Mental/Mental Claims Under the Louisiana Worker's Compensation Act After Sparks v. Tulane Medical Center Hospital and Clinic:’ A Legislative Death Knell?

Darrell James Loup

Repository Citation
Darrell James Loup, Mental/Mental Claims Under the Louisiana Worker's Compensation Act After Sparks v. Tulane Medical Center Hospital and Clinic:’ A Legislative Death Knell?, 50 La. L. Rev. (1990)
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol50/iss3/7

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
Mental/Mental Claims Under the Louisiana Worker’s Compensation Act After Sparks v. Tulane Medical Center Hospital and Clinic:1 A Legislative Death Knell?

INTRODUCTION

In 1980, plaintiff Sedonia Sparks began working in the distribution department at Tulane Medical Center Hospital and Clinic (Clinic). Her responsibilities included distributing medical supplies to the various clinic units. By 1984, plaintiff had been promoted to manager of the department. Her job required interaction with employees of the general stores department who managed the hospital supply storeroom. At trial, plaintiff testified that during her early years at the Clinic, marijuana smoking was taking place in the storeroom.2 She also claimed to have seen a storeroom employee, Calvin Green, give someone a small white package in exchange for cash.3 Plaintiff testified that from early 1982 through 1986 a wide variety of disturbing events took place in which she appeared to have been the intended victim of abuse. Among these were: 1) someone urinated in her coffee pot and left it under her desk over the weekend; 2) someone urinated in an office wastepaper basket; 3) someone stole plaintiff’s shoes, radio, and lamp; 4) someone stole plaintiff’s employees’ time cards; and 5) someone poured water into supply bins ruining sterile medical supplies.4

The distribution department was responsible for stocking the storeroom shelves from Monday through Friday. The storeroom department, however, provided two employees to stock the storeroom on weekends. Storeroom employees Calvin Green and Terry Givens admitted to not stocking the shelves over the weekend of April 4 through 5, 1987, as part of a protest against what they considered unequal responsibilities between the storeroom and distribution departments. A meeting to discuss the problem was held between plaintiff; Eddie Spillar, the storeroom

Copyright 1990, by LOUISIANA LAW REVIEW.
2. Several other employees testified that they had also observed marijuana being smoked in the storeroom or noticed the smell of marijuana in the storeroom.
3. Apparently believing the exchange was an illicit drug transfer, she confronted Green concerning the exchange either in late 1981 or early 1982. This appeared to be the start of her problems.
4. The incidents of urination, as well as the time card thefts, were reported to Clinic security and confirmed by other employees at trial.
manager; and Harold Davis, Jr., the assistant director of materials management. During the meeting, plaintiff and Spillar argued over the state of affairs at the Clinic, and Spillar admitted in court that he told Sparks, "That's why there are a lot of people around here [who] want to kick your behind." Plaintiff, however, testified that Spillar said if Green and Givens were suspended, "Those guys were really going to get me." Davis suspended Green and Givens following the meeting. Upset by the "threats," plaintiff left work later that day, April 6, 1987, and did not return.

The Medical Evidence

The day after Ms. Sparks left work, she sought treatment for headaches and depression from her physician, Dr. Dwight Green. After prescribing medication, Dr. Green instructed plaintiff to rest at home and return for a follow-up visit in two weeks. On April 21, 1987, Dr. Green recommended that plaintiff see a psychiatrist and referred her to Dr. Joseph Roniger. Dr. Green later saw plaintiff for seven follow-up visits culminating with a visit in October, 1987. At trial, Dr. Green testified that Ms. Sparks was disabled due to the headaches and depression and that he felt she was unable to return to work as late as October, 1987. Dr. Green also opined that plaintiff's headaches were related to her work problems and that she was "not able to function" or work during the period in which he treated her.

Dr. Roniger examined plaintiff twice during May, 1987. Dr. Roniger diagnosed plaintiff as suffering from an "adjustment disorder" arising from a particularly stressful situation. Dr. Roniger felt this condition

5. The testimony is quoted in the appellate court opinion. Sparks v. Tulane Med. Center Hosp. and Clinic, 537 So. 2d 276, 278 (La. App. 4th Cir. 1988).
6. Id.
7. It is interesting to note that a Dr. Richard Roniger was a witness in another mental/mental case issued the same day by the Louisiana Supreme Court. Although the court reached the same result in that case, Dr. Richard Roniger testified that he did not think the plaintiff suffered from "posttraumatic stress disorder" and thereby had been a witness for the defendant employer. See Williams v. Regional Transit Auth., 546 So. 2d 150 (La. 1989). This writer does not know if the Dr. Joseph Roniger who testified for Ms. Sparks is the same Dr. Richard Roniger who testified for defendant in Williams.
8. This description of her condition is found in the supreme court opinion, but not the appellate court opinion. Sparks, 546 So. 2d at 141.
9. The fields of psychiatry and psychology have many labels for varying degrees of mental disabilities. Among these are "posttraumatic stress disorder" and "adjustment disorder." The label should be immaterial to the determination of compensability under the Worker's Compensation Act. What should matter is whether the employee has suffered an injury caused by accident during the course of and arising out of his/her employment resulting in the inability to return to the work force. The particular label given to the injury is of no significance. Note the irrelevant discussion of these "labels" in Williams, 546 So. 2d at 155-56.
was "definitely job related" and warranted counseling. Although Dr. Roniger was unsure of the duration of plaintiff's disability, he was of the opinion that she was disabled and that the disability was due to "whatever was happening to her at her place of work."\(^{10}\)

Upon Dr. Roniger's recommendation, plaintiff, in an effort to improve her condition, sought help from Ms. Emily Jahncke, a clinical social worker. Ms. Jahncke testified that in the initial stages of treatment plaintiff was so upset that she could hardly walk. Ms. Jahncke agreed that plaintiff's condition was work related, but opined that plaintiff was probably capable of returning to work by September 30, 1987.

Although the Clinic did not present any medical witnesses, it did call the causation issue into question by establishing that plaintiff was previously diagnosed with depression in 1970 and with sinus headaches in 1985. The Clinic also proved that plaintiff complained to a physician of headaches following an apparent blow to the head in February, 1986. No evidence was introduced to show any further treatment was needed or sought for this condition. Dr. Green testified that he did not consider the headaches from this prior event related to the tension headaches for which he treated plaintiff subsequent to her leaving work in April, 1987.\(^{11}\)

THE PROCEDURAL POSTURE

Ms. Sparks sought recovery under the Worker's Compensation Act\(^{12}\) for her inability to work due to job-related stress. The district court denied relief after determining that no "accident"\(^{13}\) had occurred which caused or resulted in plaintiff's disability.

The fourth circuit reversed, reasoning that plaintiff had become disabled due to job related stress and had "suffered personal injury by accident arising out of and in the course of her employment under

---

10. *Sparks*, 546 So. 2d at 141.
11. In a brief paragraph, the Louisiana Supreme Court abridged the above facts as follows:

   In summary, then, we have a plaintiff who was diagnosed with a psychological adjustment disorder, depression and tension headaches, and who also complained of anxiety, loss of appetite, insomnia and nightmares. Three experts, an internist, a psychiatrist and a clinical social worker, related these problems to plaintiff's employment. Defendant presented no medical testimony but attempted to establish that plaintiff had pre-existing medical problems.

   *Sparks*, 546 So. 2d at 142. Note that all three experts, Dr. Green, Dr. Roniger, and Ms. Jahncke, testified they believed the disability to be work related. However, there is no testimony in the record by these experts that the disability was caused by an "unexpected or unforeseen event happening violently or suddenly" as contrasted to a gradual buildup of stress.

13. See infra note 22.
Although the court refused to grant plaintiff penalties and attorney's fees, the court awarded plaintiff $7,303.24, finding plaintiff suffered temporary total disability from April 6, 1987 to September 30, 1987.


15. La. R.S. 23:1201.2 (Supp. 1990) states in pertinent part that "[a]ny insurer liable for claims arising under this Chapter . . . shall pay the amount of any claim due under this Chapter within sixty days after receipt of written notice. Failure to make such payment within sixty days after receipt of notice, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject employer or insurer, in addition to the amount of the claim due, to payment of all reasonable attorney's fees for the prosecution and collection of such claim, . . . ." The court found that the Clinic's objections to the plaintiff's claims were not "arbitrary, capricious, or without probable cause" due to plaintiff's earlier reports of headaches and depression and the "peculiar nature and lack of clear outward manifestations of her psychological disabilities." Sparks, 537 So. 2d at 281.

16. This award was based upon La. R.S. 23:1221(1), which at the time of Sparks stated:

*Temporary total.* For injury producing temporary total disability of an employee to engage in any self-employment or gainful occupation for wages whether or not the same or a similar occupation as that in which the employee was customarily engaged when injured and whether or not an occupation for which the employee at the time of injury was particularly fitted by reason of education, training, or experience, sixty-six and two-thirds percent of wages during the period of such disability.

La. R.S. 23:1221(1) was amended by 1988 La. Acts No. 938, § 1 (effective January 1, 1989) and 1989 La. Acts No. 454, § 6 (effective January 1, 1990) to effectively hinge an award of benefits based on temporary total disability upon the "physical condition" of the recipient.

The latest amendment states in pertinent part:

(c) For purposes of Subparagraph (1)(a) of this Paragraph, whenever the employee is not engaged in any employment or self-employment as described in Subparagraph (1)(b) of this Paragraph, compensation for temporary total disability shall be awarded only if the employee proves by clear and convincing evidence, unaided by any presumption of disability, that the employee is physically unable to engage in any employment or self-employment, regardless of the nature or character of the employment or self-employment, including but not limited to any and all odd-lot employment, sheltered employment, or employment while working in any pain, notwithstanding the location or availability of any such employment or self-employment.

(d) An award of benefits based on temporary total disability shall cease when the physical condition of the employee has resolved itself to the point that a reasonably reliable determination of the extent of disability of the employee may be made, and the employee's physical condition has improved to the point that continued, regular treatment by a physician is not required, or six months after the injury, whichever first occurs. If the claimant contends that his disability is of a temporary nature, but extends beyond this six-month period, he must submit a claim for extension of the period of temporary total disability under...
The Louisiana Supreme Court affirmed, holding that this type of mental/mental injury can indeed be compensable under the Act.8

R.S. 23:1310.3.

17. Mental/mental claims are claims based on a mental injury caused purely by mental stress unaccompanied by any physical trauma or impact. See A. Larson, IB Workmen's Compensation Law, § 42.20 (1986 & Supp. 1988) [hereinafter Larson].

18. Recovery in tort for mental/mental claims having nothing to do with employment has always been a potent source of controversy. Most courts limit recovery in tort to those cases in which the mental injury is to be reasonably expected under the circumstances. The reasonableness of the injury is an objective inquiry. Many states, however, retain a physical manifestation requirement, usually with two exceptions, the death telegram rule and the negligent interference with dead bodies. The exceptions are probably due to the likelihood of actual distress upon their occurrence, thereby lessening the chance of recovery without established causation. See W. Prosser & W. Keeton, Prosser and Keeton on Torts § 54, at 361-62 (5th ed. 1984) and St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987).

In Louisiana, at least two cases in tort hold special interest. In Re Air Crash Disaster Near New Orleans, 764 F.2d 1084 (5th Cir. 1985), outlines the prerequisites to recovery for mental anguish due to damage to property. Special note should be taken of the discussion in the opinion regarding the potential for fabrication involved in these claims. The court stresses proof of causation must be “clearly established” as a safeguard against fabrication in the highly subjective mental anguish claim. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990), outlines the prerequisites to recovery for mental anguish due to injury to a spouse. In Lejeune, the plaintiff's husband was a patient at the defendant hospital. Mrs. Lejeune suffered mental anguish after observing facial wounds inflicted upon her husband by hungry rodents during his stay at the hospital. The issue for the court was the compensability for mental pain and anguish sustained by a person who was not directly injured but who suffered because of witnessing the negligent infliction of injury on a third person. Overruling Black v. Carrollton R.R. Co., 10 La. Ann 33 (1855), and over one hundred years of jurisprudence, the court held in favor of compensability. After reviewing safeguards used in other jurisdictions to ensure established causation in mental/mental cases, the court set four restrictions that must be met before recovery is granted: 1) A claimant need not be physically injured, nor suffer physical impact. The claimant must, however, either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition; 2) The direct victim of the traumatic injury must suffer such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience; 3) The emotional distress must be both serious and reasonably foreseeable. The distress must go well beyond simple mental pain and anguish. The mental pain and anguish over injury to a third person should be both severe and debilitating; and 4) There must be a “relationship” between the claimant and the direct victim. The court refused to delineate the scope of the “relationship” finding that Mrs. Lejeune was a qualified claimant.

These two cases illustrate the concern of the courts for ensuring that causation is clearly established in mental/mental cases. However, one should consider that the comparison between tort law and worker's compensation law is not particularly useful due to the differing objectives of the two systems of recovery. This comparison is given to make the reader aware of the breadth of controversy within the mental/mental issue.
The primary goal of this article is to consider the compensability of mental/mental claims in light of the 1989 amendments to the Act on fact patterns similar to Sparks. Although mental/mental claims are now statutorily compensable, just what fact patterns support recovery is subject to much debate. First discussed are the pertinent statutes in force at the time of Sparks. A brief excursus into the status of mental/mental claims prior to Sparks will then be undertaken. An analysis of the Louisiana Supreme Court’s opinion in Sparks follows. The paper will culminate with an examination of the possible effects that the 1989 amendments to the Act may have upon a factual situation similar to Sparks.

PERTINENT STATUTES IN FORCE AT TIME OF SPARKS DECISION

The fundamental requirement for recovery under the Act is provided in Louisiana Revised Statutes 23:1031, which, unchanged in pertinent part since Sparks, provides coverage to any employee not otherwise eliminated from the benefits of worker’s compensation who receives, “personal injury by accident arising out of and in the course of his employment.”

The statutory definition, as well as the jurisprudential interpretation of the words “injury” and “accident,” are of paramount importance in deciding the compensability of a mental/mental claim. At the time of Sparks, “injury,” for purposes of worker’s compensation, was defined to “include only injuries by violence to the physical structure of the body and such disease or infection as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted.” An “accident” was defined as, “an unexpected or unforeseen event happening suddenly or

20. See 1989 La. Acts No. 454, §§ 1 & 6 (effective January 1, 1990). Establishing that the mental injury was caused by the employment will always be difficult in a mental/mental case. This difficulty is more pronounced due to the competing lines of causation which are usually present in these cases. Mental injuries not caused by employment should be excluded from the Act, while those mental injuries actually occurring due to employment should be included within the ambit of the Act. The means and methods of establishing causation, as well as the substance of the necessary proof, has been redefined by the Louisiana Legislature in 1989. See Johnson, Workers’ Compensation, 50 La. L. Rev. 391 (1989). See also Larson, supra note 17, § 42.23 at 7-656. Whether this legislative restructuring of the methods of causation and substance of a mental/mental claim will alter the analysis in fact patterns similar to Sparks is debatable. See infra text accompanying notes 91-128. It appears that the 1989 amendments to the Act, however, contain statutory language designed to increase the difficulty of proving causation in mental/mental cases.
21. La. R.S. 23:1021(7). Section 1021(7) was subsequently amended by 1989 La. Acts No. 454, § 1. For a discussion of this amendment, see infra text accompanying notes 103-16.
violently with or without human fault, and producing at the time ob-
jective symptoms of an injury." Analysis of this basic statutory re-
quirement and these two definitions provide the legal framework for
the *Sparks* decision.23

**STATUS OF MENTAL/MENTAL CLAIMS IN LOUISIANA PRIOR TO **

**Sparks**

Until the time of *Sparks*, the Louisiana courts of appeal were split
as to the compensability of a mental injury induced by job-related mental
stress not accompanied by any apparent signs of physical trauma.

**First Circuit**

The first circuit dealt with the problem in *Sutherland v. Time Saver
Stores, Inc.*24 In *Sutherland*, a female convenience store clerk sued her
employer for total and permanent disability, medical payments, and
statutory penalties under the Act after being robbed while working alone
at the store. During the incident the bandit ordered the plaintiff to
disrobe. Before plaintiff completed the demand, the police arrived caus-
ing the robber to flee. The court denied recovery under the Act refusing
to recognize that either an “injury” or an “accident” had taken place.25
The court stated,

Though Louisiana is in the minority, it is the law of this state,
from which we are not ready to depart, that in order to recover
in worker’s compensation for a mental disability there must first
exist a physical detriment as a causative or contributory factor.
In other words, there must exist some objective symptoms of
injury, either at the time of the incident or subsequent thereto,
which naturally result from violence to the physical structure of
the body. . . . When the legislature employed “the objective
symptoms of injury terminology” in the definitional provisions
of the worker’s compensation statutes, it envisioned a situation
where only observable physical symptoms of injury could result
in coverage. *Symptoms exclusively within the subjective mindset*

22. La. R.S. 23:1021(1). Section 1021(1) was subsequently amended by 1989 La. Acts
No. 454, § 1. For a discussion of this amendment, see infra text accompanying notes
91-103.

23. Every worker’s compensation case involving the compensability of employee “mis-
fortune” will involve at least these statutory definitions. However, any claims involving
mental injuries, however caused, will involve interpretation of yet another statutory def-
nition beginning January 1, 1990. For further discussion of this topic, see infra text
accompanying notes 103-24.

24. 428 So. 2d 972 (La. App. 1st Cir. 1983).

of the plaintiff will not satisfy the requirements of the statute.\textsuperscript{26}

\textit{Second Circuit}

The second circuit twice addressed the mental/mental issue. The most recent decision was \textit{Jordan v. Southern National Gas Co.},\textsuperscript{27} in which the court denied recovery under the Act. Jordan allegedly suffered mental disability due to anxiety surrounding a job transfer that he felt was a "demotion." Finding that no "accident" or "injury" had occurred,\textsuperscript{28} the court refused to provide coverage to an employee disabled by "mental problems aggravated by self imposed stress on the job."\textsuperscript{29}

In \textit{Franklin v. Complete Auto Transit Co.},\textsuperscript{30} the plaintiff claimed benefits due to mental disability incurred after narrowly avoiding a collision between his 18-wheeler and an automobile that drove into his path. Approximately one year earlier, plaintiff had been involved in an accident under extraordinarily similar circumstances in which the driver of the other automobile was killed and the child passenger severely injured. Although two psychiatrists testified that plaintiff was mentally disabled due to the mental strain of these work related events, the court denied coverage reasoning that plaintiff had not suffered an "injury" or "personal injury" under the Act.\textsuperscript{31}

\textit{Third Circuit}

The third circuit may be the most experienced circuit in handling mental/mental cases. As far back as 1967, the third circuit struggled with two mental/mental cases within a span of one month. In \textit{Hackett v. Travelers Insurance},\textsuperscript{32} the court was presented with a made to order mental/mental case. Plaintiff was mentally disabled to the point of voluntarily committing himself to the Central Louisiana State Hospital at Pineville after witnessing the death of two fellow employees when a charge of dynamite exploded within a few feet of their bodies. While

\begin{footnotesize}
\begin{enumerate}
    \item 428 So. 2d at 975 citing Franklin v. Complete Auto Transit Co., 397 So. 2d 60 (La. App. 2d Cir. 1981) (emphasis added). For further discussion of Franklin, see infra text accompanying notes 30-31. It is interesting to note that by granting compensation in \textit{Sparks}, the supreme court is totally consistent with this particular theory from \textit{Sutherland}. The only difference in reasoning is that the supreme court appears to more liberally construe just what "violence to the physical structure of the body" entails. In \textit{Sparks}, Justice Calogero explicitly states that an "accident" actually occurred under the facts of \textit{Sutherland}. See \textit{Sparks}, 546 So. 2d at 147.
    \item 455 So. 2d 1217 (La. App. 2d Cir. 1984).
    \item 455 So. 2d 1226.
    \item 397 So. 2d 60 (La. App. 2d Cir. 1981).
    \item 195 So. 2d 758 (La. App. 3d Cir.), writ refused, 197 So. 2d 652 (1967).
\end{enumerate}
\end{footnotesize}
conceding that plaintiff was "permanently and totally disabled," the court denied recovery since plaintiff suffered no "physical injury or trauma."  

Shortly thereafter, Judge Tate, shackled by Danziger, again denied recovery to a traveling circulation representative of a daily newspaper who had suffered a mental breakdown caused by the demands and pressures of his job. Although the facts surrounding the injury were not nearly as meritorious towards recovery as Hackett, the court dismissed the claim without so much as a discussion of the merits.

In Stuckey v. Home Insurance, plaintiff allegedly became mentally disabled due to a series of conflicts with his boss. The court stated that Stuckey's mental/mental claim would have been compensable if he could have proven that the causative on the job stress was "extraordinary or greater than [that encountered in] everyday life." The importance of the Stuckey case was not that the court denied recovery, but that the court recognized the possibility of mental/mental claims being compensable under the Act.

The third circuit again confronted the mental/mental problem in Davis v. Oilfield Scrap and Equipment Co. In Davis, plaintiff was

33. Id. at 759. Citing Danziger v. Employers Mut. Liab. Ins. Co., 245 La. 33, 156 So. 2d 468 (1963), the court reasoned that psychic trauma producing disability is not compensable under the Act. See Hackett, 195 So. 2d at 759. The Danziger opinion concluded that paragraph (7) of La. R.S. 23:1021 defined "injury" in such a way as to eliminate disabilities stemming from emotional causes. This is a rather specious rationale, for had Mr. Hackett been struck by a dismembered body part as a result of the blast, recovery would have been certain. Danziger was later overruled by Ferguson v. HDE, Inc., 264 La. 204, 270 So. 2d 867 (1972). Ferguson broke new ground in Louisiana jurisprudence by allowing recovery for a physical injury (stroke) induced by mental stress.

34. 245 La. 33, 156 So. 2d 468 (1963). See supra note 33.


37. Citing McDonald v. International Paper Co., 406 So. 2d 582 (La. 1981). Curiously, McDonald was a case in which mental stress caused a physical injury. It was not a mental/mental case.

38. Stuckey, 433 So. 2d at 778.

39. Plaintiff also attempted to secure coverage under the Act by alleging his mental/mental disability is compensable as an "occupational disease." La. R.S. 23:1031.1, as amended by 1975 La. Acts No. 644, §§ 1 & 2, defined a compensable occupational disease. Plaintiff was unsuccessful. Whether mental/mental claims should be compensable under present La. R.S. 23:1031.1 (Supp. 1990) is beyond the scope of this paper. For a discussion of the potential applicability of the "occupational disease" approach to mental/mental claims, see Comment, Worker's Compensation: Compensating Claimants Who Suffer Psychological Disabilities Caused Solely By Job Related Mental Stress, 60 Tul. L. Rev. 651 (1986).

40. 482 So. 2d 970 (La. App. 3d Cir. 1986). H. Alston Johnson, III, Adjunct Professor of Law at the Paul M. Hebert Law Center (L.S.U.), and the leading commentator on
employed as a personal secretary to a corporate executive. While at work, plaintiff heard a gunshot and rushed to her boss' office to find he had shot himself in the chest with a large caliber handgun. She tried to assist the victim for approximately twenty minutes while awaiting medical personnel. By the time the authorities arrived, however, he had died. Plaintiff was alternatingly sedate and hysterical. Although plaintiff continued to work for a few months subsequent to the event, she was eventually hospitalized and later filed suit against the employer. Using a different approach the court, citing Guillot v. Sentry Insurance, granted recovery under the Act, not for a mental/mental claim, but for a mental/physical claim. The court concluded that plaintiff indeed suffered an injury by "violence to the physical structure of the body" that was evidenced by clinical documentation of changes in plaintiff's EEG's and chemical analyses. Thus, without the fetter of Danziger, the third circuit awarded a seemingly deserving employee her recovery under the Act.

the Act, noted that Davis is "[o]ne of the most interesting, and potentially most important, recent decisions by Louisiana courts . . . ." See 1 W. Malone & A. Johnson, Worker's Compensation Law and Practice, § 235, in 13 Louisiana Civil Law Treatise (2d ed. 1980 & Supp. 1989) [hereinafter Treatise].

41. Prior to this "accident," plaintiff had been diagnosed as having a "multiple personality disorder." See Davis, 482 So. 2d at 974.

42. Plaintiff filed suit under both tort law and the Act.

43. 472 So. 2d 197 (La. App. 5th Cir. 1985). For a discussion of Guillot, see infra text accompanying notes 57-61.

44. The approach used by the court can be broken down in the following manner: 1) violence to the physical structure of the body is necessary for recovery under the Act; 2) some mental disabilities are occasioned by changes in delicate chemical balances within the body which can be scientifically measured; 3) changes in these chemical balances within the body are violence to the physical structure of the body; 4) therefore, mental disabilities resulting in these changes in chemical balances result in an injury under the Act.

This approach was in no way novel or outside the range of scholarly legal thought. Indeed, it was pioneered by the Texas Supreme Court as early as 1955 in Bailey v. American General Ins., 279 S.W.2d 315 (Tex. 1955). The Texas court considered the physical structure of the body to be "the entire body, not simply to the skeletal structure or to the circulatory system or to the digestive system. It refers to the whole, to the complex of perfectly integrated and interdependent bones, tissues and organs which function together by means of electrical, chemical and mechanical processes in a living, breathing, functioning individual." Id. at 318 (emphasis in original).

45. 245 La. 33, 156 So. 2d 468 (1963). See supra note 33.

46. 196 So. 2d 758 (La. App. 3d Cir. 1967). See supra text accompanying notes 32-33.

47. Professor Johnson's opinion is in accord with that of the court. See Treatise, supra note 40, § 235 at 83-84 (Supp. 1989).
Fourth Circuit

The fourth circuit, at least since 1983, has marched to the beat of a different drummer regarding the compensability of mental/mental claims. This court, prior to Sparks, had granted relief to mental/mental claimants in at least two cases.

In Taquino v. Sears, Roebuck and Co., plaintiff claimed compensation benefits based on a nervous breakdown caused by a number of stressful incidents at work. Being the first Louisiana court willing to grant compensation benefits based solely on a mental injury caused by job conditions, the court stated, “[w]e feel it is realistic to provide indemnification based upon a worker’s inability to perform as a result of disability which arises out of employment, not because of the type of injury. Our ‘accident’ definition does not distinguish between organic and psychological injuries.” The liberal nature of this interpretation was accentuated by the fact that there was no “sudden or violent” event, but a buildup of stress over an extended period. The court avoided this obstacle by stating that the “accidental result” rather than an “accidental cause,” existed. The court found that the accidental result in this cases was a nervous breakdown.

50. It is critical to distinguish the reasoning in Taquino from that in Davis. The Davis court based its decision upon a mental/physical basis, refusing to recognize a mental/mental claim.
53. The court reasoned that since our worker’s compensation system evolved from the British model, we should accept the British definition of accident as it relates to cause or result. The court relied upon Ferguson v. HDE, Inc., 264 La. 204, 270 So. 2d 867 (1972), for this assertion. With less than pristine clarity, the supreme court in Sparks may have overruled the “accidental result” reasoning for cases such as Taquino while preserving the “accidental result” reasoning for cases such as Ferguson. 546 So. 2d at 147. The court, in Sparks, stated, “We emphasize, however, that a mere showing that a mental injury was related to general conditions of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation. The mental injury must be precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently.” Id. (emphasis in original). In a footnote to this quotation, the court elaborated, “While the sudden onset of physical injury may qualify as the compensable ‘accident’ in some cases, see Ferguson v. HDE, Inc., supra, . . . an employee’s subjective assertion that he had a sudden onset of symptoms of mental injury, such as depression or anxiety, is not alone sufficient to show that an accident occurred.
Prior to Sparks, the fourth circuit’s most recent mental/mental case was Jones v. City of New Orleans. This case involved a home health care nurse who alleged that she was disabled by "posttraumatic stress disorder." This disability allegedly occurred after being informed of threats made upon her safety as she entered New Orleans area housing projects as a part of her employment. Due to paranoia surrounding the incident, Ms. Jones was unable to return to work. The court in Jones refused to get tangled in a web of confusion concerning statutory definitions; the court summed up its reason for awarding compensation by stating, "If a worker suffers psychological disorders as a result of an unexpected or unforeseen event, i.e. an accident, during the course of employment, and that disorder results in disability, that worker is entitled to compensation benefits." Apparently the court considered the "accident" to have occurred when plaintiff was informed of the threat. In the court's view, since this threat caused disability, the disability was compensable. "The injury to Mrs. Jones does no less violence to the physical structure of the body than a broken arm or leg."

Fifth Circuit

The fifth circuit confronted the mental/mental problem in Guillot v. Sentry Insurance. This case, strikingly similar to Davis v. Oilfield Scrap & Equipment Co. in terms of the court's reasoning, involved a claims adjustor, afflicted with a preexisting emotional condition, who suffered a job-related nervous breakdown after being fired from his job. The court found that the "accident" requirement was met when the plaintiff's boss informed plaintiff that he was fired and that the "injury"...
NOTES

requirement was met by "physiological changes in brain cells along with biochemical changes that could be measured clinically."\textsuperscript{61}

\textbf{ANALYSIS OF SPARKS}

By bringing mental/mental claims within the ambit of compensability under the Act, Louisiana, after \textit{Sparks}, joins the majority of states.\textsuperscript{62} In analyzing \textit{Sparks}, it is important to remember the narrow issue presented to the court. The court phrased the issue as "whether a mental injury induced by mental stress is compensable when it is caused by a significant employment incident and is not accompanied by any apparent signs of physical trauma."\textsuperscript{63}

The Clinic defended itself against plaintiff's claim to compensation under the "big three" defenses which have heretofore been very successful in defending mental/mental claims under the Act.\textsuperscript{64} The Clinic's defenses were: 1) the injury did not result from an "accident" as defined by the Act;\textsuperscript{65} 2) the injury did not involve "violence to the physical structure of the body" and therefore did not meet the statutory definition of "injury;"\textsuperscript{66} and 3) alternatively, if the injury is determined to be within the limits of the Act, plaintiff failed to show the required causal relation to her employment.

As stated earlier, at the time of \textit{Sparks}, the Act defined "accident" as "an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury."\textsuperscript{67} The decision that the court had to make was whether the "event" triggering coverage should be determined by utilizing an "accidental cause" basis or an "accidental result" basis. In other words, does an "accident" occur only when some unexpected occurrence causing injury takes place, such as a collision or fall, or does an "accident" occur when an unexpected "result" takes place, such as a stroke or breakdown? Certainly the former would be considered an "accident" under the Act if the remainder of the definition is met. As to the latter, the court stated that in certain cases, "[t]he onset of the illness or injury is viewed as the accident because, from the employee's

\textsuperscript{61} Guillot, 472 So. 2d at 201. The court in Davis v. Oilfield Scrap & Equip. Co., 482 So. 2d 970 (La. App. 3d Cir. 1986), discussed supra text accompanying notes 40-42, cited Guillot for this proposition.

\textsuperscript{62} See Larson, supra note 17, \$ 42.23 at 7-639 (1986 & Supp. 1988).

\textsuperscript{63} Sparks, 546 So. 2d at 139.

\textsuperscript{64} See status of mental/mental claims in Louisiana prior to \textit{Sparks}, supra text accompanying notes 24-61.

\textsuperscript{65} See supra note 22.

\textsuperscript{66} See supra note 21.

\textsuperscript{67} See supra note 22.
perspective, the injury was an unforeseen event which occurred suddenly or violently.\textsuperscript{68} The court went on to state,

The "event" which triggers coverage, then, may be an unexpected and sudden or violent occurrence which \textit{causes injury}, or it may be an unexpected change in the employee's \textit{physical conditions} which renders him incapable of working, a change caused at least in part by an employment incident.\textsuperscript{69}

However, the court later stated, while discussing the "injury" requirement, "The mental injury must be precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently."\textsuperscript{70}

In footnote 7 to this quotation, the court emphasized,

While the sudden onset of physical injury may qualify as the compensable "accident" in some cases, see \textit{Ferguson v. HDE, Inc.}, supra, (stroke), an employee's subjective assertion that he had a sudden onset of symptoms of mental injury, such as depression or anxiety, is not alone sufficient to show that an accident occurred. The employee must be able to point to a discernible employment-related event which caused the mental injury, an event separate and apart from the onset of the symptoms of that mental injury.

Although not totally clear, it appears that the court has attempted to jurisprudentially define two different interpretations of "accident" under the Act. If the case concerns any claim other than a mental/mental claim, an "accident" may occur if, from the employee's perspective, the injury itself was an unforeseen event which occurred suddenly or violently, such as a stroke or an aneurysm. If the claim, however, was based on a mental injury caused by mental stress, the breakdown or sudden disability would be insufficient. There must be some employment-related event separate and apart from the onset of the breakdown or other mental symptoms. In short, according to \textit{Sparks}, a mental/mental claim, unlike other claims, should be judged on an "accidental cause" basis only. The "accidental result" basis is reserved for all claims other than mental/mental claims.\textsuperscript{71}

The court's reasoning appears to be an attempt to retain an element of objective causation in mental/mental cases. To require the more

\textsuperscript{68} \textit{Sparks}, 546 So. 2d at 142, citing \textit{Ferguson v. HDE, Inc.}, 264 La. 204, 270 So. 2d 867 (1972).

\textsuperscript{69} \textit{Sparks}, 546 So. 2d at 143, citing Treatise, supra note 40, at § 214 (1980 & Supp. 1989) (emphasis in original).

\textsuperscript{70} Id. at 147.

\textsuperscript{71} It should be noted that if an injury is \textit{caused} by employment and considered neither an "accident" nor an "occupational disease," the employee may be able to seek recovery in tort.
restrictive "accidental cause" interpretation of accident under the Act seems to address the troublesome prospect of recovery without a true "accident" having caused the injury. However, this requirement stretches the plain language of the statute in an effort to justify two different interpretations of the "accident" definition. Either an accident occurs or it does not occur. Since the definition of accident is to be applied in all claims, theoretically the interpretation should be the same for all claims. However, human experiences often defy the neat parameters of statutory language, and a court's sense of equity sometimes dictates that the jurisprudential results escape literal, sterile interpretations.}\footnote{72. See Harris v. Sears, Roebuck & Co., 485 So. 2d 965 (La. App. 5th Cir.), writ denied, 488 So. 2d 205 (1986) (jurisprudential expansion of employer's premises); Harvey v. Caddo De Soto Cotton Oil Co., 199 La. 720, 6 So. 2d 747, (1942) (building killed employee, not cyclone).}

Many people, particularly employers and insurers, probably feel that all claims should be measured by the \textit{Sparks} "accidental cause" interpretation. In spite of the possible theoretical inconsistencies, however, the court's interpretation of "accident" as applicable to mental/mental claims seems to be correct.\footnote{73. This "dual interpretation" concept has been used before by the court in a similar context. Previously, in determining whether a claimant had sufficiently established causation, the court held that once there is proof of an accident and the following disability without any intervening cause, a presumption is established that the accident caused the disability. See Bertrand v. Coal Operators Cas. Co., 253 La. 1115, 221 So. 2d 816 (1968); Walton v. Normandy Village Homes Ass'n, 475 So. 2d 320 (La. 1985). Yet, in Guidry v. Sline Ind. Painters, 418 So. 2d 626, 633 (La. 1982), citing Prim v. City of Shreveport, 297 So. 2d 421 (La. 1974), the court stated that "there is no presumption, however, that a vascular accident occurring on the job is caused by the employment. There must be a causal link between the employer, or the work, and the accident." Since the presumption is still valid as to claims other than those involving vascular injuries (and mental injuries), two different interpretations exist as to when a presumption of causation is established.} The potential for fraud in mental/mental claims further supports this conclusion. Realistically, the court was faced with only three choices in this regard. It could have interpreted "accident" for mental/mental claims just as it is interpreted for other claims; so long as the injury was unforeseen, the "accident" criteria was met. This interpretation would have possibly opened the floodgates to the chronic feigner looking for the application of the "greenback poultice."\footnote{74. See Miller v. United States Fidelity and Guar. Co., 99 So. 2d 511 (La. App. 2d Cir. 1958).} Alternatively, the court could have reversed past interpretations of an "accident" being fulfilled by an "accidental result," such as a stroke or other sudden illness. This solution would have undoubtedly denied coverage to many deserving employees and run counter to the purposes of the Act. Lastly, the court could have established, as it did, two different interpretations of the statutory definition of "accident."
terms of preserving the delicate balance, the court may have had sufficient justification for the judicial gloss on the term "accident." The dual interpretation, however, is a prime example of judicial manipulation of a statutory definition that may later lead to awkward situations. Whether the courts are justified in creating such distinctions where the literal language does not support the interpretation is a subject of much debate.

The court could have simply used its "accidental event" interpretation to deny recovery under the Act. It would have been both logical and accurate to hold that plaintiff's disability was caused by, "a series of events which took place over the course of six and one-half years" as alleged by the Clinic. Had that been the determination, plaintiff would have been denied relief due to the lack of an "accidental cause"—that is, no single identifiable event happening suddenly or violently. The court, however, disagreed, stating that the communication of the threats to plaintiff on April 6, 1987 was the event which produced injury in this case, not the incidents which occurred in the years prior to the threats. The accident thus occurred on April 6, 1987, and the events prior to that date are relevant simply to the extent that they reinforce the seriousness of the threats and lend credibility to plaintiff's assertion that the threats caused her severe anxiety and distress.

In this fashion, the court destroyed Clinic's defense that no "accident" had occurred.

The Clinic's next defense was that plaintiff's injury did not involve "violence to the physical structure of the body," and therefore did not

75. Professors Wex Malone and H. Alston Johnson describe this "delicate balance" as follows:

Compensation, when regarded from the viewpoint of employer and employee represents a compromise in which each party surrenders certain advantages in order to gain others which are of more importance both to him and to society. The employer gives up the immunity he otherwise would enjoy in cases in which he is not at fault, and the employee surrenders his former right to full damages and accepts instead a more modest claim for bare essentials, represented by compensation.

See Treatise, supra note 40, § 32 at 40.

76. Sparks, 546 So. 2d at 148 (emphasis added).

77. Id.

78. The requirement within the "accident" definition in La. R.S. 23:1021(1), as amended by 1983 La. Acts No. 1, § 1, that the event must produce "at the time objective symptoms of an injury" was given cursory treatment in a footnote. The court pointed out that this requirement is not strictly construed and "all that is required is a showing that the accidental event produces some symptoms of a discernable injury at a point in time sufficient to permit the conclusion that the injury was causally related to employment." 546 So. 2d at 146 n.5. See also Treatise, supra note 40, § 216.
meet the statutory definition of "injury." At the time of Sparks, the Act defined "injury" and "personal injury" as "injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom." Citing numerous appellate court decisions, the court held that the "violence" requirement was satisfied when the injury has a violent or harmful effect on the employee's physical condition, even if the cause of that change was not in itself violent. Under the jurisprudence, there need not be a blow or visible application of force in order for the 'violence' aspect of the statutory definition to be satisfied.

The court here used a "violent result" analysis instead of a "violent cause" analysis. This distinction is comparable to the previous analysis of "accidental result" versus "accidental cause." The court, however, did not establish a dual interpretation of "violence" as it did with "accident." Therefore, the criteria of "violence" are met by the same factors for mental/mental claims as well as they are with other claims.

Having established that plaintiff's disability had a "violent" effect, the court had to determine whether this effect was to the "physical structure of the body," a part of the Clinic's second defense. Following the lead set out by the Texas Supreme Court over 30 years earlier in Bailey v. American General Insurance, as well as the fourth circuit court of appeal in Taquino and Jones, the court held that mental health is a part of the delicate machinery composing the physical structure of the body. This result is indeed reasonable since a mental injury can certainly be just as incapacitating as a physical injury. Finding that plaintiff was mentally disabled and that a mental injury was "violence to the physical structure of the body," the court easily disposed of the Clinic's second defense.

79. See supra note 21.
80. Sparks, 546 So. 2d at 145 (emphasis in original).
81. See supra text accompanying notes 67-78.
82. This result is satisfactory and conforms to the accepted doctrine of taking one's victim (employee) as one finds him. The possible propensity for abuse is tempered by the safeguard of the "accidental cause" requirement described supra text accompanying notes 67-78.
83. 279 S.W.2d 315 (Tex. 1955).
86. Although there was "tangible" clinical evidence of "physiological" damages in Davis v. Oilfield Scrap and Equip. Co., 482 So. 2d 970 (La. App. 3d Cir. 1986) (EEG and chemical analyses), there was none in Bailey, Taquino or Sparks.
87. See Larson, supra note 17, § 4.23(a) at 7-655 to 656.
The Clinic’s last bulwark was that Ms. Sparks failed to show the required causal relation between the disability and her employment. Plaintiff’s burden under the Act was to prove by a preponderance of the evidence that her disability was caused by her employment. After disposing of the “accident” and “injury” defenses, the court pointed out,

Since three experts affirmatively testified that plaintiff’s disability was related to her employment, since defendant produced no testimony to the contrary, and since whatever previous medical problems plaintiff experienced were clearly not of the same severity and scope as those brought on by the events of April 6, 1987, we find that plaintiff established by a preponderance of the evidence that her injury was precipitated by the threats to her safety.89

With this finding, the Louisiana Supreme Court may have mended the split between the circuits and established that a mental injury induced by mental stress can indeed be compensable under the Act when it is caused by a significant employment incident, even if it is not accompanied by any apparent signs of physical trauma.90

Pertinent Changes in the Act and the Possible Effects on Mental/Mental Claims After Sparks

The 1989 Legislature amended the statutes controlling the three most important factual considerations of the Sparks decision.91 The changes became effective January 1, 1990; hence it is instructive to evaluate Sparks in light of these changes. As noted in the previous section, the three main factual considerations in Sparks were: 1) whether an “accident” occurred; 2) whether an “injury” occurred; and 3) whether plaintiff proved a causal connection between the “accident” and “injury”.

“Accident”

At the time of Sparks, Louisiana Revised Statutes 23:1021(1) read, “‘Accident’ means an unexpected or unforeseen event happening sud-
denly or violently, with or without human fault, and producing at the
time objective symptoms of an injury." The 1989 amendment added,
"which is more than simply a gradual deterioration or progressive
degeneration."92 It appears that this amendment is an attempt to reduce
the possibility of compensation without causation, a fear of insurers.93
The words, "producing at the time objective symptoms of an injury"
in the original definition were an attempt to do the same, but the courts
have practically ignored this aspect of the statute.94 The problem with
this amendment is that some injuries that should be compensable and
are caused by employment, such as strains, poisonings, slowly occurring
lung collapses, etc., are "gradual deteriorations" or "progressive de-
generations" and, as such, are arguably no longer covered under the
Act.95 One should not lose sight of the fact that a degenerative injury
caused by employment should be compensable.96 Although the amend-
tment taken literally would certainly not provide compensation for feigned
degenerative injuries, it would also leave valid claims uncompensated97—an
unwise and unjustified result.

In mental/mental claims, where the causation problem is at its apex,
the amendment seems less intrusive upon valid claims. However, one
should still not consider a degenerative mental injury non-compensable
due to the difficulty of proving it is caused by employment. This
causation problem was addressed by the amendment to Louisiana Revised
Statutes 23:1021(7), which raised the burden of proof in mental/mental
claims to "clear and convincing evidence."98

The courts could avoid the harsh results of the amendment to
Louisiana Revised Statutes 23:1021(1), prohibiting degenerative injuries
from being an "accident," by finding that cases involving what appear
to be valid claims indeed involve "accidents" even if the injury is

1, 1990).
93. This fear is probably justified since an important compensation requirement is
that the injury be caused by the employment. See Treatise, supra note 40, § 32.
94. See supra note 78.
95. Since 1989 La. Acts No. 454 was conceived and lobbied by the Louisiana As-
sociation of Business and Industry, this amendment is anything but surprising. See Johnson,
(1989).
96. Indeed, this is the reason the employee is given for relinquishing his right to a
tort recovery. The result is that injuries caused by employment should be compensable
regardless of fault. The fact that an injury is degenerative should be immaterial if it is
caused by employment.
97. The tension between the courts and the statute (legislature) demonstrates the force
of the political process in answering what it perceives as an abundance of previous liberal
decisions.
98. For a discussion of this concept see infra text accompanying notes 104-16.
degenerative. Suppose, for example, that a worker, as an employment task, must strenuously pull an unwieldy lever with his arm many times daily. After five years of this continuous activity, the elbow swells and the arm becomes severely disabled. The employee can no longer work and the doctor opines that the constant strain has gradually worn the joint in the elbow to a degree that surgery is necessary. A literal reading of Section 1021(1) would result in an “accident” not having occurred; hence there would be no recovery under the Act. However, the creative judge could hold that an “accident” occurred suddenly on whatever day the pulling of the lever caused the “straw to break the camel’s back.” The day the employee pulled the lever and the arm began to swell would mark the occurrence of the accident. Can it be doubted that this “injury” should be recoverable under the Act?99

The Louisiana courts have agreed that, “the ‘wear and tear’ type diseases or harms are covered only if listed in the occupational disease provision of the Workmen’s Compensation Act.”100 A strong argument could be made that the amendment to the “accident” definition101 is but added verbiage that changes nothing. The irony of the amendment to the definition of an “accident” is that the courts have long agreed that degenerative injuries not caused by employment should not be compensable. Sparks also refused to recognize a long term gradual deterioration as compensable, evidenced by the court’s employment of the “accidental cause” interpretation.102 The difference between the courts and the legislature does not center around whether “gradual deteriorations” and “progressive degenerations” should be considered “accidents” under the Act, but concerns just what facts should be accepted as proving an “accident” took place. As illustrated in Sparks, the courts have been quite adept at finding an “unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently.”103 Therefore, under the 1989 amendment to Louisiana Revised Statutes 23:1021(1), Sparks should remain valid and a viable precedent for future mental/mental cases.

99. As to mental/mental claims the reasoning should be the same, but causation will rarely be as clear. This was precisely the case in Sparks. See supra text accompanying notes 62-90. However, as indicated in the text, the solution is not to eliminate valid claims, but to approach the problem from the standpoint of sufficiency of evidence. See La. R.S. 23:1021 (7)(b), as amended by 1989 La. Acts No. 454, § 1 (effective January 1, 1990), and discussion infra text accompanying notes 104-16. Also see Larson, supra note 17, ¶ 42.23(b) at 7-661 to 669.


101. See supra note 22.

102. See supra note 53 and text accompanying notes 67-78.

103. Sparks, 546 So. 2d at 142-43.
“Injury” and the Causal Connection

At the time of Sparks, Louisiana Revised Statutes 23:1021(7) read, "‘Injury’ and ‘personal injuries’ include only injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted." The 1989 amendment added (7)(b) which states, "Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter, 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." Therefore, beginning January 1, 1990, the mental/mental plaintiff will have an added statutory requirement to meet in order to recover under the Act. The wording of the statute is not clear as to whether the "mental injury" alone, the "sudden, unexpected, and extraordinary stress" alone, or both the "mental injury" and "stress" must be demonstrated by clear and convincing evidence. To best conform to the purpose of the law, the statute should be interpreted to mean that both the "mental injury" and the "sudden, unexpected, and extraordinary stress related to the employment" be proven by clear and convincing evidence. The nebulous nature of mental/mental claims as well as the need to preserve the "delicate balance" demand that the clear and convincing standard apply to both.

Although comparisons to tort law should be avoided due to the differing objectives of the two systems of recovery, a comparison at this point may be useful. In the mental anguish tort case of In Re Air Crash Disaster Near New Orleans, the court stressed the importance of the plaintiff establishing a "clear causal relation" between the property damage and the mental anguish. A similar concern for establishing causation in a mental/mental case was shown in Lejeune v. Rayne Branch Hospital. A clear showing of causation is necessary to offset the ease of subjective fabrication of mental anguish claims. Although the Act, unlike tort law, is designed to be a "no fault" system, causation linked to employment is necessary to recovery and the "clear and convincing"

106. See supra note 75.
109. See supra note 20.
standard is an attempt to link recovery to proof of causation. Since proof of causation is required under both tort law and the Act, the reasoning espoused in *Air Crash* and *Lejeune* is valid as supporting the "clear and convincing" standard as a necessary change to the Act.

Prior to this amendment, the burden of proof for plaintiff was that the "injury" be proven by a "preponderance of the evidence." In attempting to ascertain the difference between "preponderance" and "clear and convincing," it becomes apparent that both terms are difficult to quantify. The greatest practical difference is that "clear and convincing" is a greater burden of proof than "preponderance" but a lesser burden than "beyond a reasonable doubt." In any event, it is clear that the legislature has set a stricter standard of review for testing causation in mental/mental cases than was set prior to the amendment. Due to the competing lines of causation involved in most mental/mental cases, this change is needed. To maintain the "delicate balance" necessary for the successful operation of the Act, it is essential that only injuries, whether physical or mental, actually caused by employment be covered by the Act. The elevated burden of proof provides the statutory tool necessary for the court to effectively deny benefits to an undeserving claimant who is attempting to utilize the vagueness present in most mental/mental claims as a method of circumventing the true purposes of the Act. Concurrently, this provision should not prevent a truly deserving claimant under a mental/mental fact pattern from being granted recovery under the Act. Because the claimant is in the best position to prove the extent and cause of his disability, this added burden should have no ill effects on the deserving employee while

110. Black's Law Dictionary 499 (5th ed. 1979) defines "preponderance of the evidence" as, "A standard of proof (used in many civil suits) which is met when a party's evidence on a fact indicates that it is 'more likely than not' that the fact is as the party alleges it to be." Black's defines "beyond a reasonable doubt" as, "In evidence means fully satisfied, entirely convinced, satisfied to a moral certainty; and phrase is the equivalent of the words clear, precise and indubitable." Id. at 147. Black's defines "clear and convincing proof" as, "Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., a well-founded doubt. Some cases give a less rigorous, but somewhat uncertain meaning, viz., more than a preponderance but less than is required in a criminal case." Id. at 227. But see Black's for the definition of "clear evidence or proof," which states, "Evidence which is positive, precise and explicit, which tends directly to establish the point to which it is adduced and is sufficient to make out a prima facie case. It necessarily means a clear preponderance. It may mean no more than a fair preponderance of proof but may also be construed as requiring a higher degree of proof..." Id. at 228. See also G. Pugh, R. Force, G. Rault, & K. Triche, Handbook on Louisiana Evidence Law 451-52 (1990) (index to use of "clear and convincing" standard in Louisiana law).


112. See supra note 75.
preventing the majority of undeserving recoveries.\footnote{113} The minimum practical effect of the amendment will be to require the courts to look more closely at the causation issue in mental/mental cases and require additional proof of the claim.

Whether Louisiana Revised Statutes 23:1021(7)(b) statutorily overrules \textit{Sparks} is a question of degree. The fact that the Act now expressly recognizes a mental/mental claim is proof that the narrow holding of \textit{Sparks} is now embedded in the Act.\footnote{114} The harder question is whether the facts giving rise to recovery in \textit{Sparks} would now support recovery under Section 1021(7)(b). Since the 1989 amendment was probably written to overrule such cases as \textit{Taquino},\footnote{115} the answer will depend on the court’s willingness to continue to conclude, even under the stricter evidentiary standard, that such acts as the meeting of \textit{Sparks}, \textit{Spillars}, and \textit{Davis} qualify as causing “sudden, unexpected, and extraordinary stress.”\footnote{116} If the court is willing to do so, then, Section 1021(7)(b) may be empty rhetoric.

\textbf{Effects of Louisiana Revised Statutes 23:1221(1)(c) & (d) on Mental/Mental Claims}

The plaintiff in \textit{Sparks} was awarded recovery based upon temporary total disability.\footnote{117} In 1989, the Louisiana Legislature amended Louisiana

\begin{footnotes}
\item 113. Plaintiff’s ability to meet his burden of proof as to causation in a mental/mental case will, to a large degree, depend upon the believability of the expert witness. The problem remains, however, that reasonable minds may differ, leaving the court in a position to choose between two equally plausible theories of causation. For an amusing case of a court being less than impressed with an expert medical witness, while still illustrating the serious problem of proving causation in mental cases, see Ladner v. Higgins, 71 So. 2d 242 (La. App. Orl. 1954). In \textit{Ladner}, the expert witness, a physician, was asked by counsel, “Is that your conclusion that this man is a malingerer?” Dr. Unsworth responded: “I wouldn’t be testifying if I didn’t think so, unless I was on the other side, then it would be a post traumatic condition.” Id. at 244.

Many times plaintiff’s work record will assist in the determination of the validity of the claim. Most “feigners” or “malingerers” are not created overnight. They usually will have practiced the “art” most of their lives.

\item 114. The narrow holding of \textit{Sparks} is simply that a mental injury induced by mental stress is compensable under the Act when it is caused by a significant employment incident, even though it is not accompanied by any apparent signs of physical trauma. See La. R.S. 23:1021(7)(b) (Supp. 1990).

\item 115. See supra text accompanying notes 49-53.

\item 116. Certainly fact patterns such as those illustrated by Sutherland (supra text accompanying notes 24-26), Franklin (supra text accompanying notes 30-31), Hackett (supra text accompanying notes 32-33), and Davis (supra text accompanying notes 40-47) should support recovery after \textit{Sparks} and be strong enough to prove causation under La. R.S. 23:1021(7)(b), as amended by 1989 La. Acts No. 454, § 1 (effective January 1, 1990). On the other hand, cases such as \textit{Taquino} (supra text accompanying notes 49-53), containing competing lines of causation not effectively severed by one sudden work related event should be statutorily overruled.

\end{footnotes}
Revised Statutes 23:1221 by adding subparagraphs (c) and (d)\textsuperscript{118} which now hinges the award of benefits based on temporary total disability upon the "physical condition" of the recipient. Do these two newly-enacted paragraphs prohibit a plaintiff who is mentally unable to engage in employment from receiving temporary total disability compensation? When read in conjunction with the other sections of the Act,\textsuperscript{119} the answer should be "no." It would hardly seem rational to expressly provide for recovery based upon a mental/mental claim\textsuperscript{20} and to deny recovery in the same Act if the claimant is mentally unable to return to work. Surely, such a strained interpretation would not do justice to the civilian tradition of interpreting statutes "in pari materia." However, one may expect a future mental/mental claim to be challenged on this basis, although the challenge should not be successful.

In 1983, the legislature amended Section 1221(2) to enact subparagraph (c), which provided for the same results regarding permanent total disabilities as the 1989 amendment provided for temporary total disabilities. Professor Alston Johnson, in his treatise of the subject, clearly stated that the 1983 amendment should not be interpreted as denying recovery for injuries based on mental causes.\textsuperscript{121} Professor Johnson's reasoning is just as persuasive for claims based on a temporary total disability.

Due to the expressed recovery now available for mental/mental claims, the wording of Louisiana Revised Statutes 23:1221(1)(c) and (d) and (2)(c) is anomalous and should be revised. It is hoped that the legislature will attend to this housekeeping chore and delete the word "physically" from Section 1221(1)(c) and (2)(c) and the word "physical" from Section 1221(1)(d). Such an amendment will prevent the Act from being inherently contradictory in respect to this issue.

**Another Consideration**

It should be pointed out that the 1989 legislation also enacted Louisiana Revised Statutes 23:1021(7)(c) and (d). Section 1021(7)(c) concerns a mental/physical injury. Section 1021(7)(d) is particularly interesting, stating that no mental/physical claim shall be compensable unless the mental injury or illness is diagnosed by certain qualified individuals using certain accepted evaluative criteria.\textsuperscript{122} One wonders why this pro-

\textsuperscript{118} See supra note 16 for the text of this statute.


\textsuperscript{120} See infra note 126.

\textsuperscript{121} See Treatise, supra note 40, § 281 (Supp. 1989).

\textsuperscript{122} La. R.S. 23:1021(7)(d), as amended by 1989 La. Acts No. 454, § 1 (effective January 1, 1990), states the following:

No mental injury or illness shall be compensable under Subparagraph (c) [the
phylactic measure is applied to mental/physical claims, and not to the more suspicious mental/mental claims. Possibly, the legislature felt the restrictions imposed by the more constrictive construction of Louisiana Revised Statutes 23:1021(7)(b) provide sufficient safeguards against spurious mental/mental claims. In any event, Section 1021(7)(d) is puzzling as to its limited application to mental/physical claims.

CONCLUSION

One wonders whether the more significant effect upon the status of mental/mental claims in Louisiana will be the Sparks decision, or the amendments made to the Act by the 1989 Louisiana Legislature. There are some certainties apparent from both. Mental/mental claims are now statutorily compensable under the Act although the burden of proving causation is more strongly levied against the claimant. The true litmus test will be the practical significance given by the courts to the new "clear and convincing" standard of proof. Although the burden of proof is greater, the courts maintain much latitude when deciding whether the facts presented by the claimant warrant recovery. No amount of legislative tinkering can change the fact that the statute must be interpreted in light of the facts presented.

"mental[physical]" subparagraph] unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association.


124. Another issue spawned by recent legislative action is the creation of "administrative hearing officers." These officers will serve as the initial adjudicator to any contested claims under the Act. An appeal from the decision of the "hearing officer" to the appropriate court of appeal will be allowed on a question of law, a question of fact, or both. The controversy surrounds the fact that the appeal shall be determined "on the record" made before the hearing officer. This lack of de novo review is likely to be tested as a constitutional question. This predicted challenge is evidenced by statutory provisions within the Act providing for contingencies in case such challenge is successful. A complete analysis of this issue is beyond the scope of this paper. The reader may find it helpful to consult 1988 La. Acts No. 938 and 1989 La. Acts No. 23, 43, 260, & 454. Special attention should be focused upon La. R.S. 23:1141 (Supp. 1989).

125. 546 So. 2d 138 (La. 1989).

Other than the new "clear and convincing" burden of proof, the amended "accident" and "injury and personal injuries" definitions should prove inconsequential in light of the reasoning used in *Sparks*. The judiciary continues to possess much freedom to apply the definitions to the facts. The new statutory parameters are not so strictly defined as to prevent judicial interpretation in furtherance of equity. For this reason, the circuits may still remain "split" regarding the compensability of mental/mental claims after *Sparks* and the 1989 legislative session. In other words, facts that support recovery in one circuit may not support recovery in another circuit. Hopefully, all available interpretive skills will be utilized in an effort to compensate valid claims and deny claims that fall outside of the underlying policy bases of the workers' compensation system.

*Darrell James Loup*