning causation in such matters, and Louisiana has been no exception.

In 1982, the Louisiana Supreme Court authored two opinions which offered significant guidelines to the lower courts in resolving these problems—*Adams v. New Orleans Public Service, Inc.*[17] and *Guidry v. Sline Industrial Painters, Inc.*[18] These decisions were discussed in detail in this forum at that time.[19] In general terms, *Adams* on original hearing had indicated a rather lenient view toward proof of work relationship, and *Guidry* was somewhat more rigorous. On re-hearing, the *Adams* opinion moved closer to the announced *Guidry* rationale, and it seemed likely that *Guidry* would prove to be the more influential decision.

The opinion in *Reid v. Gamb, Inc.*,[20] during this term, seems to confirm this view. There were indications after *Guidry* that the courts of appeal were using its "stress greater than non-employment life" test in instances of pre-existing disposition to heart attack or stroke and were reaching conclusions of denial of benefits more often than had been done previously.[21] In *Reid*, the lower courts followed this pattern

17. 418 So. 2d 485 (La. 1982).

18. 418 So. 2d 626 (La. 1982).

19. Johnson, Developments in the Law, 1981-1982—Workers' Compensation, 43 La. L. Rev. 613, 617-21 (1982).

20. 509 So. 2d 995 (La. 1987).

21. See, e.g., Mayeaux v. Commercial Union Ins. Cos., 492 So. 2d 188 (La. App. 3d Cir. 1986) (pains occuring at home after a rather ordinary work day were not considered work-related); Edwards v. Exxon Co., 485 So. 2d 228 (La. App. 3d Cir.), cert. denied, 489 So. 2d 250 (1986) (stroke after minor physical exertion not work-related, even though

in denying recovery and the supreme court granted a writ, but did not change the result. Instead it simply took the opportunity to clarify the *Guidry* rationale.

The employee was the district manager of five restaurants in a region composed of several parishes. He visited the various stores on a periodic basis, performing various administrative and managerial tasks. On the date in question, he was working with other employees to prepare a restaurant for its opening day. At 6:00 p.m., he finished work and picked up a snack at a convenience store. He repaired to his motel room, where he experienced some numbness in his right arm and hand just before he went to sleep. When he awoke the next morning, he found that he could not lift his right arm. A cerebral vascular accident was diagnosed.

The majority opinion in *Reid* took the predictable step of extending the *Guidry* rationale from heart attacks to vascular accidents (strokes).[22] More importantly, the court announced that it would no longer respect the distinction between the physical nature of employment stress and purely mental or emotional stress, and that it also would no longer respect the distinction between "extraordinary" stress and "ordinary" stress. If there was a distinction between the treatment of vascular accidents in the earlier decision in *McDonald v. International Paper Co.*[23] and the treatment in *Reid*, the court thus seemed rather clear that it intended the distinction to cease.

The result in *Reid* was a denial of benefits. The supreme court could discern no error in the trial judge's conclusion that the worker had shown no causal connection whatsoever between his work and his injury. Thus, regardless of the formula used to test the causal relationship, his effort had to fail. The significance of *Reid* is not in its present result, however, but in its future use. Even though serving as a clarification of *Guidry*, it will suggest a very slight development of the rationale in such future cases toward a somewhat relaxed standard for recovery. Caution should be exercised, as always, to delineate as carefully as possible between those risks properly assignable to employment and those which are truly personal risks that the employment enterprise should not bear.

Lenient Standards for Measuring Temporary Total Disability

Last year's discussion in this forum noted that judicial ingenuity had triumphed over legislative craftsmanship once again in the workers'

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it occurred on job premises during work hours); Johnson v. Hendrix Mfg. Co., 475 So. 2d 103 (La. App. 2d Cir. 1985) (no causal link shown between exertion of employment activities and heart attack).

22. 509 So. 2d at 998.

23. 406 So. 2d 582 (La. 1981).

compensation field.[24] The drafters of the comprehensive 1983 amendments had carefully amended the provisions relative to total and permanent disability and (formerly) permanent partial disability benefits (now Supplemental Earnings Benefits, or SEB) to overrule the so-called odd lot doctrine, and generally to impose very rigorous standards designed to make total and permanent disability awards rare indeed.[25]

Curiously, the provisions governing temporary total disability benefits were left unchanged. As discussed in this space last year,[26] the courts were quick to note the omission and to conclude that there must have been no intent to change the pre-1983 provisions insofar as they were applicable to temporary total disability cases. Those provisions also permitted a lesser standard of proof—the ordinary preponderance of evidence as opposed to the clear and convincing standard chosen by the 1983 drafters. From there, it was only a small step to a determination that the claimant in the case at hand was indeed in a temporary status, and that, accordingly, he should be entitled to the standard used in disability cases prior to 1983.

At the time last year's symposium was written, there were only two examples of this trend. Last year's trickle, however, has turned into this year's deluge. In numerous cases decided during this term, claimants were held to have established their right to temporary total disability benefits by a preponderance of the evidence on the basis of pre-1983 concepts such as odd lot status or working in pain.[27] In many of these

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24. Johnson, Developments in the Law, 1985-1986—Workers' Compensation, 47 La. L. Rev. 521 (1987).

25. Cf. Johnson, Bound in Shallows and Miseries: The 1983 Amendments to the Workers' Compensation Statute, 44 La. L. Rev. 669, 679 (1984).

26. Johnson, Developments in the Law, 1985-1986—Workers' Compensation, 47 La. L. Rev. 521 (1987).

27. Price v. Fireman's Fund Ins. Co., 502 So. 2d 1078 (La. 1987) (temporary total disability (TTD) established during six-month period); Talley v. Enserch Corp., 508 So. 2d 197 (La. App. 3d Cir. 1987) (claimant failed to prove permanent total disability by clear and convincing evidence, but proved TTD by preponderance of the evidence during thirty-month period); Green v. Jackson Rapid Delivery Serv., 506 So. 2d 1345 (La. App. 2d Cir. 1987) (claimant showed entitlement to TTD payments for one-year period); Johnson v. Monroe Pulpwood Co., 505 So. 2d 862 (La. App. 2d Cir. 1987) (claimant established right to TTD payments, based upon substantial pain, "until termination of disability" in a few years); Bailey v. Zurich Am. Ins. Co., 503 So. 2d 611 (La. App. 4th Cir. 1987) (TTD payments awarded lasting from October, 1983, through trial and until an indefinite point in the future); Lang Pham v. Delta Petroleum Co., 503 So. 2d 149 (La. App. 5th Cir. 1987) (entitlement to TTD payments shown, but case remanded for further taking of evidence); Thomas v. Elder Pallet & Lumber Sales, Inc., 493 So. 2d 1267 (La. App. 3d Cir. 1986) (odd lot doctrine continues to apply to TTD cases). Occasionally, there was a ruling that the claimant should be denied recovery because he had not established entitlement to total and permanent disability benefits by clear and convincing evidence. Roszell v. INA of Texas, Inc., 499 So. 2d 659 (La. App. 3d Cir. 1986).

cases, there is little doubt that the court was intent upon finding a way to use the pre-1983 standards to afford relief, and almost no doubt that the results were the very ones that the 1983 amendments were intended to prevent.

The writer will resist the temptation to point out that such a judicial effort to adjust the balance struck by the 1983 amendments was predictable and predicted. The treatment of injuries under the rubric of temporary total disability benefits in the manner indicated in these cases seriously undermines the reform undertaken by the 1983 amendments. The question now is whether the inevitable legislative re-adjustment will make some attempt to restore a more rational balance, or whether only this particular omission will be corrected—only to leave another spot in the Act where the judiciary will choose to adjust the balance once again.

Rehabilitation

An otherwise unremarkable decision during this term gives us some insight into the way in which the new provisions on rehabilitation might be interpreted. In *Works v. Trinity Universal Insurance Co.*,[28] the claimant had suffered a serious work injury that left him with a 25% disability. The employer's insurer determined that the claimant/employee was entitled to rehabilitation, and eventually placed him with his old employer at his old rate of pay, but with modifications in his duties to accommodate his disability.

As a practical matter, however, the claimant found that he was having to exceed the defined limits of his "new" job with some frequency, and naturally was worried about the permanency of his new arrangement. The employee felt he was entitled to additional rehabilitation services which would re-train him in a different skill for a job of a more permanent nature that he could perform within his physical limitations. The insurer resisted, and the trial court denied any further rehabilitation services on the ground that he was earning the same amount earned before his injury.

The appellate court reversed, noting that it was very significant to the court that the insurer had *agreed* that rehabilitation services were justified. Having done that, the insurer could only then question the extent of rehabilitation. In the court's mind, rehabilitation meant more than restoration of the employee to his old wages. It disagreed with defendant's expert that the paramount goal of rehabilitation was to put the injured person back at his old job with his old employer at his old wage.

28. 501 So. 2d 1045 (La. App. 2d Cir. 1987).

While "simple and pragmatic" in the court's words, this view is "not correct."[29] The court regarded this incorrect interpretation of the goal of rehabilitation as specialized job placement that was inherently transitory and contingent upon the good will of the old employer. Rather, the court saw the statute as requiring "vocational education and appropriate training to make the worker competitive in the labor market."[30] The case was remanded for an appropriate order requiring rehabilitation of the worker to prepare him for "secure, suitable employment."[31]

Intentional Act Exclusion

Ever since its introduction into the Act in 1976, the so-called intentional act exclusion has proved troublesome. The legislative intent must clearly have been to interject some balance into the tort immunity scheme that it was extending to executive officers and co-employees, providing that though they were entitled to tort immunity in most instances, they were not to be excused from liability "resulting from an intentional act."[32]

This peculiar choice of language was unfortunate, but to its credit, the supreme court rather early announced the proposition that "intentional act" in this context meant simply "intentional tort."[33] Thus a claimant, in order to establish that he should not be limited to a compensation remedy, had to prove either that the actor desired the harmful or offensive consequences of his conduct, or must have known to a virtual certainty that they would occur.[34]

There was little dissent from this view,[35] but there was considerable dissent about the mechanics of getting to that point in the inquiry. Could the claimant survive a threshold dismissal device such as an exception of no cause or a summary judgment by the mere incantation of "intentional" conduct? Even the supreme court provided mixed signals on the issue.[36] Understandably, the intermediate appellate courts were

29. Id. at 1047.
30. Id. at 1048.
31. Id.
32. La. R.S. 23:1032 (1985).
33. Bazley v. Tortorich, 397 So. 2d 475, 480 (La. 1981).
34. Id. at 481.
35. Unless one considers the decision in Citizen v. Daigle, 418 So. 2d 598 (La. 1982) as dissent. In that case, the supreme court ignored and thereby declined, in spite of Justice Watson's dissent, to use the concept of "transferred intent," known to basic tort law, in order to permit a claimant to escape tort immunity. The actor had intended assault but accomplished battery. In his concurrence, Justice Dennis seems to indicate that "intentional act" and "intentional tort" might not necessarily be the same.
36. Compare Mayer v. Valentine Sugars, Inc., 444 So. 2d 618 (La. 1984), with Fallo v. Tuboscope Inspection, 444 So. 2d 621 (La. 1984).

accordingly mixed on the issue, with the broad view of the immunity taken in *Babin v. Edwards*[37] being the best-reasoned decision.

During this term, the supreme court had occasion to return to the subject in *Caudle v. Betts*.[38] A Christmas party at a car dealership was the occasion of some shenanigans with an electric automobile condenser. The reader will be spared most of the details; suffice it to say that the defendant (who was president and principal stockholder of the dealership) was found to have shocked the back of plaintiff's neck with the condenser and to have chased him with the condenser in hand until plaintiff locked himself in a safe place. Among other injuries, plaintiff suffered an unexpected impairment of his occipital nerve.

The trial judge found that defendant intended to shock plaintiff, but did not intend to injure him beyond a passing, relatively minor electrical shock. In other words, he intended the act and probably the offensive consequences, but not the unforeseen harmful consequences. Surprisingly, both the trial court and the appellate court[39] applied tort immunity and dismissed plaintiff's suit.

The case afforded the supreme court the opportunity to elaborate upon its earlier work in the field. Quite properly, it cited basic tort principles which establish that the intent to cause injurious consequences as opposed to offensive consequences does not change the fact that the victim's privacy and sense of dignity has been invaded. Moreover, every first-year tort student is well versed in the rule of the "eggshell skull" plaintiff, and his right to collect for even unexpected consequences of a relatively minor contact. Thus, the fact that the actor may not have intended the full consequences of his action is of no significance. In this instance, it was sufficient that the defendant intended the offensive contact, and must as a matter of law be liable for the consequences of his act, however remote they might be.

Affirmation of these basic tort principles at the fringe of the compensation statutes, however, serves to highlight the continuing problem. No doubt the appellate court was moved by the unstated concern that full exposure in tort for the employer/actor seemed too harsh a sanction for conduct which was essentially horseplay in the workplace that got out of hand. Its reaction was to attempt to re-define tort principles otherwise well established in general tort law. The result would ultimately be two kinds of tort law, one for use in its own realm and one for use in workers' compensation matters. Such an artificial distinction could not long last, even though it might be accomplishing "just" results in the eyes of some.

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37. 456 So. 2d 659 (La. App. 1st Cir.), cert. denied, 460 So. 2d 604 (1984).
38. No. 87-C-0445 (La. Sept. 9, 1987).
39. Caudle v. Betts, 502 So. 2d 146 (La. App. 3d Cir. 1987).

Perhaps we need to re-visit the suggestion made in this forum some years ago.[40] It was then suggested that re-entry into the tort system should be reserved for those particularly heinous situations which occasionally arise in the workplace, such as a physical assault by a supervisor on a worker. Some might say that the facts in *Caudle* are close enough to such conduct that the re-entry into tort was appropriate. So long, however, as the appellate courts continue to be somewhat reluctant to impose the ultimate sanction of potential tort liability (as evidenced by the surprising lower court decisions in *Caudle*), the supreme court will have to engage in legitimate "balancing," proper though it may have been in this instance.

Also, so long as that process continues, there is the danger that conduct at the fringe of "horseplay" in the workplace might be the basis for re-entry into the tort system. The tendency will be to give the benefit of the doubt to the claimant under those circumstances, and we may look up in ten years and find that the intentional act loophole is truck-sized rather than the size of a knitting needle. Perhaps the legislature should once again consider the possibility of a less draconian sanction for intentional torts, such as double the workers' compensation payment otherwise due the claimant, as some type of penalty in lieu of full tort liability.

Immunity of the Principal after Berry v. Holston *Well Service*

Easily the most discussed decision in workers' compensation in the last three years, *Berry v. Holston Well Service, Inc.*[41] is now past its infancy and into a stable if not necessarily thriving childhood. As faithful readers will recall, *Berry* established a three-part inquiry to determine whether the work in which the injured claimant was involved at the time of his injury was part of the trade, business or occupation of the alleged principal. Failure of the alleged principal to hurdle successfully each of the three parts of the inquiry means at least that there can be no summary judgment in its favor and would ordinarily mean no immunity after a trial on the merits.

The opinion was expressed in last year's comments that the *Berry* rationale might be more of a restatement of the law than new law. Experience during this term tends, predictably, to demonstrate support for both parts of that statement. In one group of cases, the initial *Berry* inquiry of whether the work of the injured employee was "specialized

40. Johnson, Developments in the Law, 1981-1982—Workers' Compensation, 43 La. L. Rev. 613, 626-29 (1982).

41. 488 So. 2d 934 (La. 1986). See Johnson, Developments in the Law, 1985-1986—Workers' Compensation, 47 La. L. Rev. 521, 523-25 (1987), for initial comments shortly after the decision was released.

per se" had been decisive, resulting in a conclusion that the work was not part of the trade of the principal and therefore tort immunity was not available.[42] In another group of cases, surprisingly numerous, the principal survived the "specialized per se" test and successfully demonstrated that the work was not so specialized that it could not be considered a part of its regular trade, business or occupation.[43] The immunity of the general contractor in the construction field has proved resilient, under the so-called "dual contract" or "contract and contract out" alternative basis for tort immunity under section 1061.[44]

Whether *Berry* has actually changed the law as to the immunity of the principal depends in part upon whom one asks. Opponents of the immunity naturally think that it has, and can cite the cases above in which the "specialized per se" conclusion has defeated the immunity. Friends of the immunity can point to the equal number of instances in which the "specialized per se" rubric has not been definitive. The supreme court has not had occasion to re-visit the subject during this term. Even if it should do so, the writer sees no reason to depart from the view expressed last year. The ultimate solution should be legislative rather than judicial.

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42. Chauvin v. Gulf Coast Minerals, Inc., 509 So. 2d 622 (La. App. 3d Cir. 1987) (work of erection of steel for commercial building found to be specialized per se; interesting discussion of jury question as to whether the contract in question was "to perform" or "to provide"); Davis v. Material Delivery Serv., Inc., 506 So. 2d 1243 (La. App. 1st Cir. 1987) (over-the-road truck driver operating lime truck and required to load and unload lime was doing work which was specialized per se); Miller v. Atlantic Richfield Co., 499 So. 2d 1095 (La. App. 3d Cir. 1986), cert. denied, 501 So. 2d 198 (1987) (welding as part of drilling process held to be specialized per se); Teague v. Sawyer Drilling Co., 499 So. 2d 127 (La. App. 2d Cir. 1986) (cementing of surface casing as part of oil well drilling process held to be specialized per se); Roberts v. Amstar Corp., 496 So. 2d 1146 (La. App. 4th Cir. 1986) (pipefitting is specialized per se).

43. Lewis v. Modular Quarters, 508 So. 2d 975 (La. App. 3d Cir. 1987) (sandblasting and painting not specialized per se; other evidence demonstrated that work was within trade of alleged principal; summary judgment in favor of principal affirmed); Recatto v. Bayou Steel Corp., 508 So. 2d 877 (La. App. 5th Cir. 1987) (work of electrician not specialized per se; other evidence demonstrated that regular employees of alleged principal did same work at same time; summary judgment affirmed); Cantrell v. BASF Wyandotte, 506 So. 2d 793 (La. App. 1st Cir. 1987) (work of security guard not specialized per se; although such work had always been contracted out, the court nonetheless affirmed summary judgment); Palmer v. Loyola Univ., 496 So. 2d 421 (La. App. 4th Cir. 1986) (janitorial and labor services not specialized per se, but case remanded since no evidence was available to proceed to other levels of inquiry under *Berry*).

44. Jackson v. Louisiana Power & Light, 510 So. 2d 8 (La. App. 5th Cir. 1987); Guillory v. Ducote, 509 So. 2d 455 (La. App. 3d Cir. 1987) (court also noted that alternative argument that carpentry was specialized per se was incorrect); Williams v. Gervais F. Favrot Co., 499 So. 2d 623 (La. App. 4th Cir. 1986), cert. denied, 503 So. 2d 19 (1987).

Loss of Consortium

It appears that a consensus is emerging in the cases with respect to the claim of a spouse of loss of consortium when the injury to the employed spouse is covered by workers' compensation. In a word (or several), the loss of consortium claim is seen as derivative, and is subject to the same defenses as the claim of the injured employee spouse would be. This is consistent with the treatment of the claim for loss of consortium in other contexts, and thus is a predictable result.

There are only two cases, but the opinions to date have been unanimous.[45] The results are correct, and demonstrate that the courts have the proper view of the importance of maintaining the delicate balance upon which the Act rests. The results indicate that the courts are resisting the temptation to use the loss of consortium issue to move the balance used in the Act more toward the employee. It is likely that the Act needs some movement in that direction, but the loss of consortium issue would have been the wrong place to accomplish that result.

Sharing of Attorney's Fees in Interventions

The decision which holds the most potential for making practical changes in the way workers' compensation cases are litigated and resolved is *Moody v. Arabie*.[46] An injured worker brought suit against various tortfeasors, and the compensation carrier intervened. A jury found for the worker against one of the tortfeasors and a judgment for $60,000.00 was entered. The preferential claim of the carrier for some $35,400.00 was recognized. The liability insurer of the tortfeasor tendered some $82,300.00 in payment of the judgment amount with accrued interest and costs. The check was made payable to the worker, his attorney and the compensation carrier.

A dispute then arose over the disposition of the proceeds. The carrier contended that its $35,400.00 claim should be paid first, without deduction of any amount for one-third contingency fee which plaintiff owed to his attorney. The attorney naturally contended that this one-third applied to the entire judgment, not just to the judgment balance left after deduction of the amount to be paid to the intervening carrier.

The trial court resolved the dispute by applying the contingency fee fraction to the entire amount, yielding a fee of $27,400.00. It also held that $5,900.00 in out-of-pocket costs of the attorney should be reim-

45. Redding v. Essex Crane Rental Corp., 500 So. 2d 880 (La. App. 1st Cir. 1986), cert. denied, 501 So. 2d 774 (1987); Theriot v. Damson Drilling Corp., 471 So. 2d 757 (La. App. 3d Cir.), cert. denied, 472 So. 2d 907 (1985). See also Mundy v. Kulkoni, Inc., 503 So. 2d 66 (La. App. 5th Cir. 1987).

46. 498 So. 2d 1081 (La. 1986).

bursed as called for by the contingency fee contract. Thus, the total payment to the worker's attorney was $33,300.00. The carrier had paid more than $49,000.00 in benefits and expenses, but slightly less than that amount was available from the total paid on the judgment. Thus the compensation carrier was held to be entitled to the balance remaining after the sum paid to the worker's attorney. It follows that the worker received from the $82,300.00 tort judgment exactly zero.

The trial judge seemed impressed by the attorney's argument that under Louisiana Revised Statutes (La. R.S.) 9:5001 the contingency fee ranked as a first privilege on all of the proceeds of the judgment, "priming" even the rights of the intervening carrier.

The appellate court reversed this decision, holding that the contingency fee only applies to the sum left after deduction of the amounts due to the intervening carrier.[47] This would have substantially reduced the amount to be paid to the attorney, while permitting the intervening carrier to receive its full reimbursement without bearing any of the costs of the worker's attorney.

This unhappy state of affairs, whether one focuses on the trial court decision or the appellate opinion, led the supreme court to grant a writ. Anyone who believed that the worker was going to be left with nothing after receiving an $82,300.00 judgment in "his" favor has simply not been following the course of Louisiana workers' compensation cases over the years.

The supreme court addressed the problem as one of co-owners of a right. Both the injured worker and the compensation carrier have been harmed by the conduct of the tortfeasor, and own together the right to be reimbursed by that tortfeasor. As such, each is required to contribute in proportion to his interest to the expenses of legal services that inure to his benefit. Having established that proposition, it was a simple step to the formula which would establish, as a percentage, the amount of reimbursement of the carrier to the total amount of the tort recovery, and then require the carrier to pay that percentage of the attorney's fees. In the case at hand, the carrier (calculating its reimbursement without reference to the attorney's fees) received about 60% of the awarded amount, and the plaintiff the remaining 40%. Thus, the "cost of the recovery" should be split between them in that percentage.

On the whole, this was good news for the worker's attorney, who theoretically won the argument about having his one-third contingency fee applied to the whole amount rather than to the 40% actually recovered by the worker. The supreme court, however, was not finished. It also announced application of the principle, carefully crafted in other

47. 485 So. 2d 660 (La. App. 3d Cir. 1986).

cases,[48] that courts are not bound by the agreement between client and attorney that a specified fraction of the recovery will constitute the attorney's fee. With regard to both the fee of the worker's attorney and the carrier's attorney, the court clearly indicated that the issue was for judicial resolution rather than contractual resolution between the parties. Specifically, the court noted that in order to qualify as a reasonable cost of recovery an attorney's fee must reflect actual services which augmented recovery "rather than duplicative services or those designed to benefit a single party such as the mere monitoring of proceedings."[49]

It seems obvious that neither the attorney for the worker nor the attorney for the carrier can expect to permit the other to carry the burden of prosecuting the case and then demand a share of the recovery as an attorney's fee. There is no doubt a method in the court's madness. Some have felt that there is a certain imbalance in the proceedings when the worker lines up against alleged tortfeasors and insurers. The defendants probably have greater staying power in the litigation and might simply "wear down" the worker into a modest settlement at best. In many instances, the role of the intervening carrier was relatively small; it often was content to let the workers' counsel do most of the work and it would simply pick up its portion of any recovery at the end. Seen in this light, the court's opinion might be seen as an effort to even up the sides just a bit, and to require as a practical matter that the intervening carrier participate more actively in the litigation as an opponent to the insurers on the other side. In theory, if the intervening carrier is going to bear a portion of the fee paid to the worker's lawyer, the carrier is going to be much more active in the case.

Indeed, it is not impossible that in some instances the carrier might simply choose to let the worker's counsel represent its own interests and save the cost of one attorney. Perhaps in a truly unusual case, the worker's attorney would permit counsel for the carrier to handle the matter. Such unusual alliances should prove very interesting. However, one thing is clear: Neither the carrier nor the worker can any longer be indifferent to the role played by the other, or by their respective counsel. This, it is submitted, was precisely what the supreme court was striving to achieve in *Moody*.

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48. See Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982).
49. *Moody*, 498 So. 2d at 1086-87.