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LEGISLATIVE DEVELOPMENTS

Of the legislative developments in the field of workers' compensation that took place during the past year, the most significant are contained in Act 938.[1] This far-reaching reform legislation makes substantial changes in the adjudication of workers' compensation claims. Some of the changes include removing the district court from the process, as well as important amendments to certain provisions of the Louisiana Workers' Compensation Act dealing with temporary total disability, compromise and settlement of claims for supplemental earnings benefits, and a reimbursement schedule for medical, hospital and related expenses. Such a fundamental change in workers' compensation procedure merits more extended coverage than could be offered in this format; moreover, brooding constitutional questions may render discussion of the mechanics of the new procedure premature. An exegesis of Act 938 must, then, be deferred.

In addition to these significant legislative developments, there were several relatively minor ones, which need be mentioned only briefly. Act 617[2] makes it clear that although an employee cannot change physicians within a field or specialty without the permission of his employer or the compensation carrier, he is free to change to a treating physician in another field or specialty without that approval.

Act 997[3] makes several changes in the provisions governing the Second Injury Fund. The new legislation increases the annual assessment on insurers, which finances the Fund, from 1.5 percent to 2.0 percent of annual premiums. Act 997 also clarifies that the prescriptive date for filing a claim with the Fund is one year from the initial payment

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1. 1988 La. Acts No. 938. Act 938 has a staggered effective date, with part becoming effective January 1, 1988 and the remainder on July 1, 1989.

2. 1988 La. Acts No. 617.

3. 1988 La. Acts No. 997. Another act, 1988 Louisiana Acts Number 732, provides a penalty if a properly executed and endorsed check or draft in settlement of a workers' compensation claim is not paid within three days after presentation. It does so by making the general provisions to that effect, which are applicable to other types of insurance and found in Louisiana Revised Statutes 22:658(c), applicable to workers' compensation insurers as well.

of benefits on the underlying claim, and it removes any discretion in the Second Injury Fund Board to grant extensions to that period of time. Further, the new provisions authorize a credit in the Fund's favor for any amount recovered through third-party tort claims and prohibit any reimbursement for payments made under federal legislation. Finally, Act 997 specifies that the Board has the discretion to reimburse lump-sum settlements either in a lump sum or in quarterly installments.

JURISPRUDENTIAL DEVELOPMENTS

Extent of Immunity of Principal

An unusual question regarding the always-controversial immunity of a principal under the Louisiana Workers' Compensation Act (Act) arose during this term. It is clear from the Act itself that when a principal undertakes a particular task within its trade, business, or occupation, and then contracts with an intermediary to carry out a portion of that task, not every employee of the intermediary is barred from suing the principal in tort. This result is well-founded, for since the principal has not undertaken an obligation to pay workers' compensation to all of the employees of the intermediary, he should not be entitled to a pervasive tort immunity.

The Act addresses this issue in section 1061,[4] which requires the principal to pay compensation to "any employee employed in the execution of the work," and in section 1032,[5] which grants the principal immunity from a tort suit by any such employee. The Act is less restrictive on this requirement than the acts of some other states, which limit the obligation to pay compensation to those employees injured while working on the principal's premises[6] or those over whom the principal actually retained supervision and control.[7] Louisiana courts have given the operative phrase "any employee employed in the execution of work" a broad reading,[8] but obviously there are limits. The principal on a construction job should not owe compensation to an office worker of the intermediary who never sets foot on the construction site.

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4. La. R.S. 23:1061 (1985).

5. Id. § 1032 (1985).

6. See, e.g., Mo. Ann. Stat. § 287.040 (Vernon 1965); Conn. Gen. Stat. Ann. § 31-291 (West 1987).

7. See, e.g., Ariz. Rev. Stat. Ann. § 23-902(B) (1983).

8. See, e.g., Shired v. Maricle, 156 So. 2d 476 (La. App. 3d Cir. 1963). In that case, an employee was repairing a truck he normally used in the execution of his work. The truck was not on the site where he worked for his immediate employer, who was under contract to the alleged principal. On the way home in the truck, the employee was injured. The court held that the employee was entitled to compensation from the principal.

In *Labruzzo v. Employers Insurance*,[9] the court had an opportunity to consider this question in a typically unclear factual situation. JSIL was a limited partnership with a corporate general partner. The corporation was owned in equal shares by Berger, Burrus and Ducote, three individuals. JSIL had been formed for the purpose of purchasing and holding title to certain immovable property in New Orleans. The individuals involved in this enterprise formed various limited partnerships in this manner for tax and liability reasons. When rehabilitation of the properties was required, they contracted with outside contractors or used a "core group" of employees. This core group consisted of payroll employees of an ordinary partnership, BBI, owned by Berger and Burrus.

The plaintiff was a payroll employee of BBI, but was not among those chosen to work on the project being supervised by JSIL. On the day of his injury, the plaintiff was in his office when Burrus came in and asked him to go look at property JSIL was refurbishing. According to Burrus' version, the visit to the property was more social than anything else. The plaintiff was injured during the inspection tour, and he sued JSIL in tort. The compensation insurer argued that since JSIL was using BBI and its employees in carrying out the work, JSIL was immune to a tort suit from a BBI employee such as the plaintiff.

The court rejected the claim of immunity. As the court observed, the fact that JSIL used some of BBI's employees in the project did not make JSIL the statutory employer of all BBI employees. Since the plaintiff was working on BBI projects other than the JSIL project, JSIL was not immune from the plaintiff's tort suit.

Assault Occurring on Employer's Premises

The dividing line between personal risks that contribute to injury and employment risks is fundamental in every compensation system. As fuzzy as the line may be in some instances, its proper delineation is very important because the delicate compromise inherent in the Act draws its vitality to a great extent from judicial respect for the proper location of this dividing line. If too many truly personal risks are included within the compensation system, the compromise is seriously undermined.

The four-to-three decision in *Raybol v. Louisiana State University*,[10] which involved an assault by a jilted lover on a worker while the worker was actively engaged in her employment, provides some indication of the closeness of many of the questions asked in determining whether the injury was personal or employment related. The decision is worthy of comment not so much because of its result—compensability—but

9. 521 So. 2d 515 (La. App. 4th Cir.), writ denied, 523 So. 2d 1342 (1988).
10. 520 So. 2d 724 (La. 1988).

because of its implications for the continued vitality of the dual requirement analysis to determine such questions. Using this analysis, the court ordinarily compares the strength of the "in the course of employment" showing with the strength of the "arising out of employment" showing.

The plaintiff in *Raybol* was a custodial worker at a university. During the summer break, the plaintiff was cleaning a part of a dormitory and was separated from her coworkers. The dormitory supposedly was closed and locked for the summer to prevent unauthorized entries. On the day in question, her former lover, who himself had worked at the university and had visited the plaintiff there several times when they were on more friendly terms, learned her location from a coworker and gained entry into the dormitory. When his efforts to restore amicable relations between the two were rebuffed, he attacked the plaintiff, who was rescued by fellow workers.

The trial judge granted the defendant's motion for summary judgment based on these facts. The appellate court affirmed,[11] but the supreme court reversed and remanded for further proceedings. In the court's view, the assault arose out of the employment.

The court's reasoning, while not surprising, merits brief comment. The court properly recognized, as it has done in numerous decisions before this one,[12] that the two requirements for compensability under the Act—that the injury occur in the course of employment and arise out of it—are not to be applied in isolation. Rather, they should be considered together; in a close case, a strong showing on one element might make up for a weak showing on the other.

The *Raybol* fact situation presented the classic case of a strong in the course of employment showing: plaintiff was on the work premises

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11. Raybol v. Louisiana State University, 513 So. 2d 561 (La. App. 1st Cir. 1987).

12. See, e.g., Lisonbee v. Chicago Mill and Lumber Co., 278 So. 2d 5 (La. 1973) (employee shot by robber at store across street from workplace; in view of employer's prohibition of leaving premises, "in course of" showing not strong enough to compensate for weak "arising out of" showing); Verette v. Town of Ponchatoula, 464 So. 2d 392 (La. App. 1st Cir. 1985) (reasonably strong "in course of" argument, but "arising out of" showing so weak that shooting by husband of woman to whom employee was paying undue attention was not compensable); Palermo v. Reliance Ins. Co., 501 So. 2d 333 (La. App. 3d Cir.), writ denied, 503 So. 2d 19 (1987) (drowning in Mexico while on recreational-social trip sponsored by employer to reward excellent job performance; weak "in course of" showing not balanced by "arising out of" showing when trip was voluntary; compensation denied); Turner v. United States Fidelity & Guar. Co., 339 So. 2d 917 (La. App. 3d Cir. 1976), writ denied, 341 So. 2d 899 (1977) (strong "in course of" showing made up for weak "arising out of" showing; shooting injury during horseplay shortly before lunch compensable); Robinson v. F. Strauss & Son, 465 So. 2d 284 (La. App. 4th Cir. 1985), aff'd, 481 So. 2d 592 (1986) (weak "in course of" showing, and thus, shooting arising out of girlfriend problems not compensable).

during work hours, fully engaged in her employment tasks. It also presented a weak arising out of employment showing: the cause of her injury was an argument with a jilted lover, an entirely personal affair with only the most marginal connection to her employment.

After noting the strong in the course of employment showing, Justice Dennis stated that in such circumstances, the injury caused by a third person "arises out of employment regardless of the nature of difficulty that prompted the attack or the identity" of the assailant.[13] With respect, this statement of the principle goes too far. The fact that the victim is squarely in the course of employment does not compel the conclusion that the assault arose out of the employment. Such a showing may counterbalance a weak showing that the assault arose out the employment, as in *Raybol*, and thus may justify compensating the injured worker. But to say that a strong showing of course of employment *establishes* that an injury arises out of employment is another matter entirely, and in fact would reduce the dual requirement in many instances to a single requirement.

It would have been preferable to say simply, as Louisiana courts have done in the past, that the course of employment showing was as strong as it could possibly be, and that, though still weak, the arising out of employment showing did not establish a risk that was not so clearly personal that the scales were tipped against an award of compensation. Though the result might still have been one on which reasonable minds could differ, the integrity of the analysis would have been preserved. Louisiana courts have not hesitated to grant compensation upon a proper dual requirement analysis in such cases,[14] and have not hesitated to deny it when the course of employment showing was somewhat less compelling than in *Raybol*.[15] Indeed, the author of *Raybol* concluded, two years ago and without dissent, that compensation should

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13. *Raybol*, 520 So. 2d 724, 727 (La. 1988). The opinion cites W. Malone and H. Johnson, Louisiana Workers' Compensation Law and Practice § 195, in 13 Louisiana Civil Law Treatise (2d ed. 1980), but there is a slight and important difference between the language of the opinion and the cited source. The opinion concludes that when the employee is clearly in the course of the employment as described, the injury arises out of the employment. The cited source says that when the employee is clearly in the course of the employment, "he *should be protected against* assault without reference to the nature of the difficulty that prompted the attack . . . ." (emphasis added). He should be protected, not because the injury arises out of the employment, but because the strong showing on the "in the course of" requirement outweighs a weak showing on the "arising out of" requirement.

14. See, e.g., Powell v. Gold Stamp Co., 204 So. 2d 61 (La. App. 2d Cir. 1967) (worker on premises during work hours; estranged husband came there, argued with and then shot her); Rogers v. Aetna Casualty & Sur. Co., 173 So. 2d 231 (La. App. 3d Cir.), writ denied, 247 La. 723, 174 So. 2d 133 (1965) (worker on employment premises during work hours; assailant came there and spent one-half hour with her before he shot her).

15. See, e.g., *Lisonbee*, 278 So. 2d 5 (La. 1973) (night watchman left premises and

be denied in another romantic tiff because the course of employment showing was somewhat weaker and thus insufficient to counterbalance an admittedly weak arising out of employment showing.[16]

The objection, then, is not necessarily to the result of the case, but to the court's inadvertent transformation of the dual requirement into a single requirement. Care should be exercised in the future to make sure that both requirements are kept alive and well; the courts may want and need to use both in future cases.

Immunity of Principal Revised: Berry *Two Years Later*

It is both the curse and the challenge of the law that it is never static. No sooner has one principle supposedly been established than attorneys and courts set to work on expanding or constricting it. In this context, the issue is the immunity of a principal, or statutory employer, and the principle is the restatement of this immunity two years ago in *Berry v. Holston Well Service, Inc.*[17]

The *Berry* decision announced a more stringent analysis for evaluating a principal's claim of immunity made on the basis that the principal undertook certain work within its trade, business, or occupation and then contracted with another person to carry out all or some of that work. The supreme court in *Berry* outlined a three-level analysis. The first level involves an examination of whether the contract work in question is "specialized" or "nonspecialized." If it falls into the former category, it cannot be part of the general trade, business, or occupation of the principal, which arguably is not in that specialized trade, and therefore the immunity cannot be established.

The second level of the analysis involves a comparison of the contract work to the trade, business, or occupation of the principal in order to determine whether the work is "routine and customary," that is, "regular and predictable" in that business. If not, then the principal cannot receive statutory employer immunity. Prior to *Berry*, this question had been the primary battleground in this area of the law.

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was shot by armed robber in store across the street); Mitchell v. Employers Mut. Liab. Ins. Co., 341 So. 2d 35 (La. App. 3d Cir.), writ denied, 342 So. 2d 1121 (1977) (supervisor of chicken-catching crew engaged in some nighttime activities of his own, some distance from the location of the crew that he was supposed to be supervising, when he ran afoul of a disgruntled husband).

16. Robinson v. F. Strauss & Son, 481 So. 2d 592 (La. 1986) (employee arguably had deviated from employment task, so course of employment showing was weak to some extent; the shooting occurred while the employee was attempting reconciliation with neighbor who was jealous over his attentions toward women with whom the neighbor resided; weak arising out of employment showing; compensation denied).

17. 488 So. 2d 934 (La. 1986).

Finally, if the principal survives both of these two prior inquiries, the court should inquire whether the principal was actually engaged in the claimed trade, business, or occupation at the time of the injury. That it may have been engaged in such a trade at some time in the past would not necessarily establish that it was still engaged in that trade at the time of the incident. If the principal was so engaged, however, then it could not claim the benefit of immunity.

The *Berry* decision had the desired effect, causing appellate courts to consider claims immunity in this slightly restated context. In one series of cases decided since *Berry*, the first level of the analysis of "specialized per se" has proved to be decisive, requiring a conclusion that the immunity was not available.[18] In another series of cases, the alleged principal has survived that hurdle and either has established the immunity or has been permitted an opportunity to do so.[19]

In this flurry of activity, the courts may have overlooked the fact that *Berry* did not address itself to the second foundation upon which the immunity of the principal might be based, the so-called two-contract doctrine. A defendant may claim tort immunity if it "contracted to perform" any work, whether or not it was a part of its trade, business, or occupation, and then "contract[ed] with any person . . . for the execution by or under the contractor of the whole or any part of the work undertaken by the principal."[20] This two-contract basis for the compensation obligation and its concomitant tort immunity has been in the Act since its inception, and seems well established both before and after *Berry*.[21] Indeed, the *Berry* court took pains to exclude the two-

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18. A good number of these cases are collected at Johnson, Developments in the Law, 1986-1987—Workers' Compensation, 48 La. L. Rev. 519, 530 n.42 (1988). To that list may be added the more recent decision of Ardoin v. BASF Wyandotte Corp., 525 So. 2d 684 (La. App. 1st Cir. 1988) (mechanical insulation work not so clearly nonspecialized that summary judgment could be affirmed).

19. Many of these decisions are also collected at Johnson, supra note 18, at 530 n.43. To that list may be added Hankins v. Woman's Hosp., 517 So. 2d 217 (La. App. 1st Cir. 1987), writ denied, 518 So. 2d 511 (1988) (supplying food service not specialized; immunity of hospital as principal established); Demery v. Dupree, 511 So. 2d 1268 (La. App. 2d Cir.), writ denied, 514 So. 2d 456 (1987) (cutting and hauling timber is not specialized per se); Dobson v. New Orleans Public Serv., 522 So. 2d 1190 (La. App. 4th Cir.), writ denied, 523 So. 2d 1345 (1988) (relocation of utility poles not specialized, and defendant proved other elements of *Berry* rationale to establish tort immunity).

20. La. R.S. 23:1061 (1985). See also the similar formulation contained in Louisiana Revised Statutes 23:1032 (1985), as amended by 1976 Louisiana Acts Number 147, § 1.

21. See Williams v. Metal Bldg. Prod. Co., 522 So. 2d 181 (La. App. 1st Cir.), writ denied, 530 So. 2d 82 (1988) ("no error of law"); Aetna Casualty & Sur. Co. v. Schwegmann Westside Expressway, 516 So. 2d 412 (La. App. 1st Cir. 1987); Guillory v. Ducote, 509 So. 2d 455 (La. App. 3d Cir.), writ denied, 510 So. 2d 376 (1987); Williams v. Gervais F. Favrot Co., 499 So. 2d 623 (La. App. 4th Cir. 1986), writ denied, 503 So. 2d 19 (1987); Jackson v. Louisiana Power & Light, 510 So. 2d 8 (La. App. 5th Cir.), writ denied, 514 So. 2d 134 (1987).

contract doctrine from its rationale,[22] and in an earlier decision, the supreme court had expressly affirmed that doctrine's continuing validity,[23] although apparently not unanimously.[24]

Seen in its proper light, this second basis for the compensation obligation and the corresponding tort immunity has nothing to do with the trade, business, or occupation debate. The evil that the legislature targeted in section 1061 was the evasion of a compensation obligation. If an entity was already in a trade, business, or occupation and chose to carry out that trade through contracts with intermediaries who would actually employ the workers, the drafters of our Act did not want that entity to be insulated from a compensation obligation to those workers. Similarly, if an entity were not in a given trade, business, or occupation, but contracted to perform a particular task, and then again chose to carry out the agreed task through contracts with intermediaries that actually employed the workers, the same result should follow: the entity should owe a compensation obligation to the actual workers so engaged. In either event, the worker's right to compensation should be protected, and the entity should not be able to insulate itself through this contracting strategy, whether the work is already within its trade, business, or occupation or is a one-time arrangement.

The potential compensation obligation, imposed on either of these alternative bases, need not carry with it tort immunity, and indeed it apparently did not for a number of years. For the last decade or so, however, the potential obligation has by statute carried with it full tort immunity.[25] If there is any objection to giving tort immunity the same breadth that the potential compensation obligation has,[26] the solution

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22. 488 So. 2d at 936 n.3.

23. Lewis v. Exxon Corp., 441 So. 2d 192, 198 (La. 1983) ("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 a project—he is, for the purposes of injuries resulting from that project, engaged in that trade, business or occupation."). Note that even this formulation tends to merge the two-contract basis into the trade, business, or occupation basis, when the more accurate description would simply be to say that the principal is, for the purposes of injuries resulting from that project, exposed to a compensation obligation and immune in tort.

24. Concurring in the result in *Lewis*, Justice Dennis objected to the dicta quoted in supra note 23 as a "debatable proposition." Id. at 200 (Dennis, J., concurring).

25. The immunity was first recognized by the supreme court in Thibodaux v. Sun Oil Co., 218 La. 453, 49 So. 2d 852 (1950). The 1976 amendments to Louisiana Revised Statues 23:1032 codified the rule.

26. There do seem to be some judges who will object to this view. As Justice Lemmon remarked during this term: "Because the remedial purpose of workers' compensation mandates liberal interpretation in favor of coverage and because statutes conferring immunity must be strictly construed, the extent of an employer's *immunity* in a tort action need not necessarily coincide with the extent of the same employer's *liability* in a com-

should be obtained through legislative reform, not through merging the two alternative bases.

But precisely this latter approach seems to be at work in a small group of cases decided during this term, though the judicial view on this issue is far from uniform. During this term, the third circuit decided *Benoit v. Grey Wolf Drilling Co.*,[27] drawing upon its earlier decision in *Chauvin v. Gulf Coast Minerals, Inc.*[28] In *Benoit*, Grey Wolf had entered into a contract to drill a well and thereby to perform services that it could not perform on its own. It subcontracted with the plaintiff's employer to procure certain services (equipment supplied to perform a "hammer job"). The trial court granted Grey Wolf's motion for summary judgment, which was based on the contention that Grey Wolf was a principal and therefore enjoyed tort immunity. The plaintiff did not appeal, but the intervenor, his employer, did. The appeal, then, involved only a dispute between the plaintiff's employer and the alleged principal. Reversing the trial court and denying the claimed immunity, the appellate court inaccurately described the *Chauvin* opinion as "directly addressing the two contract statutory employer situation,"[29] and found that opinion's supposed tenets applicable to the much clearer two-contract situation in *Benoit*.

The *Benoit-Chauvin* reasoning seems to be that one may properly merge the two-contract defense into the trade, business, or occupation defense and then apply the stricter test of *Berry* to this newly created single defense. There is no authority for this approach either in *Berry* or in section 1061. As was indicated earlier, these two doctrines provide alternative bases for the compensation obligation in that statute and so make the availability of the compensation remedy broad enough to cover two different methods of doing business. The alternative bases are there for a reason, and the reason did not disappear because the legislature codified tort immunity for the principal twelve years ago. Until such time as the legislature rewrites the statute to merge the two bases for the compensation obligation into one, the appellate courts should resist the temptation to do so.[30]

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pensation action." Ducote v. Albert, 521 So. 2d 399, 406 (La. 1988) (concurring opinion). In Justice Dennis's words, this conception of the law is a "debatable proposition." *Lewis*, 441 So. 2d 192, 200 (dissenting opinion).

27. 520 So. 2d 1104 (La. App. 3d Cir. 1987), writ denied, 522 So. 2d 566 (1988).

28. 509 So. 2d 622 (La. App. 3d Cir.), writ denied, 512 So. 2d 1175 (1987). *Chauvin* in turn was heavily influenced by the dubious decision in Duvalle v. Lake Kenilworth, Inc., 467 So. 2d 850 (La. App. 4th Cir. 1984), writ denied, 472 So. 2d 919 (1985), which restated the discussion about the immunity of the principal as an inquiry whether it had agreed to "perform" the services in question or merely to "provide" them. This comparison is not found in the Act and is not particularly helpful.

29. *Benoit*, 520 So. 2d at 1107.

30. There is appellate authority contrary to the *Benoit* approach. See Hope v. State,

Dual Capacity

Until this term, Louisiana courts had regularly rejected the notion that an employer or his employees might be immune to tort suits by an injured employee for some purposes, but exposed to tort suits for other purposes. Arguments in support of this so-called "dual capacity" of an employer or coemployee had been presented in numerous instances, but intermediate appellate courts regularly rejected them.[31]

In *Ducote v. Albert*,[32] however, the supreme court accepted the concept of dual capacity, at least in the context of medical malpractice by a "company doctor." The plaintiff, who was employed by American Cyanamid as a laborer, injured his left hand on the job and was treated by a physician on the job site. The physician purportedly was employed by American Cyanamid "on a full-time basis," but the opinion does not reveal the precise nature of his employment. The plaintiff's injury was allegedly aggravated by the physician's treatment, and he later sued the physician in malpractice.

The physician argued that he was a coemployee and thus was immune in tort, and the trial court granted his motion for summary judgment on that basis. The court of appeal reversed, holding that the physician was not a coemployee, but an independent contractor.[33] The supreme court affirmed the result reached by the court of appeal, but not on the ground that the physician was an independent contractor. Rather, the supreme court reasoned that his services as a physician was in a

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525 So. 2d 353 (La. App. 1st Cir. 1988); Burleigh v. South Louisiana Contractors, 525 So. 2d 87 (La. App. 3d Cir. 1988) (also discussing the two-way contract theory as being an "automatic" determination that the work is within the trade, business, or occupation of the alleged principal); Guillory v. Ducote, 509 So. 2d 455 (La. App. 3d Cir.), writ denied, 510 So. 2d 376 (1987).

31. See Dauphine v. F. W. Woolworth Co. 451 So. 2d 1333 (La. App. 1st Cir. 1984) (products liability suit against seller who was also claimant's employer barred by workers' compensation); Smith v. AMF Tuboscope, Inc., 442 So. 2d 679 (La. App. 1st Cir. 1983) (manufacturer of allegedly defective product was also claimant's statutory employer); Green v. Turner, 437 So. 2d 956 (La. App. 2d Cir. 1983) (negligent party was state employee in different department than the injured state employee); McGuire v. Honeycutt, 387 So. 2d 674 (La. App. 3d Cir. 1980), writ denied, 397 So. 2d 1364 (1981) (state employees in different departments); Wright v. Moore, 380 So. 2d 172 (La. App. 1st Cir. 1979), writ denied, 382 So. 2d 164 (1980) (state employees in different departments); Atchison v. Archer-Daniels-Midland Co., 360 So. 2d 599 (La. App. 4th Cir.), writ denied, 362 So. 2d 1389 (1978) (claim in products liability against manufacturer who was also the claimant's employer). See also White v. Naquin, 500 So. 2d 436 (La. App. 1st Cir. 1986) (father could not seek indemnity from school board in its capacity as *in loco parentis*, when father had been named as defendant by school bus driver who was pushed down by child).

32. 521 So. 2d 399 (La. 1988).

33. Ducote v. Albert, 503 So. 2d 85 (La. App. 5th Cir. 1987).

capacity different from his capacity as an ordinary coemployee, and in that special capacity, he was not immune from a tort suit.

The precise rationale of the opinion is not immediately clear. There is a flavor to the opinion suggesting that the majority felt that negligent medical treatment was simply not one of the expected risks from a work-related injury, and therefore should not be regarded as a proper subject of a workers' compensation remedy because it is not a risk arising out of employment—a notion developed by Justice Lemmon in his concurrence. From that conclusion, it is a simple step to a permissible tort suit. At other points in the opinion, however, the majority seemed to lean toward a conclusion that the injury was work-related but that the dual capacity of the physician left him exposed in one of his capacities to a tort suit even for a work-related injury.[34] Either of these rationales, and indeed the result itself, has superficial appeal. There are, however, troubling aspects to the opinion on a deeper level.

What one terms "outside of the work relationship" in the context of a compensation remedy versus tort remedy debate decides which of two avenues of relief will be available to the claimant, and this was the case in *Ducote*. But in the different situation in which the dispute is over a compensation remedy or no remedy at all, the same principle may prove harsh. If negligent medical treatment is not within the expected risks from an employment injury, then are we to overrule the Louisiana cases holding that these injuries are compensable[35] and leave the employee who suffers injuries at the hands of a private physician without any prompt remedy for consequences that flow from his work injury and its statutorily-mandated treatment? What will become of the increasingly common case in which the injured employee becomes addicted to pain-killing drugs, prescribed without negligence by a physician treating him for a work-related injury?

The alternative rationale advanced in *Ducote* is difficult to administer. If a physician is immune sometimes and not immune sometimes, what is the dividing line? If he is hurrying into the parking lot to treat an emergency case and runs over another employee, is he immune? If he performs a physical examination on an employee to permit the employee to purchase a new term life insurance policy at his own expense,

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34. The court relied in part on Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977), although that case has apparently been overruled by legislation. See Cal. Lab. Code § 3602 (West 1971 & Supp. 1988).

35. See, e.g., Johnson v. Employers Mut. Liab. Ins. Co., 250 So. 2d 38 (La. App. 3d Cir. 1971); Ryan v. Aetna Casualty and Sur. Co., 161 So. 2d 286 (La. App. 2d Cir. 1964); Hoffman v. City of New Orleans, 121 So. 2d 12 (La. App. Orl. 1960), amended on other grounds, 240 La. 943, 125 So. 2d 774 (1961); Preston v. Ramoneda Bros., 152 So. 81 (La. App. Orl. 1934); Calhoon v. Meridian Lumber Co, 151 So. 778 (La. App. 2d Cir.), aff'd, 180 La. 343, 156 So. 412 (1934).

and is negligent in failing to detect a disease, does he lose any immunity he may have had? If so, will he not cease performing that service? Moreover, this is not a one-way street. If the hurrying physician trips over a board left behind by a careless coworker, may he sue the employer in tort because he was injured in his "capacity" as a physician? And if he may sue in tort in that instance, might he do so if he trips over the same board during his active treatment of a patient who is a coworker?

The broader implication of applying the dual capacity doctrine to a given employee is equally troublesome. One should probably distinguish the cases in which the employer itself, as an entity, has several capacities—a product manufacturer and an employer of persons who use the same product in their work, for example. In that instance, there is at least an arguable basis for preserving an employee's rights to complain about the product as would a nonemployee.[36] But when one has to divide a given coemployee into parts, the distinction becomes artificial and will prove administratively cumbersome. In the specific instance of a physician, it may lead to the demise of the "company doctor," which may be lauded by some but which could conceivably delay important medical treatment in some situations.

The issue of dual capacity was, and is, a controversial one, and the question has been rigorously debated in many jurisdictions. The only thing certain is that Louisiana has not heard the last word about it in *Ducote*. We should be very wary, however, about incursions into the pervasive coverage of the compensation principle, however slight and attractive they may be in the short term or in a given case.

Reimbursement of Employer or Carrier: Limited to Wage Awards?

During this term, the supreme court also had occasion to question one of the most venerable propositions in Louisiana compensation law, namely, that an employer or carrier is entitled to reimbursement from the entirety of a tort award for the compensation that the employer has paid to the employee. The court's attention was directed to the assertion that the employer or carrier should be paid back only from those funds that match the category of benefits it has paid. Specifically, the court was asked to decide whether, if the jury categorizes part of the award against the tortfeasor as past wages, the employer or carrier should be limited to that fund in seeking reimbursement for the weekly

36. The Louisiana Products Liability Act of 1988 specifically leaves this question open by declaring that it does not apply to the question of whether an employee might have a cause of action against a manufacturer for injury caused by a product, when that manufacturer is also his employer. 1988 La. Acts No. 64.

benefits paid. The answer to these inquiries addresses the very purpose of the compensation system.

In *Brooks v. Chicola*,[37] the injured worker, who was described as a "seasonal" worker, was employed part-time by a cotton warehouse. After he was injured in the course of that employment, he was paid weekly benefits by his employer's compensation carrier, and substantial medical expenses were paid on his behalf. The injured worker also filed suit against an alleged tortfeasor. By the time of trial (apparently about three years after his injury), the worker had been paid $26,724.00 in weekly benefits and $13,249.42 in medical expenses.

At trial, a jury awarded the worker a total of $124,500.00. This figure was broken down into categories as follows: $7,000.00 for past pain and suffering; $30,000.00 for future pain and suffering; $5,000.00 for past mental anguish; $2,500.00 for future mental anguish; $15,000.00 for past loss of earnings; and $65,000.00 for future loss of earnings. The past lost earnings figure was apparently based on evidence that the worker had earned $5,000.00 per year in his part-time, seasonal employment. The parties had agreed in advance of trial that the issue of past lost earnings would be submitted to the jury, but that the proven medical expenses would simply be added to the jury's total if an award were made. Moreover, the parties agreed that the judgment would decide the issue of reimbursement of compensation benefits.

In view of the jury's verdict, the trial judge decided to limit the reimbursement of weekly benefits to the $15,000.00 award for past lost wages, adding to that figure the full amount of medical expenses. The trial judge also limited the future credit against compensation to the $65,000.00 award for future lost wages. The net effect of the ruling by the trial judge was to prohibit any reimbursement from the awards for pain and suffering, mental anguish or other general damages.

The divided panel of the court of appeal, following what had theretofore been regarded as the general Louisiana rule, reversed.[38] It allowed reimbursement for the full amount paid in weekly benefits prior to trial, and did not limit the future credit to the $65,000.00 future wage loss award. The court noted that the worker had been paid the equivalent of $9,500.00 per year in weekly benefits, even though his actual lost wages were only $5,000.00 per year. At the urging of the intervening carrier, the court reasoned that the best explanation for this discrepancy was that the weekly benefits paid to the worker included some amount for pain and suffering.

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37. 514 So. 2d 7 (La. 1987).

38. Brooks v. Chicola, 503 So. 2d 1086 (La. App. 3d Cir. 1987). See also Stewart v. Hanover Ins. Co., 416 So. 2d 286 (La. App. 3d Cir.), writ denied, 421 So. 2d 907 (1982). Also inconsistent with this "general rule," however, is Price v. Mitchell Constr. Co., 482 So. 2d 869 (La. App. 2d Cir.), writ denied, 484 So. 2d 671 (1986).

The supreme court granted a writ[39] and reinstated the judgment of the trial court. The court went to great lengths to reject the premise that some of the weekly benefits were actually for pain and suffering, and properly so.[40] Having rejected that premise and determined that no part of the weekly benefits were for pain and suffering, the supreme court then concluded that there could be no reimbursement for those weekly benefits from the award for pain and suffering, or indeed from any award other than that for lost wages. Several intermediate appellate decisions promptly followed this lead.[41]

This author respectfully submits that this conclusion is troublesome. Since it is true that no part of the weekly benefits are payable for pain and suffering, there is no need for an extended discussion on that point. Suffice it to say that the workers' compensation remedy entirely replaces and eliminates a tort recovery, so that a discussion of whether weekly benefits include an amount for pain and suffering is similar to comparing the proverbial apples and oranges. The weekly benefits are payments to compensate for loss of earning capacity at an arbitrarily determined percentage of that capacity. The Act is not a wage-replacement or wage-protection plan, nor is it a mini-tort recovery.

Part of the problem lies in a dubious distinction made in the tort damage assessment in this case and probably in others that does not coincide with the concept of the workers' compensation benefit. There can be little doubt that the measure of the weekly benefits in workers' compensation is loss of earning capacity, rather than loss of wages, and the best proof of that is the fact that though the worker in *Brooks* only lost $5,000.00 in wages, he was paid $9,500.00 in weekly benefits. The difference is not an award for pain and suffering, but rather an award for loss of the worker's ability to earn a greater sum, an ability that he might have chosen to exercise.

But whether the proper tort award is only for lost wages is another matter entirely. If the tortfeasor injured the worker and in doing so deprived him of the capacity to earn wages on a full-time basis if he so chose, then the proper measure of his damage is not lost wages but lost earning capacity. For the sake of simplicity, we have gravitated to a custom in tort suits of measuring past loss of earnings only by the wages actually not earned between the injury and the trial and future loss of earnings by speculating about what the worker might have done

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39. *Brooks*, 505 So. 2d 1133 (La. 1987).

40. See Atchison v. May, 201 La. 1003, 1011, 10 So. 2d 785, 788 (1942); Note, Workmen's Compensation—Right of Persons Not Dependent to Recover in Tort, 5 La. L. Rev. 358 (1943); W. Malone and H. Johnson, supra note 13, at § 32.

41. See Whitehead v. Fireman's Fund Ins. Co., 529 So. 2d 82 (La. App. 3d Cir. 1988); Senez v. Grumman Flxible Corp., 518 So. 2d 574 (La. App. 4th Cir. 1987), writ denied, 521 So. 2d 1151 (1988).

in the future. Why should we not also measure what he might have done between the injury and the trial?

When compensation and tort awards are seen in this light, it is clear that the issue in *Brooks* should never have arisen. The $9,500.00 paid per year in weekly compensation benefits would, by definition, always be a smaller sum than the actual annual earning capacity of the worker. The Act does not pay 100 percent of the loss of earning capacity, but a lesser percentage. If the tort award properly considered loss of earning capacity in the past, rather than past loss of earnings, and if the compensation benefits were properly calculated, the tort award for lost earnings would always be sufficient to reimburse the amount paid in weekly compensation benefits. It is suggested, therefore, that courts should be certain that the basis for a tort award for past lost earnings is loss of earning capacity in the past, not simply lost wages.

Because this is an imperfect world, however, it will probably still be the case that an award for past lost earnings will in some instances be insufficient to permit reimbursement for weekly benefits actually paid under the Act. Should the rule of *Brooks*, limiting reimbursement (or a credit on the basis of future lost earnings) to the actual award and denying access to pain and suffering damages be approved? There are strong reasons why it should not.

Perhaps the principal reason for the establishment of workers' compensation is to bring prompt relief to the worker for the two most important types of injury, lost wages and medical expenses, at the most economical cost to the industry in which he works. The employer understands that when the injury is due entirely to conditions within the workplace, he must pay the mandated weekly benefits and medical expenses without hope of reimbursement or cost-sharing. Because the cost of such a compensation remedy must be spread over the product or service that he sells, an employer with a high incidence of injury may, at least theoretically, find himself priced out of the market and may therefore go out of business. Thus, an economic incentive for safety, though indirect, is present.

To that end, the workers' compensation program is in large part a no fault system with the attendant economies inherent in such a system. The employer has no right to seek reimbursement or sharing of those costs, and as a result the system avoids the costs entailed in efforts by the employer to recoup those costs through judicial action of one kind or another. Were the workers' compensation system completely no fault, there would never be any third-party actions by either the worker or the employer on any basis.

But of course the system is not pure. We were not prepared then and are not prepared now to eliminate entirely any tort recovery by the worker, or any reimbursement by the employer. Thus we permit either or both to seek such a recovery in an appropriate instance. The scheme

to do so, while not perfect in every respect, has much to recommend it. The worker, in theory, receives precisely the same amount he would have received if there were no workers' compensation system. He receives prompt and direct amounts from the employer or its carrier, and he later receives a tort award, reduced by the exact amounts that he has already received. The tortfeasor pays the same thing he would have paid if there were no compensation system; he pays a tort award, partially to the worker and partially to the employer or carrier. And the employer or carrier suffers no net loss other than the loss attributable to his enterprise.

The *Brooks* decision skews this approach, and as a result will increase the cost of workers' compensation to the employer although his workplace is not any less safe. This cost increase therefore will be due not to factors connected with the economics of the workplace, but to the name of the pigeonhole in which a particular award of money to the worker in the tort suit may be placed. This is a noneconomic factor being introduced into an analysis that should be based on legitimate economic costs of business. The ultimate judgment on the viability of a business enterprise should be made in the market place on the basis of economic factors, not such "pigeonholes." If we violate these principles, we lose whatever small amount of "no fault" benefit there may be in the Act.

If the concern underlying *Brooks* is that the worker does not actually receive his full tort recovery because he has to pay attorney's fees out of his award, and therefore he should get to protect his pain and suffering award to assist him in bearing that burden, there are several responses. The first is found in *Moody v. Arabie*,[42] which permits an allocation of the worker's attorney's fees between the worker and the intervenor. The second is the observation that most tort claimants have to bear their own attorney's fees under the general American rule, and thus the injured worker should be treated no differently in his tort suit from any other claimant. And finally, if there is no other answer to the problem, it would be far better to impose the attorney's fees directly on the tortfeasor by legislation than to do so indirectly by limiting worker's compensation reimbursement to the earnings award, an approach that impermissibly skews the entire reimbursement scheme.

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42. 498 So. 2d 1081 (La. 1986).