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Workers' Compensation

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LEGISLATIVE DEVELOPMENTS

Unlike the past several years, the main focus of developments in the law of workers' compensation during the 1988-1989 term was in the legislative rather than the judicial arena. But like most years, the action in the legislative arena was directly related to previous decisions in the judicial arena. With very few exceptions, most of the major legislative changes seem clearly intended to overrule recent appellate decisions.

Not every legislative action was of major import, to be sure. There was a series of "housekeeping" measures following Act 938 of 1988, mentioned in this forum last year[1] though not extensively discussed. Many of these minor measures do not merit textual discussion and are confined to the margin.[2] Several were intended to deal with the problems created by the pending constitutional challenge to Act 938[3]; at this

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1. Johnson, Workers' Compensation, Developments in the Law, 1987-1988, 49 La. L. Rev. 549 (1988).

2. 1989 La. Acts No. 24, § 1 deletes a specific reference to La. R.S. 23:1351 in § 1201(F) of the Act, and replaces it with a reference to an appeal "as provided by law." Similarly, 1989 La. Acts No. 25, § 1 makes a general reference to the "provisions of law governing disputes" over medical care rather than specific statutory references. 1989 La. Acts No. 27, § 1 deletes a reference to the "presiding" hearing officer with respect to the authority of the Director to organize and direct the necessary administrative work to support the hearing officer system. 1989 La. Acts No. 28, § 1 adds a provision to Section 1168 of the Act, authorizing forfeiture to the Director of any security posted by a self-insured employer, in the event of the employer's default, and authorizing the Director to use the funds so generated to pay the claims of its employees. 1989 La. Acts No. 29, § 1 repeals Section 1181 of the Act, relative to security to be posted by foreign employers, thereby equalizing the treatment of Louisiana and out-of-state employers as to security for payment of compensation. 1989 La. Acts No. 43, § 1 changes slightly the qualifications of hearing officers, and the restrictions applicable to them. The specific authority for gubernatorial appointment of such officers is deleted, and the general prohibition against practicing law is reduced to a prohibition against practicing "worker's compensation law" while employed as a hearing officer.

3. 1989 La. Acts No. 23, § 2 is a "failsafe" enactment, restoring the provisions repealed by Act 938 of 1988, in the event that the pertinent portions of the 1988 enactment are declared unconstitutional. 1989 La. Acts No. 260, § 1 delays from July 1, 1989 to January 1, 1990 the effective date of the administrative hearing officer system created by 1989 La. Acts No. 938. A joint resolution proposing a constitutional amendment to address the arguments raised in the litigation questioning the constitutionality of the act was proposed but failed of passage.

writing, the administrative hearing officer system which it contains has been held constitutional by a state district court and an appeal is pending. Perhaps the only substantive change wrought by these minor measures is the elimination of the internal appeal in the hearing officer system (from the original hearing officer to a three-officer panel) prior to an appeal to the proper intermediate appellate court.[4]

There were also isolated substantive revisions relative to the confidentiality of the employment records of an individual[5] and the application of comparative negligence to the claim of a subrogee.[6]

But clearly the major news on the legislative front was the passage of Act 454, to be effective January 1, 1990. Conceived and lobbied by the forces of the Louisiana Association of Business and Industry, and containing a number of proposed changes which had been through the legislative mill unsuccessfully in prior years, these amendments make very significant changes in the fabric of the Act. The enactment is so significant that it should probably be the subject of a separate article, and the writer can only discuss the changes briefly in the space allowed in this symposium. With a few exceptions, the changes will be addressed in the order in which they appear in the bill and therefore in the Act.

Definitions

Certain definitions are amended, with an eye toward eliminating coverage for some of the more troublesome kinds of work-related injuries. The term "accident" itself is amended, with an addition to the present definition requiring that an injury which is suffered must be "more than simply a gradual deterioration or progressive degeneration."[7] This additional language is clearly intended to reverse the established

4. 1989 La. Acts No. 26, § 1.

5. 1989 La. Acts No. 530, § 1 clarifies the proper use of employment records, authorizing their release to state or federal prosecutors or for the purpose of calculating offsets against benefits. Moreover, their proper use within the litigation itself is also permitted. The same act creates a fraud section within the office of the Director.

6. 1989 La. Acts No. 771, § 1 enacts Civil Code article 2324.2, which is a general provision that when a personal injury claimant's recovery is diminished by the application of comparative negligence, the claim of a legal or conventional subrogee must be diminished by the same percentage. While a later portion of the same act, permitting the parties to waive this result in a settlement, refers to a legal or conventional subrogee under the workers' compensation act, it is not absolutely clear that Act 771 will govern workers' compensation. The Act originally referred to subrogation as the basis for the intervenor's claim, but the reference was later repealed. Thus the precise basis for the intervenor's claim may not be subrogation. See 2 W. Malone and H. Johnson, Louisiana Workers' Compensation Law and Practice § 371, in 14 Louisiana Civil Law Treatise (2d ed. 1980) [hereafter Malone and Johnson].

7. Section 1021(1), as amended by 1989 La. Acts No. 454, § 1.

trend in the jurisprudence to permit coverage for disability which appears to be clearly work-related but does not fit the statutory definition of accident.[8] Ironically, the amendment comes at a time when some recent cases appear to be running counter to the trend.[9]

Other changes to the definitions in the Act address the very troublesome areas of mental disability and vascular accidents (heart attack and stroke). The amendments specify that mental injury or illness alleged to be due to mental stress "shall not be considered a personal injury by accident" that is work-related unless the mental injury was the result of a "sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence."[10] If applied as written, this amendment would sharply curtail awards for disability allegedly due to relatively long-term job-related stress, in particular instances such as that typified by the recent *Sparks* decision discussed later in this symposium article.[11] The writer has been critical of this jurisprudential trend, especially because repeated cautions with respect to the difficult causation issues so created have not been heeded.[12] The new language, however, arguably would preserve compensation awards for certain types of mental stress as to which the difficult causation issues are probably not present because the stress is acute rather than chronic.[13]

The same standard of proof is to be applied to mental injury caused by physical injury, which is not compensable unless demonstrated by "clear and convincing evidence."[14] Moreover, such a mental injury is not compensable unless it is diagnosed by a psychiatrist or psychologist

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8. See generally Malone and Johnson, supra note 6, § 216.

9. See, e.g., Hamilton v. Southern Plastics, Inc., 535 So. 2d 1016 (La. App. 2d Cir. 1988), writ denied, 536 So. 2d 1223 (1989) (worker in plastics plant claimed problems in air quality in work environment caused her respiratory problems, but court believed non-work factors were in fact to blame; court affirmed denial of claim, in part on basis of lack of showing of "accident"). But see Houston v. Kaiser Aluminum and Chemical Corp., 531 So. 2d 1129 (La. App. 4th Cir. 1988) (cervical problems apparently related to fact that worker had to spend great portion of time at work with head turned at 45 degree angle; sufficient showing of accident).

10. La. R.S. 23:1021(7)(b), added by 1989 La. Acts No. 454, § 1.

11. Sparks v. Tulane Medical Center Hosp. and Clinic, 546 So. 2d 138 (La. 1989), see infra text accompanying notes 61-66.

12. Malone and Johnson, supra note 6, at § 235 (Supp. 1989).

13. See, e.g., Davis v. Oilfield Scrap & Equip. Co., 482 So. 2d 970 (La. App. 3d Cir. 1986) (personal secretary heard gunshot in adjacent office occupied by her boss; he had committed suicide and died twenty minutes later in her arms; resulting mental disability compensable); Jones v. City of New Orleans, 514 So. 2d 611 (La. App. 4th Cir.), writ denied, 515 So. 2d 1111 (1987) (claimant was home health care provider who received death threat on a certain day when she made trip to housing project, and thereafter suffered disability anxiety).

14. La. R.S. 23:1021(7)(c), added by 1989 La. Acts No. 454, § 1.

and the diagnosis meets the criteria established in the applicable manual of mental disorders (commonly known as DSM-III).[15] Once again, this amendment is aimed at a particular line of cases,[16] probably not as worrisome as the so-called mental/mental cases but still a source of concern to the employer community. Since the causal link between employment event and disability is often clearer in such cases, this amendment is probably less necessary than the mental/mental amendment.

As for vascular accidents, they are defined to be non-compensable unless there is "clear and convincing evidence" that the physical stress on the job was "extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation" and the physical job stress was the "predominant and major cause" of the vascular accident.[17] All good scholars of compensation law know that this amendment is aimed at the established line of heart attack cases, the most recent of which is discussed later in this symposium.[18] Once again, there is likely to be a restriction in compensation awards if the amendment is applied as written.

It is difficult to reach a conclusion as to the wisdom of these amendments. On the one hand, there should always be concern when the coverage of the Act is trimmed and tailored to fit the particular interpretations of the day, which are thought to be causing higher rates for employers. If the system is generally sound, it should have broad coverage. Moreover, it is extremely likely that mental stress and heart attack cases are far down the list of factors that may cause whatever evils are perceived in the present compensation system.

On the other hand, particularly with the mental/mental cases, the judiciary had failed to be sufficiently concerned about the multiple streams of causation which might join to cause disability in long-term mental stress situations, and perhaps some adjustment may have been appropriate. It is as important that the compensation system exclude

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15. La. R.S. 23:1021(7)(d), added by 1989 La. Acts No. 454, § 1.

16. See, e.g., Ducharme v. Garland Belongia, 544 So. 2d 590 (La. App. 1st Cir. 1989) (truck driver involved in serious accident, but escaped relatively unscathed; kidney contusion caused some minor problems, but major disabling problem was mental distress, including fear of returning to the road; court held post-traumatic stress disorder should be considered an "injury" under the Act); Westley v. Land & Offshore, 523 So. 2d 812 (La. 1988) (fall from high construction area caused residual mental disability). Most of the decisions in this area involve situations which are likely to produce the same result even under the more stringent standard. The standard may, however, change the result in cases in which the call has been much closer. See, e.g., Williams v. State of Louisiana, 489 So. 2d 461 (La. App. 3d Cir. 1986).

17. La. R.S. 23:1021(7)(e), added by 1989 La. Acts No. 454, § 1.

18. Carruthers v. PPG Indus., Inc., 543 So. 2d 472 (La. 1989); see infra text at notes 68-70.

those disabling conditions that are not caused by employment as it is that it include those conditions which are so caused. How to tell the difference is always the rub. Whether these amendments are part of the solution or become a part of the problem remains to be seen.

Basic Coverage

In an attempt to strengthen the role of employer defenses under the Act, the amendments purport to elevate one of these defenses to a part of the claimant's prima facie case and to provide an additional basis upon which the employer may deny compensation in the other. A new subsection to Section 1031 declares that an injury is not considered as having arisen out of employment "if the injured employee was engaged in horseplay at the time of the injury."[19] Another new subsection provides that an injury is not considered as arising out of employment if the "employer can establish that the injury arose out of a dispute with another person or employee over matters unrelated to the injured employee's employment."[20]

Though the difference in the two amendments is probably not intentional, the former amendment arguably requires an employee to demonstrate that he was *not* engaged in "horseplay" in order to discharge his burden of proving that the injury arose out of the employment, while the latter places the burden of proof on the employer to demonstrate a non-employment dispute leading to injury. There is an obvious problem resulting from the insertion of a slang word (horseplay) without definition. Perhaps the judiciary will say that it cannot be defined, but "we know it when we see it."[21]

Once again, there are recent cases at which these amendments are aimed.[22] There is probably more to recommend the second amendment than the first, and perhaps therefore the placing of the burden of proof on the employer in that instance is not desirable. The first amendment

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19. La. R.S. 23:1031(C), added by 1989 La. Acts No. 454, § 2.

20. La. R.S. 23:1031(D), added by 1989 La. Acts No. 454, § 2.

21. Or perhaps it will be said that the term is entirely justified because it is used by the eminent authors of Malone and Johnson, supra note 6, as the heading for their § 197.

22. See, e.g., Robertson v. Stratagraph, Inc., 458 So. 2d 619 (La. App. 3d Cir. 1984) (injury due to epoxy resin glue placed on workbench by fellow worker as practical joke which caused burns to claimant's buttocks); Bennett v. Industrial Welding & Fabricating, Inc., 411 So. 2d 574 (La. App. 1st Cir. 1982) (Russian roulette); Blakeway v. Lefebure Corp., 393 So. 2d 928 (La. App. 4th Cir.), writ denied, 399 So. 2d 610 (1981) (dive into shallow end of pool after night of dining and drinking while on business trip). As to non-employment disputes, see in particular Raybol v. Louisiana State Univ., 520 So. 2d 724 (La. 1988), criticized in part in Johnson, Workers' Compensation, Developments in the Law, 1987-1988, 49 La. L. Rev. 549, 551-54 (1988).

re-introduces the notion of employee fault into a presumably no-fault system, with a very broad definitional base and in a factual setting which is very common and endemic to the workplace.

There is also an amendment which narrows the coverage of the occupational disease provision. It specifically excludes from any coverage "degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease."[23] No doubt exclusion of the latter two "diseases" are added to be certain that the restrictive amendments on this subject under the definition of injury accomplish their purpose. But the specific exclusion of certain diseases from coverage starts the Act back down a road which it has traveled before. Prior to 1952, there was no coverage for occupational disease at all. Between 1952 and 1975, there was coverage only for a specific schedule of diseases. And finally, in 1975, there was general coverage, though under a very restrictive definition.[24]

In each instance, the judiciary has given the most liberal interpretation possible to the pertinent statutes to permit coverage of the disabling condition when causation in the workplace is clear. The current amendments start us back in the other direction, probably with the same judicial result to follow.

A separate amendment specifically excludes compensation under the Act for any employee covered by the FELA, the LHWCA "or any of its extensions," or the Jones Act.[25]

Tort Immunity

Predictably, tort immunity is shored up by the amendments. A sentence added to Section 1032(A)[26] is clearly intended to stop the development of any "dual capacity" theory as a basis for permitting a tort suit by an employee against his employer, and thereby to overrule the decision in *Ducote v. Albert*,[27] criticized in this forum last year.[28]

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23. La. R.S. 23:1031.1(B), as amended by 1989 La. Acts No. 454, § 2.

24. See generally Malone and Johnson, supra note 6, at § 220.

25. La. R.S. 23:1035.2, added by 1989 La. Acts No. 454, § 2. This amendment, at least as to the FELA and the Jones Act, is probably unnecessary in light of present La. R.S. 23:1037. As to the LHWCA, which presumably has "concurrent" application to certain Louisiana workers with state compensation law, there are certain to be difficult interpretive cases.

26. "This exclusive remedy is exclusive of all claims, including all claims that might arise against his employer, or any principal or any officer, director, stockholder, partner or employee of such employer or principal under any dual capacity theory or doctrine." La. R.S. 23:1032(A), as amended by 1989 La. Acts No. 454, § 2.

27. 521 So. 2d 399 (La. 1988).

28. Johnson, Workers' Compensation, Developments in the Law, 1987-1988, 49 La. L. Rev. 549, 558-60 (1988).

This amendment seems sound, as it preserves the broad reach of the Act in favor of compensation remedies to employees in an area in which there might have been years of difficult interpretive jurisprudence.

There is also an attempt in an amendment to Section 1061[29] to overrule, or at least severely limit, the holding in *Berry v. Holston Well Service*[30] and its impact on the availability of the statutory employer defense. The amendment attacks *Berry* directly by declaring that the fact that the work in question is "specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work" from being considered a part of the principal's trade, business, or occupation. This does not, one supposes, mean that these factors are not to be considered; rather, it appears to mean that no single factor (such as specialized versus non-specialized work) may be used to defeat the defense of immunity raised by the principal.

While this defense is one extremely dear to the hearts of the employer community, employers were perhaps less hurt by the recent cases than they believed. There have been a remarkable number of cases in which the *Berry* "test" has been satisfied, even on a summary basis.[31] This particular portion of the Act, however, seems destined for tinkering every several years.

Employer Defenses

A lengthy amendment strengthening the intoxication defense is also included in Act 454. A fairly standard set of presumptions based on blood alcohol content is enacted,[32] along with a presumption based on

29. La. R.S. 23:1061, as amended by 1989 La. Acts No. 454, § 3.

30. 488 So. 2d 934 (La. 1986).

31. Humphrey v. Louisiana Power & Light Co., 546 So. 2d 520 (La. App. 4th Cir. 1989) (summary judgment affirmed; vendor of bricks used own employees and decedent's employer as delivery services); Mouton v. Louisiana Power & Light Co., 545 So. 2d 1114 (La. App. 5th Cir. 1989) (summary judgment affirmed; nuclear security officer's duties were shared by direct employees as well); Solomon v. United Parcel Serv., Inc., 539 So. 2d 715 (La. App. 3d Cir. 1989) (summary judgment affirmed; maintenance and housekeeping duties at offices of express delivery service; other direct employees had same duties); Garrene v. BASF Wyandotte Corp., 532 So. 2d 510 (La. App. 1st Cir. 1988) (summary judgment affirmed; boilermaker performing maintenance services; direct employees performed same services). See generally Malone and Johnson, supra note 6, at § 364 (Supp. 1989), especially at note 59.150.

32. La. R.S. 23:1081(3)(a), (b), and (c), added by 1989 La. Acts No. 454, § 3, provide a presumption of non-intoxication at 0.05 percent blood alcohol level and of intoxication at 0.10 percent or more. There is no presumption for levels in between these two, but the evidence of blood alcohol level is admissible.

use of certain controlled substances.[33] The employer is granted the right to administer drug and alcohol testing, or demand that the employee undergo such testing, under rigorous regulations.[34] The employee may decline, but is presumed to have been intoxicated if he does so.[35] Most importantly, once the employer has discharged the burden of proving intoxication at the time of the accident, it is presumed that the accident was caused by the intoxication.[36] This last change most squarely addresses the problem in the jurisprudence, since in many instances intoxication has been clear and the court has used the causation requirement to deny the defense.[37]

There are a few concessions. The defense of intoxication does not apply if the intoxication "resulted from activities which were in pursuit of the employer's interests or in which the employer procured the intoxicating beverage or substance and encouraged its use during the employee's work hours."[38] And, if a health care provider has delivered services to a worker later found to be intoxicated, the employer has the responsibility to pay for the medical expenses until the worker is released from the acute care facility, at which point the obligation terminates.[39]

While these amendments on intoxication are lengthy and detailed, they are probably overdue. Even the original act incorporated some employee fault, including intoxication, and the defense has never had the reach that it was probably intended to have. In these times, the defense probably needed strengthening.

Rights Upon Settlement of Judgment

Easily one of the most confusing aspects of the 1983 amendments was the revision to Sections 1101, 1102, and 1103 of the Act. Clearly,

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33. La. R.S. 23:1081(5), added by 1989 La. Acts No. 454, § 3. The employer may prove such drug use by a preponderance of the evidence. La. R.S. 23:1081(8), added by 1989 La. Acts No. 454, § 3.

34. La. R.S. 23:1081(7)(a) and (9), added by 1989 La. Acts No. 454, § 3.

35. La. R.S. 23:1081(7)(b), added by 1989 La. Acts No. 454, § 3.

36. La. R.S. 23:1081(12), added by 1989 La. Acts No. 454, § 3.

37. Some of the worst examples are Gaffney v. Saenger Theatre Partnership Ltd., 539 So. 2d 1014 (La. App. 4th Cir. 1989) (stagehand fell through opening in stage; determined to have had 0.123 blood alcohol level; defense unsuccessful because there was no proof of causal connection between intoxication and fall); Folse v. American Well Control, 536 So. 2d 686 (La. App. 3d Cir. 1988), writ denied, 538 So. 2d 592 (1989) (blood alcohol content of 0.16 following fatal accident; court recited significant alcohol use by decedent and concluded he was in category of persons who would be "least affected" by alcohol content in blood, and therefore insufficient proof of causation); Ray v. Superior Iron Works and Supply Co., Inc., 284 So. 2d 140 (La. App. 3d Cir.), writ denied, 286 So. 2d 365 (1973) (0.26 blood alcohol content, but defense denied on basis that no causation was shown).

38. La. R.S. 23:1081(1)(b), amended by 1989 La. Acts No. 454, § 3.

39. La. R.S. 23:1081(13), added by 1989 La. Acts No. 454, § 3.

the amendments were intended to strengthen the hand of the employer and the compensation carrier in the case in which a tort suit by the claimant is settled without the consent of the employer and the carrier. Both the settling claimant (through the loss of "future" compensation benefits unless there is a "buy back" by repayment of past benefits paid) and the settling tortfeasor (through automatic payment of the claim of the employer or carrier for past benefits paid) are subject to sanctions for unauthorized settlements. Particularly with the overlay of the attorney's fee issues raised by the decision in *Moody v. Arabie*,[40] these provisions have proven very difficult to apply.

The amendments in Act 454 do not solve the main problems, but they do address some minor ones. They clarify the definition of a "third person" who might be considered a tortfeasor.[41] They also specify that the compensation responsibility beyond the tort award is applicable only upon the required written approval and after the employer or carrier receives a "dollar for dollar credit against the full amount paid" in the settlement, less attorney's fees and costs paid by the employee in the prosecution of the tort claim.[42] In a surprising concession, Section 1103 was amended to provide that the employer's or carrier's credit out of a tort award against future compensation obligations shall be reduced "by the amount of attorney fees and court costs paid by the employee in the third party suit."[43]

A new subsection to Section 1103 overrules the decision in *Brooks v. Chicola*,[44] which was criticized in this forum last year for incorrectly limiting the employer's or carrier's reimbursement to only those portions of a quantum award that were denominated loss of wages or medical expenses.[45] Until that decision, our courts had properly permitted reimbursement from the award regardless of the labels that might have been attached to the award. The amendment properly restores the law to that earlier reading.

An additional new subsection to Section 1103 clarifies the decision in *Moody v. Arabie* by specifying that an intervenor is responsible only for "reasonable legal fees and costs" incurred by the attorney retained by the plaintiff, which shall not exceed one third of the intervenor's

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40. 498 So. 2d 1081 (La. 1986).

41. La. R.S. 23:1101(C), added by 1989 La. Acts No. 454, § 3. A third person includes "any party who causes injury to an employee" at the time of employment or thereafter, provided the employer is obligated to pay benefits "because the injury by the third party has aggravated the employment related injury."

42. La. R.S. 23:1102(B), as amended by 1989 La. Acts No. 454, § 4.

43. La. R.S. 23:1103(A)(1), as amended by 1989 La. Acts No. 454, § 4.

44. 514 So. 2d 7 (La. 1987).

45. Johnson, Workers' Compensation, Developments in the Law, 1987-1988, 49 La. L. Rev. 549, 560-64 (1988).

recovery for his pre-judgment payments to the claimant.[46] The employee as an intervenor is not responsible for the employer's attorney's fees attributable to post-judgment damages, nor is the employer as an intervenor responsible for the attorney's fees attributable to the credit that the employer or carrier gets for future compensation benefits.[47]

Finally, subsections C(2) and C(3) of Section 1102 are repealed outright, removing their discussion of unreasonable refusal to settle and settlements by fewer than all of the defendants.[48]

Medical Expense Offset

An interesting provision of uncertain import is the new Section 1212 enacted by Act 454.[49] It specifies that payment "by any person or entity other than a direct payment by the employee, a relative or friend of the employee," of medical expenses otherwise owed by the employer extinguishes the claim against the employer or carrier for those expenses. This provision is specifically stated not to be a violation of Section 1163, which otherwise prohibits any direct or indirect charging of the cost of compensation to the employee. However, if the employer and the employee (or the spouse's employer and the employee's spouse) have shared the cost of premiums for health and accident insurance (which is the most likely source of the payment envisioned by the section), the offset applies only in the same percentage in which the employer paid the premiums.

Duration of Temporary Total Disability Benefits

The "gap" created by the failure of the 1983 amendments to revise the definition of temporary total disability (TTD) benefits, and the ensuing jurisprudential use of the pre-1983 standards to award seemingly unlimited temporary total disability benefits, was also addressed. The more stringent post-1983 standard for total and permanent disability benefits was enacted verbatim in the TTD portion of the act, a logical inconsistency insisted upon by the proponents.[50] The only difference between temporary benefits based on total disability and permanent benefits based on total disability is their duration, not the extent of disability. Thus there was no real need to reiterate the "extent of disability" standard from the total and permanent disability section. A mere reference would have sufficed.

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46. La. R.S. 23:1103(c), added by 1989 La. Acts No. 454, § 4.
47. Id.
48. 1989 La. Acts No. 454, § 10.
49. La. R.S. 23:1212, added by 1989 La. Acts No. 454, § 5.
50. La. R.S. 23:1221(b) and (c), added by 1989 La. Acts No. 454, § 6.

Be that as it may, the standards are now identical. The question of duration of TTD benefits was also addressed, as it had been in Act 938 of 1988. Only this time, a specific six-month limit was put on such benefits unless the claimant submits a claim to the hearing officer for extension, at which point the matter must be administratively resolved.[51]

Miscellaneous

There were certainly other changes wrought by Act 454, many significant in the narrow field of their application. The procedure for resolving a dispute over the medical reimbursement schedule was clarified.[52] An employee's right to benefits is forfeited during a period of incarceration, unless there is a showing that he has dependents who rely upon the benefits for their support, in which case they will be paid directly to such dependents.[53] There is a specific provision that monthly supplemental earnings benefits may not exceed 4.3 times TTD benefits.[54] The sanction for misrepresentations concerning benefit payments is changed, probably to make it easier to prove.[55] Forfeiture of benefits may also occur, under certain conditions, if the employee does not answer truthfully when asked about prior injuries, disabilities, or other medical conditions.[56]

There are also significant amendments to Section 1226 relative to the rehabilitation obligation of the employer.[57] These seem primarily aimed at overruling the expression in an early decision after the 1983 amendments to the effect that the paramount goal of rehabilitation could not be simply to return the worker to his same job.[58]

Needed clarification as to the authority to approve a settlement may be found in the amendments to Section 1272, which make it clear that once a suit is filed against a tortfeasor, the district court hearing the suit has authority to approve a lump sum settlement or compromise, and the parties do not have to return to the Director (or to a hearing officer) for approval.[59]

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51. La. R.S. 23:1221(d), added by 1989 La. Acts No. 454, § 6.

52. La. R.S. 23:1034.2, as amended by 1989 La. Acts No. 454, § 2.

53. La. R.S. 23:1201.4, added by 1989 La. Acts No. 454, § 5.

54. La. R.S. 23:1202(A), as amended by 1989 La. Acts No. 454, § 5.

55. La. R.S. 23:1208, as amended by 1989 La. Acts No. 454, § 5. Rather than the claimant having to be "convicted" of the criminal conduct defined by the section, he forfeits his compensation rights if he "violates" the section.

56. La. R.S. 23:1208.1, as amended by 1989 La. Acts No. 454, § 5.

57. La. R.S. 23:1226, as amended by 1989 La. Acts No. 454, § 6.

58. Works v. Trinity Universal Ins. Co., 501 So. 2d 1045 (La. App. 2d Cir.), writ denied, 503 So. 2d 480 (1987). See generally Malone and Johnson, supra note 6, at § 291 (Supp 1989).

59. La. R.S. 23:1272(C), added by 1989 La. Acts No. 454, § 7.

There are also a few incidental "housekeeping" matters with respect to the intended new procedure involving administrative hearing officers.[60]

Act 454 is effective January 1, 1990, except for Section 12, which mandates a 5% one-time credit in the manual rate to insureds upon renewal of outstanding policies after January 1, 1993.

Conclusion

There is little else that needs to be said. This commentary has attempted to be fair and objective, lauding some changes which were clearly needed and criticizing those that seem unnecessary. As with so many other commentaries on the Act, this one must close with the observation that the constant friction between the employee community, the employer community, the insurers, and the judiciary does not bode well for the health of the compensation system. Perhaps this tinkering will produce the end of such friction, but one is entitled to doubt that result. Could it be that the various sides to the dispute prefer to continue to disagree, and to tinker?

JURISPRUDENCE

For once, the judicial side of this commentary is relatively short. Indeed, there are only two primary developments that deserve discussion, and they are in areas of the law addressed by the provisions of Act 454 of 1989. Thus, whatever import these developments may have must be tempered in the light of the provisions of this most recent enactment. They may perhaps have no importance whatsoever in view of Act 454. But then again, they may simply provide guidance to the careful reader as to the way the judiciary will seek to circumvent the provisions of Act 454.

Mental Stress

It was probably only a matter of time before the various decisions on this issue over the past fifteen years were gathered together into a significant pronouncement extending the basis for recovery. In a typical manner, earlier tentative announcements[61] formed the basis for bolder

60. See La. R.S. 23:1310.5 and 1310.8, both as amended by 1989 La. Acts No. 454, § 9.

61. See generally, in the mental/physical context, Ferguson v. HDE, Inc., 264 La. 204, 270 So. 2d 867 (1972) and McDonald v. International Paper Co., 406 So. 2d 582 (La. 1981). See also Malone and Johnson, supra note 6, at § 217.

statements,[62] and suggestions of caution in the application of these principles[63] were not heeded.

During this term, the supreme court squarely addressed the so-called mental/mental type of case, in which disabling symptoms of a mental nature follow some type of non-physical incident or series of incidents in the workplace. Though it ultimately pegged its decision to a single, observable incident that occurred on a given work day, there can be little doubt that the court's broad discussion left a great deal of fertile ground to be tilled in the gradual mental stress area in the future.

The decision in question is *Sparks v. Tulane Medical Center*.[64] The worker had been employed at the medical center for about seven years, in charge of the stocking and distribution of medical supplies. Over most of that period of time, she had observed what she believed to be drug use and sale by employees, and had therefore complained to her supervisor. Probably as a result of her complaints, some friction was created between her and those co-workers who might have been involved in such activities. At unspecified times during the last five years of her employment, there had been instances of vandalism, perhaps aimed at her. Someone had urinated in an office waste basket, and even into her coffee pot. Water had been poured into supply bins, ruining the medical supplies contained there.

Moreover, she believed that the weekend shift (which included at least one worker that she believed was involved in the drug activities) which was supposed to keep up with stocking and delivering drugs through the hospital was not doing its job, leaving a heavier work load for her on Mondays.

Over a given weekend, the weekend shift workers apparently decided to bring the issue to a head by declining to stock any supplies. When the claimant discovered this on Monday, she promptly complained to the supervisor, who proposed a suspension of the erring workers. This frightened the claimant, who said they would "get her" if they were suspended. Moreover, she was told by another worker in that same meeting that there were "a lot of people around here who want to kick your butt." Later that same day, she became so upset that she could not continue to work. She sought and received professional counseling for her situation, and did not return to work for a number of months thereafter.

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62. See generally, in the mental/mental context at the intermediate appellate level, Taquino v. Sears, Roebuck & Co., 438 So. 2d 625 (La. App. 4th Cir.), writ denied, 443 So. 2d 597 (1983) and Jones v. City of New Orleans, 514 So. 2d 611 (La. App. 4th Cir.), writ denied, 515 So. 2d 1111 (1987).

63. See Malone and Johnson, supra note 6, at § 235 (2d ed. 1980 and Supp. 1989).

64. 546 So. 2d 138 (La. 1989).

Because of her inability to work, she sought compensation benefits. The trial court held that there had been no "accident" and denied benefits. The court of appeal reversed, granting her benefits for a five-month period of disability. The supreme court affirmed, holding that there had been an accident and that the absence of any signs of physical trauma did not present an obstacle to the award of compensation.

The supreme court's opinion is well researched and well written, dealing appropriately with the background of the "accident" requirement and the mental/mental type of case. Though the opinion discusses in some detail the long history of harassment endured by this claimant in the workplace, it finally focuses on the Monday morning meeting and the threats as being the single event that could serve as the triggering factor to permit the award of compensation. To that extent, the opinion is faithful to some earlier cases in which there was a single event that could be described as the basis for the disabling condition.[65]

The only problem in this instance is that the event, standing alone, was very likely not the sole, or even primary, cause for the disabling condition. The event does not appear to have the characteristics of the events in earlier decisions (witnessing a serious injury to a co-worker or witnessing the suicide of a close associate) that might comfortably be identified as the cause of the disabling condition. The claimant's condition seemed to have been caused by a series of events over the five-year period prior to the Monday morning meeting, or by various other causes outside the workplace during that same five-year period. If that is true, then the court should have been more concerned about the competing lines of causation that are necessarily presented when the condition arises over a long period of time rather than a very short period of time.

The other interesting decision in this area is *Williams v. Regional Transit Authority*.[66] The worker was a streetcar operator in New Orleans who was suspected of theft of fares. After an investigation, and accusations from co-workers also implicated in similar activities, the worker was arrested at the end of his shift. So far as the opinion reflects, he was apparently apprehended in plain view of the occupants of the car, handcuffed and taken off in a patrol car. The record was unclear on the disposition of the criminal charges, but apparently they were "dropped" and the claimant's employer told him he could return to work.

He tried to do so, but was unable to work in view of the mental stress that he said had followed this incident. The trial court granted

65. See, e.g., Davis v. Oilfield Scrap & Equip. Co., 482 So. 2d 970 (La. App. 3d Cir. 1986) (co-worker heard gunshot and discovered suicide victim in next room, near death).

66. 546 So. 2d 150 (La. 1989).

his request for benefits, but the court of appeal reversed, stating that "it would be contrary to sound public policy to expand" the compensation statutes to afford recovery. The supreme court granted a writ, reversed the appellate court and reinstated the trial court judgment.

Based on its contemporaneous decision in *Sparks*, the court had no difficulty concluding that the arrest was an identifiable event that could be considered an accident. Indeed, on that point, the case was an easier one than *Sparks*, since there was little if any evidence of a long series of events that might have led to the claimant's ultimate mental problems. Also on the basis of its opinion in *Sparks*, the court concluded the absence of any physical trauma was not an obstacle to recovery for resultant mental stress (though it might have used the physical incident of handcuffing as such physical trauma if that had been thought to be necessary).

The primary focus of the opinion in *Williams*, however, was not on these issues of accident and mental/mental occurrence, but on whether the arrest and resultant disability arose out of plaintiff's employment. To resolve this dispute, the court imposed upon the claimant the burden of proving that he did not commit any criminal conduct that led to the arrest, and held that he had discharged that burden. When the employer failed to rebut that evidence, the court opined that the erroneous charges were "plainly employment-related" and thus arose out of the employment.

Standing alone, these decisions would seem to suggest modifications in the jurisprudence that point toward expanded recovery for mental stress that does not have initial physical causes. However, one must consider the amendments to the Act brought about by Act 454 of 1989 to determine whether cases such as these could be decided in the claimant's favor in the future.

The earlier discussion in this article reveals that, after the 1989 amendments, "mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident . . . unless the mental injury was the result of a sudden, unexpected and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence." It will be recalled that the defendant in *Sparks* argued that there was no "accident" because the claimant had not alleged a "single, unexpected, unforeseen and catastrophic event" which gave rise to her injuries, but rather only a series of such events over more than six years. The supreme court disagreed, finding the threats in the Monday morning meeting to constitute such an event. It does not take much imagination to conceive of a future opinion that would conclude that a meeting such as that in *Sparks* would satisfy the new definition, at least as to its "sudden" and "unexpected" nature. Whether it was "extraordinary" might be debated, but it should not be difficult to conclude that it was. Seen in this light, the only part of the revised

language that might militate against a result such as in *Sparks* would be the standard of proof (clear and convincing evidence versus preponderance of the evidence).

A similar observation should be made about *Williams*. The arrest outside the streetcar at the end of the work shift would seem to qualify as "sudden, unexpected and extraordinary," leaving the change in the standard of proof as the only difference between the statutory language on which *Williams* was based and the revised language on which a future case of its type would be based.

This is not to suggest that some amendments such as those in Act 454 of 1989 might not have been necessary, particularly in light of the general tenor of the *Sparks* decision. It is to suggest that the amendment might not prove to be effective in reversing the result in such cases.

Heart Attack

During this term, the supreme court revisited the troublesome issue of heart attacks in *Carruthers v. PPG Industries, Inc.*[67] Faithful to its most recent pronouncements on the subject,[68] the court on original hearing declined to award compensation to the family of a worker who could not demonstrate that the stress of his job was greater than that of the average non-worker. The claimants asserted that the test should be whether the stress of the worker's job was greater than the stress of his own non-employment life. The supreme court on original hearing rejected this "subjective" test in favor of a continuation of the "objective" standard of measuring the claimant's work stress against the stress of the average non-working individual. But on rehearing, the court reversed itself and adopted the subjective first urged by the claimants.

The decedent was a man with multiple medical problems including hypertension and diabetes. For several years prior to the fateful day, he had repeatedly ascended five steps to reach his office. In the four months immediately preceding the incident, he was required to ascend another eight steps when his office was moved from the first floor to the second floor. On the day in question, he suffered the fatal attack in the morning immediately following the ascension of these thirteen steps. The claimants argued that the strain of these additional eight steps over a four-month period caused the fatal attack.

As indicated earlier, the supreme court ultimately reversed the determinations of both lower courts, choosing a subjective standard and concluding that the work-related stress on the decedent was in fact

67. 543 So. 2d 472 (La. 1989).

68. See, e.g., Reid v. Gamb, Inc., 509 So. 2d 995 (La. 1987); Guidry v. Sline Indus. Painters, Inc., 418 So. 2d 626 (La. 1982); Adams v. N.O.P.S.I., 418 So. 2d 485 (La. 1982).

greater than that which he faced in his non-employment pursuits. This result seems inconsistent with the developing jurisprudence in such matters since 1982, though it is obvious that the supreme court is deeply divided on the issue. The result is particularly ironic when one juxtaposes this subjective standard against the legislative amendment in Act 454 of 1989.

The 1989 amendments will probably impose a more stringent test for recovery than is contained in the supreme court cases in recent years and certainly will contain a more rigorous standard than that announced on rehearing in *Carruthers*. In the first place, a standard of clear and convincing evidence is imposed. Moreover, the claimant must demonstrate that the physical work stress in the job environment was "extraordinary and unusual" in comparison with the "stress or exertion experienced by the average employee in that occupation." This replaces the consideration of the stress on an average worker in a non-employment setting with a consideration of the average worker in that same occupation. This arguably returns the law to its interpretation prior to the somewhat more liberal heart attack decisions of the past decade.[69] And, of course, the 1989 amendments also require that the physical work stress "and not some other sources of stress or preexisting condition" be the "predominant and major cause" of the heart attack or other vascular accident.

If interpreted as written, these amendments would certainly reverse the result in a case such as *Carruthers*, and would probably reverse the result in some other recent heart attack cases.[70] That was no doubt the intent of the drafters, and the success of that endeavor will have to await judicial scrutiny over the coming years, particularly in light of the ultimate result in *Carruthers*.

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69. See, e.g., Brian v. Employers Cas. Co., 111 So. 2d 161 (La. App. 2d Cir. 1959) and Bertrand v. Coal Operators Cas. Co., 253 La. 1115, 221 So. 2d 816 (1969), among numerous other such cases. See generally Malone and Johnson, supra note 6, at § 261.

70. See, e.g., Woolsey v. Cotton Bros. Bakery Co., Inc., 535 So. 2d 1119 (La. App. 2d Cir. 1988) (onset of angina during work day was sufficient showing of accident; stress at work greater than exertion of ordinary non-employment life; compensation allowed); Hibbard v. M-N Utilities, Inc., 530 So. 2d 1190 (La. App. 2d Cir.), writ denied, 532 So. 2d 134 (1988) (foreman for water company spent day of fatal heart attack disconnecting water meters and other relatively minor physical tasks; close case, but court felt exertion was greater than non-employment life and at least equal to some other cases in which recovery had been granted; compensation granted, overruling contrary trial court determination); Gaspard v. State, Through Dept. of Rev. and Taxation, 509 So. 2d 523 (La. App. 3d Cir. 1987); Youngblood v. Rotor Aids, Inc., 491 So. 2d 132 (La. App. 3d Cir.), writ denied, 494 So. 2d 1177 (1986).