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Legislative Developments

Unlike the 1988 and 1989 legislative sessions, the 1990 Regular Session of the Louisiana Legislature was a quiet one for workers' compensation issues.[1] For the sake of completeness, the legislative changes of the current session will be summarized very briefly.

The method of calculating the level of contribution by self-insurers to the Second Injury Fund was clarified.[2] Act 202 authorizes the claimant's attorney to withhold the statutorily-permitted attorney's fees in an escrow account, pending approval of such fees by the hearing officer.[3] Act 485 clarifies that the filing fee of $30.00 for the filing of a claim with the Office of Worker's Compensation Administration is to be collected by the Director only after the decision in the case is final.[4]

Another act requires any insurer which issues a workers' compensation policy in Louisiana either to establish a claims office here or retain a "licensed claims adjuster," unless a waiver of the statutory requirements is obtained upon demonstration that the insurer has complied with applicable laws and regulations pertinent to workers' compensation claims.[5] "Carpal tunnel syndrome" is specifically included within the definition of occupational diseases by Act 943.[6] Finally, Act 973 specifies that a claim by a carrier or employer for reimbursement of compensation benefits paid, even as part of a tort suit, may not be tried by jury; and that evidence of payment of past or future compen-

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1. 1988 La. Acts No. 938 established, among other changes, the administrative hearing officer system and the medical reimbursement schedule. 1989 La. Acts No. 454 made a number of substantive changes in the Act, most of which were comprehensively discussed in this forum last year.

2. 1990 La. Acts No. 63, amending La. R.S. 23:1377(B)(1) (Supp. 1990).

3. 1990 La. Acts No. 202, amending La. R.S. 23:1143 (Supp. 1990).

4. 1990 La. Acts No. 485, amending La. R.S. 23:1310.11(A) (Supp. 1990).

5. 1990 La. Acts No. 885, amending La. R.S. 22:1249(B)(B) (1978), 22:1252 (1978), and 22:1263(9) (1978), and enacting La. R.S. 22:1253(C)(4), :1262.1(B)(1)(d), :1262.1(E)(4), and La. R.S. 23:1161.1.

6. 1990 La. Acts No. 943, amending La. R.S. 23:1031.1(B) (Supp. 1990).

sation benefits is not admissible evidence before the jury in a tort suit arising from the same injury.[7]

Constitutionality of Hearing Officer System

The constitutionality of the hearing officer system enacted by Act 938 of 1988 was the subject of both jurisprudence and legislation during this term. Shortly after the enactment of the hearing officer system, a constitutional challenge was brought in state district court in East Baton Rouge Parish. It is beyond the purview of this article to discuss the challenge in detail. Suffice it to say that the plaintiffs argued that the system unconstitutionally deprived the district courts of original jurisdiction over workers' compensation matters and, furthermore, unconstitutionally established the hearing officers as the equivalent of district judges.[8] Proponents of the system disagreed, citing several constitutional provisions which appeared to envision such a method of resolving workers' compensation disputes.[9]

The district court held that the system was constitutional, probably to the surprise of both sides, thus affording to the disappointed party the expeditious remedy of a right of direct appeal to the supreme court. Due to this result, the case was appealed to the first circuit court of appeal, which reversed, holding that the system was indeed unconstitutional.[10]

The matter was then heard by the supreme court, which affirmed the appellate court's ruling in a slip opinion which is not published at the time this symposium article is being written.[11] The supreme court's opinion thus necessarily gave greater importance to one other act of the 1990 Regular Session—a constitutional amendment which would retroactively and prospectively validate the hearing officer system.[12] The constitutional amendment was approved by the people on October 6, 1990, thus presumably curing the perceived deficiencies of the system. Thus, the hearing officer system, according to the amendment, will have been properly in place since January 1, 1990.

Because of the approval of the constitutional amendment, the "fail-safe" legislation[13] passed earlier was not needed to preserve the director-recommendation system first enacted in 1983.[14]

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7. 1990 La. Acts No. 973, enacting La. R.S. 23:1101(D) and La. Code Evid. art. 411.1.

8. See Moore v. Roemer, 560 So. 2d 927, 931 (La. App. 1st Cir.), aff'd, 567 So. 2d 75 (1990).

9. Id. at 934.

10. Id. at 935.

11. Moore v. Roemer, 567 So. 2d 75 (1990).

12. 1990 La. Acts No. 1098.

13. 1989 La. Acts No. 23.

14. See 560 So. 2d at 930 n.2.

Jurisprudence

Employment of Minors

The difficult issue of remedies for a minor injured in a work-related incident was addressed anew in *Ewert v. Georgia Casualty & Surety Company*.[15] The injured worker was a sixteen-year-old boy who was hired by the defendant in its logging operations and then injured on the first day of work. He brought a tort suit through his mother and was met with the predictable defense that his employer should be immune from tort liability.

The trial judge initially sustained an exception of no cause of action as to the allegations that the worker had been injured as a result of an intentional act by the employer, but the appellate court reversed and remanded for trial.[16] After trial, the court awarded tort damages, but found that the allegation of an intentional act was not substantiated by the facts. Accordingly, the employer appealed, claiming that it was entitled to tort immunity. A divided appellate court affirmed the award of damages on a 3-2 vote, holding that the minor should be afforded the option of proceeding in tort or workers' compensation.[17] The supreme court denied a writ.[18]

The third circuit approached the case as a matter of first impression.[19] An earlier decision had concluded that workers' compensation should be the exclusive remedy when the minor was legally employed but was injured at a task which was forbidden.[20] In *Ewert*, at least according to the view of the majority, the minor's employment was illegal from the outset, regardless of the task to which he might have been assigned at any given moment. Thus the *Ewert* majority felt that it was not constrained to follow the earlier and arguably distinguishable decision.[21]

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15. 548 So. 2d 358 (La. App. 3d Cir.), writ denied, 551 So. 2d 1339 (1989).

16. Ewert v. Georgia Casualty & Sur. Co., 468 So. 2d 13 (La. App. 3d Cir.), writ denied, 472 So. 2d 920 (1985).

17. 548 So. 2d at 361. La. Const. art. V, § 8(B) (1974) requires reargument before a five-judge panel if the original three-judge panel is split in favor of reversal or modification of the trial court's judgment. Since there was a five-judge panel in this case, one must presume that two members of the original three-judge panel were in favor of reversing the trial court. However, in the final analysis, the vote was 3-2 in favor of affirming the trial court judgment which had rejected tort immunity for the employer.

18. Ewert v. Georgia Casualty & Sur. Co., 551 So. 2d 1339 (La. 1989). Only Justice Marcus dissented from the writ denial. Justices Watson and Cole joined in the writ denial and added that "the excellent majority opinion of the court of appeal is correct as a matter of law." Id. at 1339-40.

19. 548 So. 2d at 360.

20. Mott v. River Parish Maintenance, Inc., 432 So. 2d 827 (La. 1983).

21. 548 So. 2d at 360.

Indeed, the *Ewert* majority may have found some support for its view in a footnote in the earlier decision which seemed to reserve the issue of illegal employment for a later day.[22] The court saw a clear conflict between the tort immunity of an employer on the one hand and the policy underlying the Child Labor Law on the other, and simply chose the latter over the former.[23]

The dissenting judges had two very valid concerns. The first was that the Worker's Compensation Act[24] makes no distinction between legal and illegal employments, and thus grants tort immunity even to an employer which violates the law by engaging in illegal employment. As a corollary to this view, it was noted that the statutory sanction for illegal employment is specific and does not include loss of tort immunity under workers' compensation.[25] The second concern was that the facially appealing choice which the majority made in providing a tort remedy for this particular minor might prove to be less attractive if it brought along with it tort defenses, such as fault of the young worker.[26]

The problem probably calls for legislative consideration, in which the legislature should decide whether loss of tort immunity is the proper sanction for an employer who violates the Child Labor Law. If so, this sanction should be specifically stated. If not, an appropriate and specific sanction should be provided. In that process, one should not lose sight of the concept that if a penalty is regarded as too harsh, it might never be applied, even though some penalty of a lesser nature would be. In other words, the sanction should fit the violation, or else the violation might go unpunished.

Claims Beyond the Act

The area of exceptions to the coverage of the Act remains one of the most active in the current case law. This section contains a brief review of a group of decisions factually distinct, but sharing the common theme of testing the outer limits of the coverage of the Act. In most instances, as usual, the issue is whether the tort immunity of the Act shields the employer from liability for the particular harm suffered.

The breadth of the intentional act exception continues to be a hotly-litigated issue. In *Boudoin v. Bradley*,[27] the claimants alleged that they had suffered severe emotional distress when the compensation carrier

22. Id. (citing Mott v. River Parish Maintenance, Inc., 432 So. 2d 827, 832 n.5 (La. 1983)).

23. Id. at 362.

24. La. R.S. 23:1021-:1379 (1985 & Supp. 1990) [hereinafter Act].

25. Id. at 363-64 (Doucet, J., dissenting).

26. Id. at 364-65 (Foret, J., dissenting).

27. 549 So. 2d 1265 (La. App. 3d Cir. 1989).

terminated the husband's compensation benefits, allegedly because he declined to accept an unreasonably low settlement offer. They attempted to state a cause of action for intentional infliction of mental distress, for which there is, in fact, jurisprudential authority, at least as to the employer itself.[28] Though the appellate court recognized the possibility of such a cause of action, it held that even if all the alleged facts were proven, the showing would fall far short of the necessary allegations to establish such a cause of action.[29] Accordingly, it affirmed the decision below sustaining an exception of no cause of action, but remanded to permit the claimants to amend to attempt to state a cause of action.[30]

A word of caution is in order. For the most part, the kind of conduct in which a carrier might engage (termination of benefits, delay of benefits and the like) is subject to specific sanction under the Act.[31] Penalties and attorney's fees, under well-defined statutory provisions and interpretive case law, are available as a remedy to the claimant.[32] Thus the situation of the compensation carrier is radically different from the intentional conduct of an employer or co-employee which might produce severe emotional distress; such conduct is outside of the coverage of the Act completely. This is not to say, however, that *some* conduct of a compensation carrier which does not fit this category might be the subject of a tort claim, but it is to say that conduct which is sanctionable under the provisions governing penalties and attorney's fees should probably not be subject to a different sanction unless the legislature changes the Act. This is in fact the position taken in another decision during this term.[33]

In *Reeder v. Laks Corporation*,[34] the claimant brought a tort action against the operator of the nursing home facility for whom he was employed. He actually had two different theories of potential recovery, but was successful under neither. He was injured by the conduct of a

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28. See Maggio v. St. Francis Medical Center, Inc., 391 So. 2d 948 (La. App. 2d Cir.), writ denied, 396 So. 2d 1351 (1981). The court reasoned that since there is no statutory provision according the insurer greater immunity than the employer, the *Maggio* decision should be considered authority for the proposition that a cause of action for intentional infliction of mental distress could also be recognized as to the insurer. This position, however, fails to recognize that much of the conduct of the carrier may be sanctioned elsewhere in the Act, and a remedy is granted for it, viz., penalties and attorney's fees.

29. 549 So. 2d at 1267.

30. Id. at 1268.

31. See La. R.S. 22:658, :1201 (1987 and Supp. 1990) (governing fines and penalties for failure to pay insurance claims and late payments).

32. See La. R.S. 23:1102(C)(2) (1987) (allowing for recovery of attorney's fees for an insurer's unreasonable failure to settle).

33. Suarez v. Metropolitan Erection Co., 559 So. 2d 29 (La. App. 4th Cir. 1990).

34. 555 So. 2d 7 (La. App. 1st Cir. 1989), writ denied, 559 So. 2d 142 (1990).

patient at the facility, and claimed that the operator of the facility should be vicariously liable for that conduct. He also claimed that the operator could properly be the object of a dual capacity theory, i.e., though he would not be liable in his capacity as the claimant's employer, he might owe a duty to the claimant as a member of the general public to protect him against the conduct of patients.[35] The court properly rejected both theories.

Two decisions during this term reflect the continuing difficulty of distinguishing those acts which are truly intentional in nature and should escape coverage under the Act from those acts which are, at worst, careless. In *Lyons v. Airdyne Lafayette, Inc.*,[36] the claimant was injured very slightly due to the release of some compressed air by a co-worker. Since the release was followed by laughter, the claimant thought the conduct was intentional, but the court determined that it was accidental. This result should be compared with *Robertson v. LaPlace Concrete, Inc.*,[37] in which a workplace tussle was held to be sufficiently imbued with intentional conduct to permit the claimant to state a cause of action in tort.

The factual setting in *Cushing v. Time Saver Stores, Inc.*[38] appears at first glance to state a difficult problem of coverage, but upon closer analysis, the difficulty is easily resolved. A female employee of the defendant was in the latter stages of pregnancy when she suffered a work-related injury. The injury to her also produced an injury to the fetus *in utero*, on whose behalf a cause of action in tort was brought following the birth. The defendant interposed an exception of no cause of action, alleging that since the injury to the mother was covered by the Act, there could be no claim for the child. The trial court sustained the exception.

The appellate court reversed, properly noting that the claim for the child's injuries was a separate claim, reserved to the child.[39] Had the child been two years old at the time and visiting the work premises at a time when both the mother and the child were injured by the same incident, no one would seriously contend that the child's claim was barred by the Act simply because the mother had a workers' compensation claim. The result should be no different when the child happens to be *in utero*, so long as under other legal principles we recognize the right of such a fetus to bring a cause of action for prenatal injuries.[40]

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35. Id. at 10-11.
36. 558 So. 2d 277 (La. App. 3d Cir. 1990).
37. 560 So. 2d 561 (La. App. 5th Cir. 1990).
38. 552 So. 2d 730 (La. App. 1st Cir. 1989), writ denied, 556 So. 2d 1281 (1990).
39. Id. at 732.
40. See id.

Procedure: Jury Trial?

In Solet v. K-Mart Corp., a department store employee fell in the on-site cafeteria operated by her employer.[41] The incident occurred during her lunch hour, during which she was free to leave and for which she was not paid. Although she was arguably available for work, if she remained on the premises during that lunch hour, the likelihood that she would be called seemed remote. She was neither required nor encouraged to eat on the premises, and did not even receive reduced prices.

The employee was initially paid compensation for her injury until her return to work. Some time after that, she ceased working. In the interim she filed a tort suit against the department store, alleging that in its capacity as a restaurant operator it owed her a duty separate from its duty to her as its employee.[42]

The claimant filed an unsuccessful motion in limine seeking to have the trial judge determine in advance of trial whether the case was in tort rather than in workers' compensation. Rather, the judge included in the jury interrogatories at the close of the trial a question asking whether the injury occurred within the "course and scope of the employment." The question was answered in the affirmative, and accordingly no tort judgment was rendered in favor of plaintiff.[43]

The appellate court in *Solet* properly invalidated this procedure, noting that a jury trial is not available in a workers' compensation proceeding[44] and that the question posed to the jury is tantamount to permitting the jury to decide the central issue of workers' compensation coverage.[45] The issue should be decided by the court in an appropriate pre-trial procedure.

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41. 555 So. 2d 35, 36 (La. App. 1st Cir. 1989), writ denied, 558 So. 2d 572 (1990).
42. Id.
43. Id.
44. La. Code Civ. P. art. 1732.
45. 555 So. 2d at 36-37.